REFERENCE MATERIALS – BOARD SUBMISSION NO. 2017.09.23.0a

TITLE: Consideration of *Amazon EU S.à.r.l vs. ICANN* Independent Review Process Final Declaration

Background Regarding the Amazon Applications:

Amazon applied for .AMAZON and its Chinese and Japanese character equivalents (Amazon Applications). The Amazon Applications passed Initial Evaluation. The Geographic Names Panel determined that the Amazon Applications did not qualify as geographic names, as per the criteria established in the Applicant Guidebook (AGB). (Initial Evaluation Report https://newgtlds.icann.org/sites/default/files/ier/bqe3so7p3lu2ia8ouwp7eph9/ie-1-1315-58086-en.pdf.)

Various South American countries including Brazil and Peru, through the Governmental Advisory Committee (GAC), raised concerns about the Amazon Applications. The Guidebook allows for the GAC to provide a GAC Early Warning, which is a notice to an applicant that "the application is seen as potentially sensitive or problematic by one or more governments." The governments of Brazil and Peru, with the endorsement of Bolivia, Ecuador and Guyana, submitted an Early Warning notice in November 2012 through the GAC, in which the concerned governments stated that: "[g]ranting exclusive rights to this specific gTLD to a private company would prevent the use of this domain for the purposes of public interest related to the protection, promotion and awareness raising on issues related to the Amazon biome. It would also hinder the possibility of use of this domain to congregate web pages related to the population inhabiting that geographical region." (Early Warning

https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197938/
Amazon-BR-PE-58086.pdf.) Amazon engaged with the concerned governments to discuss the GAC Early Warning, but there was no resolution of the issue.

The Amazon Applications were identified in the GAC Beijing Communiqué (April 2013) as requiring further GAC consideration. (GAC Beijing Communiqué https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf.) Pursuant to the New gTLD Program, applicants have the opportunity to respond to GAC advice, and Amazon provided a response stating that the GAC's further consideration is "a new action in the process neither contemplated by the AGB or the community." (Amazon Response to GAC

Beijing Communiqué https://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf.)

On 18 July 2013, the GAC provided consensus advice (GAC Advice) to the ICANN Board in the Durban Communiqué that the Amazon Applications should not proceed (https://gacweb.icann.org/display/GACADV/2013-07-18-Obj-Amazon). Amazon provided a response stating that the GAC Advice "is inconsistent with international law; would have discriminatory impacts that conflict directly with ICANN's Governing Documents; and contravenes policy recommendations implemented within the AGB achieved by international consensus over many years." (Amazon Response to GAC Durban Communiqué https://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315-58086-en.pdf.) Following careful consideration of Amazon's response, ICANN commissioned an independent, third-party expert, with respect to Amazon's international law argument, "to provide an opinion on the well foundedness of various objections raised against the reservation of the new gTLD 'amazon'" (https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf). The conclusion of the expert supported the view that ICANN, within its processes, could either accept or reject the Amazon Applications and neither would be inconsistent with international law.

The Amazon Applications were each the subject of a community objection filed by the Independent Objector (IO). Amazon prevailed in each of the community objections. The ICC expert determination dismissing the IO's community objections was issued on 27 January 2014 (https://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf).

On 14 May 2014, the NGPC accepted the GAC Advice and directed ICANN not to proceed with the Amazon Applications. (Resolution 2014.05.14.NG03

https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#2.b.) As part of its deliberations, the NGPC considered various factors including but not limited to the GAC Early Warning, Amazon's response(s) to the GAC Advice, correspondence received from various parties on the matter, and the expert analysis commissioned by ICANN organization.

The NGPC's decision was without prejudice to the continuing efforts by Amazon and members of the GAC to pursue dialogue on the relevant issues.

On 30 May 2014, Amazon submitted a Reconsideration Request (Request 14-27), which the NGPC denied on 8 September 2014 (https://www.icann.org/resources/pages/14-27-2014-06-03-en). On 1 March 2016, Amazon submitted a request for independent review of ICANN Board Resolution 2014.05.14.NG03 directing that the Amazon Applications should not proceed.

Attachments:

The following attachment is relevant to the Board's consideration of the Panel's Final Declaration in the Amazon EU S.à.r.l (Amazon) vs. ICANN Independent Review Process (IRP) regarding the Amazon Applications:

• Attachment A is the Panel's <u>Final Declaration</u> issued on 11 July 2017.

Other Relevant Materials:

The documents submitted during the course of the Amazon IRP are available at: https://www.icann.org/resources/pages/irp-amazon-v-icann-2016-03-04-en.

Initial Evaluation Report for the .AMAZON application is available at: https://newgtlds.icann.org/sites/default/files/ier/bqe3so7p3lu2ia8ouwp7eph9/ie-1-1315-58086-en.pdf.

GAC Early Warning against the Amazon Applications, issued on 20 November 2012, is available at:

 $\frac{https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197938/Amazon-BR-PE-58086.pdf\ .$

GAC Beijing Communiqué issued on 11 April 2013, is available at: https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf.

Amazon Response to the GAC Beijing Communiqué issued on 10 May 2013, is available at: https://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf.

GAC Durban Communiqué, providing GAC consensus advice that the Amazon Applications

should not proceed, issued on 18 July 2013, is available at:

http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf.

Amazon Response to the GAC Durban Communiqué issued on 23 August 2013, is available at: https://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315-58086-en.pdf.

ICC expert determination on 27 January 2014 that the Independent Objector's Community Objections against the Amazon Applications did not prevail, is available at: https://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf.

Expert analysis commissioned by ICANN, issued on 7 April 2014, is available at: https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf.

NGPC Resolution 2014.05.14.NG03, accepting the GAC consensus advice and directing ICANN not to proceed with the Amazon Applications, is available at: https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#2.b.

Amazon's Reconsideration Request 14-27, the Board Governance Committee's recommendation, and the NGPC's determination are available at: https://www.icann.org/resources/pages/14-27-2014-06-03-en.

Letter from the Brazilian Internet Steering Committee to ICANN Board regarding Amazon IRP Final Declaration, received on 10 August 2017, is available at:

https://www.icann.org/en/system/files/correspondence/glaser-to-crocker-09aug17-en.pdf.

Letter from Amazon to ICANN Board regarding Amazon IRP Final Declaration, received on 7 September 2017, is available at: https://www.icann.org/en/system/files/correspondence/hayden-huseman-to-crocker-07sep17-en.pdf.

Submitted by: Amy Stathos, Deputy General Counsel

Date Noted: 7 September 2017 Email: amy.stathos@icann.org

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION INDEPENDENT REVIEW PANEL

ICDR No. 01-16-0000-7056

In the N	Aatter of an	Independent	Review Process	

Between:

AMAZON EU S.A.R.L., Claimant,

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.

FINAL DECLARATION

IRP Panel:

Hon. Robert C. Bonner, Chair

Robert C. O'Brien, Esq.

Hon. A. Howard Matz (Concurring and partially dissenting)

1. Claimant Amazon EU S. a. r. l. ("Amazon") seeks independent review of the decision of the Board of the Internet Corporation for Assigned Names and Numbers ("ICANN"), acting through ICANN's New gTLD Program Committee ("NGPC"), denying its applications for top-level domain names of .amazon and its IDN equivalents in Chinese and Japanese characters. Amazon contends that in making the decision to deny its applications, the NGPC acted in a manner that was inconsistent with and violated

- provisions of ICANN's Articles of Incorporation, Bylaws and/or Applicant Guidebook for gTLD domain names (collectively, ICANN's "governance documents"). ICANN contends, to the contrary, that at all times the NGPC acted consistently with ICANN's governance documents.
- 2. After conducting a two-day in-person hearing on May 1–2, 2017 and having reviewed and considered the briefs, arguments of counsel and exhibits offered by the parties as well as the live testimony and the written statement of Akram Atallah, the written statement of Scott Hayden, the expert reports of Dr. Heather Forrest, Dr. Jerome Passa, and Dr. Luca Radicati di Bronzoli, the Panel declares that:
 - a. The Board, acting through the NGPC, acted in a manner inconsistent with its Articles, Bylaws and Applicant Guidebook because, as more fully explained below, by giving complete deference to the consensus advice of the Government Advisory Committee ("GAC") regarding whether there was a well-founded public policy reason for its advice, the NGPC failed in its duty to independently evaluate and determine whether valid and merits-based public policy interests existed supporting the GAC's consensus advice. In sum, we conclude that the NGPC failed to exercise the requisite degree of independent judgment in making its decision as required by Article IV, Section 3.4(iii) of its Bylaws. (See also ICANN, Supplementary Procedures, Rule 8(iii) [hereafter "Supplementary Procedures"].)
 - b. The effect of the foregoing was to impermissibly convert the strong presumption to be accorded GAC consensus advice under the Applicant

- Guidebook into a conclusive presumption that there was a well-founded public policy interest animating the GAC advice.
- c. While the GAC was not required to give a reason or rationale for its consensus advice, the Board, through the NPGC, was. In this regard, the Board, acting through the NGPC, failed in its duty to explain and give adequate reasons for its decision, beyond merely citing to its reliance on the GAC advice and the presumption, albeit a strong presumption, that it was based on valid and legitimate public policy concerns. An explanation of the NGPC's reasons for denying the applications was particularly important in this matter, given the absence of any rationale or reasons provided by the GAC for its advice and the fact that the record before the NGPC failed to substantially support the existence of a well-founded and merits-based public policy reason for denying Amazon's applications.
- d. Notwithstanding the strong presumption, there must be a well-founded public policy interest supporting the decision of the NPGC denying an application based on GAC advice, and such public policy interest must be discernable from the record before the NGPC. We are unable to discern a well-founded public policy reason for the NGPC's decision based upon the documents cited by the NGPC in its resolution denying the applications or in the minutes of the May 2014 meeting at which it decided that the applications should not be allowed to proceed.

- e. In addition, the failure of the GAC to give Amazon, as a materially affected party, an opportunity to submit a written statement of its position to the GAC, despite Amazon's request to the GAC Chair, violated the basic procedural fairness requirements for a constituent body of ICANN. (See ICANN, Bylaws, art. III, § 1 (July 30, 2014) [hereinafter Bylaws].) In its decision denying the applications, the NGPC did not consider the potential impact of the failure of the GAC to provide for minimal procedural fairness or its impact on the presumption that would otherwise flow from consensus advice.
- f. In denying Amazon's applications, the NGPC did not violate the Bylaws' prohibition against disparate treatment.
- g. Amazon's objections to changes made to the Applicant Guidebook are untimely.

I. PROCEDURAL HISTORY

The relevant procedural background of this Independent Review Process ("IRP") is:

3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: John Thorne of Kellogg, Hansen, Todd, Figel & Frederick

Respondent: Jeffrey LeVee of Jones Day

4. The authority for the Independent Review Process is found at Article IV, Section 3 of the ICANN Bylaws.

- 5. The applicable Procedural Rules are ICDR's International Dispute Resolution Procedures, as amended and in effect on June 1, 2014, as augmented by ICANN's Supplementary Procedures, as amended and in effect as of 2011.
- On May 14, 2014, relying primarily upon the GAC's consensus objection, the NGPC rejected Amazon's applications.
- 7. Amazon's request for reconsideration was rejected by ICANN's Board Governance Committee on August 22, 2014.
- 8. Thereafter, Amazon notified ICANN of its intention to seek independent review under Article IV, Section 3 of ICANN's Bylaws, and Amazon and ICANN participated in a Cooperative Engagement Process in an attempt to resolve the issues related to Amazon's applications. No resolution was reached.
- 9. On March 1, 2016, Amazon filed a Notice of Independent Review with the International Centre for Dispute Resolution, and thereafter, this Independent Review Panel (the "Panel") was selected pursuant to the procedures described therein.
- 10. After a preliminary telephonic conference on October 4, 2016, the Panel issued Preliminary Conference and Scheduling Order No. 1, *inter alia*, establishing timelines for document exchange and granting Amazon's request for an in-person hearing to be held in Los Angeles, California. Thereafter, on November 17, 2016, in its Order No. 2, the Panel granted Amazon's application to permit live testimony at the hearing of Akram Atallah, the Interim President and Chief Executive Officer of ICANN, and denied its requests for live testimony by Amazon's Vice President and Associate

General Counsel for Intellectual Property Scott Hayden; Dr. Heather Forrest, an Amazon expert witness; and Heather Dryden, former chair of the GAC. After some adjustment, a schedule for pre-hearing briefs was established and the merits hearing dates were set for May 1–2, 2017.

- 11. On January 3, 2017, the Panel approved a Joint Stipulation Against Unauthorized Disclosure of Confidential Information ("Joint Stipulation") providing for the good faith designation of proprietary and sensitive internal documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL.
- 12. An in-person merits hearing was held in Los Angeles on May 1–2, 2017, at which Mr. Atallah's testimony was taken, exhibits were produced and the matter argued. At the conclusion of the hearing on May 2, the Panel closed the proceedings, subject to receiving a transcript of the hearing and a consolidated exhibit list from counsel, and took the issues presented under submission.
- 13. Following the merits hearing, on June 7, 2017 the Panel issued its Order No. 3 denying Amazon's objections to ICANN's proposed redactions of the hearing transcript that disclosed information contained in several exhibits designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL under the Joint Stipulation.

II. FACTS

The salient facts are:

14. Amazon is a global e-commerce company incorporated under the laws of Luxembourg.

Marketing through retail websites worldwide, Amazon, together with its affiliates, is

one of the largest internet marketers of goods in the world, with hundreds of millions of customers globally. (Statement of Scott Hayden, ¶ 5-6 [hereinafter Hayden Statement].) It has a well-recognized trade name of "Amazon" which is a registered trademark in over 170 nations. (Id., at ¶ 7.) For nearly two decades, Amazon has been granted and used a well-recognized second level domain name of amazon.com. (Id., at ¶ 15.)

- 15. In April 2012, Amazon applied to ICANN for the delegation of the top-level domain names .amazon and its Chinese and Japanese equivalents, pursuant to ICANN's Generic Top-Level Domains ("gTLD") Internet Expansion Program. (Id., at ¶12.)
- 16. There are significant security and operational benefits to a company having its own top level domain name, including its ability to "create and differentiate" itself and have its own "digital identity online." (Tr. Akram Atallah Test., 82-83 [hereinafter Atallah Tr.].) Amazon saw the potential of having the .amazon gTLD, or string, as a "significant opportunity to innovate on behalf of its customers" and improve its service to its hundreds of millions of customers worldwide. (Hayden Statement, ¶ 7.) It also saw it as a means to safeguard its globally recognized brand name. (Id.)
- 17. ICANN is a non-profit, multi-stakeholder organization incorporated in the State of California, established September 30, 1998 and charged with registering and administering internet names, both second and top level, in the best interests of the internet community. (Request for Independent Review, 3.) ICANN operates pursuant to Articles of Incorporation and Bylaws. The Bylaws applicable to this IRP proceeding are those as amended in July 30, 2014. (Id., at 3-4; *see* Bylaws (designated as Ex. C-64).)

- 18. In 2008 ICANN proposed to expand top level domain names beyond .com, .edu, .org to generic top level domain names. (Request for Independent Review, 6-7.) Through its multi-stakeholder policy development process, over a several-year period ICANN developed and issued an Applicant Guidebook ("Guidebook" or "AGB") setting forth procedures for applying for and the processing and approval of gTLD names. There have been several iterations of the Guidebook. The version applicable to the Amazon applications at issue was adopted in 2012. (Id.; *see* ICANN, gTLD Applicant Guidebook (June 4, 2012) (designated as Ex. C-20) [hereinafter Guidebook].)
- 19. The Guidebook sets forth procedures for applying for and objecting to top level domain names. As for geographic names, the Guidebook adopts the ISO geographic names registry that includes prohibited geographic names and restricted geographic names, the latter which cannot be used over the objection of a nation that has an interest in such names. (See Guidebook, §§ 2.2.1.4.1, 2.2.1.4.2.) There is an initial review process for all applications for gTLDs. (Id., at § 1.1.2.5.) The objection process includes both an Independent Objector ("IO") process and the potentiality of an objection by one or more governments that make up ICANN's Government Advisory Committee ("GAC"). (Id., at §§ 1.1.2.4, 1.1.2.6., 3.2.5.) An IO can lodge an objection which ordinarily results in one or more independent experts being appointed by the International Chamber of Commerce to determine the merits of the objection, against criteria set forth in the Guidebook. (Id., at § 3.2.5.) Short of an objection, a GAC member government is permitted to lodge an "Early Warning Notice" expressing its public policy "concerns" regarding an application for a gTLD or string. (Id., at § 1.1.2.4.) The Guidebook also contemplates situations where the member governments of the GAC

- provide "consensus advice" objecting to a string, in which case such "advice" is to be given a strong presumption against allowing an application to proceed. (*See generally* Guidebook, Module 3.)
- 20. There have been over 1,900 applications for gTLDs. Only a small fraction of them, less than 20, have been the subject of GAC advice. (Atallah Tr., 214.)
- 21. Amazon's applications passed ICANN's initial review process with flying colors, receiving the highest possible score in ICANN's initial review report ("IER"). (Hayden Statement, ¶¶ 25-30.) Indeed, on July 13, 2013, ICANN issued an IER for the .amazon application that received a maximum score of 41 out of a possible 41 points. (Id.) The IER stated that .amazon did "not fall within the criteria for a geographic name contained in the Applicant Guidebook § 2.2.1.4." (Id.) In other words, at this early stage, ICANN had determined that .amazon is not a listed geographic name in the AGB. This means that .amazon was not a prohibited nor restricted geographic name requiring governmental support. (Id., at ¶ 31.)
- 22. Nonetheless, on November 20, 2012, Amazon's applications were the subject of an Early Warning Notice filed by the governments of Brazil and Peru. (*See* Ex. C-22.) By its own terms, an Early Warning Notice is not an objection; however, it puts an applicant on notice that a government has a public policy concern about the applied for string that could be a subject of GAC advice at some later point in time. (*See* Guidebook, § 1.1.2.4.) The Early Warning Notice process is set forth in ICANN's Applicant Guidebook. (Id.)

- 23. The Early Warning Notice began with the recital that "The Amazon region constitutes an important part of the territory of . . . [eight nations, including six others besides Brazil and Peru] due to the extensive biodiversity and incalculable natural resources." (Ex. C-22, at 1.) Brazil and Peru then stated three reasons for their concerns about a private company, Amazon, being granted the gTLD "Amazon." (Id., at 1-2.) The reasons were that:
 - (1) It would prevent the use of this domain for purposes of public interest related to the protection, promotion and awareness raising an issue related to the Amazon biome. It would also hinder the possibility of use of this domain name to congregate web pages related to the population inhabiting that geographical region;
 - (2) The string "matched" part of the name, in English, of the "Amazon Cooperation Treaty Organization," an international organization formed under the Amazon Cooperation Treaty signed in 1978; and
 - (3) The string had not received support from governments of countries where the geographic Amazon region is located.¹

(See Id.)

24. In a note to the Early Warning Notice, Brazil stated:

The principle of protection of geographic names that refer to regions that encompass peoples, communities, historic heritages and traditional social networks whose public interest could be affected by the assignment, to

¹ As noted elsewhere, under the Guidebook, a non-listed "geographic" name does not require government support.

private entities, of gTLDs that directly refer to those spaces, is hereby registered with reference to the denomination in English of the Amazon region, but should not be limited to it.

(Id., at 3.) Brazil went on to state that its concerns about the .amazon string extended to the English word "amazon" in "other languages, including Amazon's IDN [internationalized domain name] applications" using Chinese and Japanese characters. (Id.)

- 25. The parties stipulated that none of the strings applied for by Amazon are listed geographic names as defined in ICANN's Applicant Guidebook. (Ex. C-102, ¶ 1; Expert Report of Dr. Heater Forrest, 18-28 [hereinafter Forrest Report].)
- 26. Part of Guidebook procedures provide for an Independent Objector ("IO") to challenge applications for domain names. (Guidebook, § 3.5.4.) Regarding Amazon's applications, on March 12, 2013, an IO, Alain Pellet, initiated community objections to Amazon's applications before the International Centre for Expertise of the International Chamber of Commerce ("Centre"). (Ex. C-102, ¶ 2.) The objections interposed by the IO were virtually identical to the concerns raised by Brazil and Peru in their Early Warning Notice. (Hayden Statement, ¶ 32.) Amazon responded to the IO's community objections in May 2013. Thereafter, on June 24, 2013, the Centre selected Professor Luca G. Radicati di Brozoli as an independent expert to evaluate the IO's objections. (Ex. C-47, at 4.) At the request of the IO, the independent expert, Professor Radicati, allowed both sides to file additional written statements. (Id., at 5.) The IO provided an augmented written statement on August 16, 2013, and Amazon replied to it on August 22, 2013. (Id., at 5.) Although, following an extension of time, his draft expert report

- was due October 5, 2013, Dr. Radicati did not submit his final expert report until January 27, 2014. (Id., at 5, 25.)
- 27. On January 27, 2014, Professor Radicati issued a detailed Expert Determination rejecting the IO community objections. (*See* Ex. C-47.) He methodically considered the four factors laid out in Section 3.5.4 of the Guidebook as to whether the IO's objection on behalf of the community, i.e., the people and area of the Amazon region, had merit. (Id., at 13-14.) Regarding the first factor, he found that there was a strong association between the "community" invoked by the IO and the strings applied for. (Id., at 15.) As to the second factor, i.e., whether there as a "clear delineation of the community" invoked by the IO, Dr. Radicati indicated that: "The record is mixed and doubts could be entertained as to whether the clear delineation criterion is satisfied." (Id., at 16-18.) In light of his conclusion that there was not material detriment to the community being represented by the IO, (*see* discussion *infra*), Dr. Radicati stated that there was no need to reach a "conclusive finding" on the second factor. (Id., at 18.)
- 28. One of the four factors was "[w]hether the Applications create a likelihood of material detriment to a significant portion of the Amazon community." (Id., at 21). Professor Radicati determined that the applied for string .amazon would not pose a material detriment to the region or the people who inhabit the geographic region proximate to the Amazon River. (Id., at 21-24)
- 29. Among other things, Professor Radicati found that neither the Amazon community nor any entity purporting to represent that community had applied for the string .amazon.

 (Id., at 23.) This failure alone, he found, "can be regarded as an indication that the

inability to use the Strings in *not crucial* to the protection of the Amazon Community's interests." (Id. (emphasis added).) Regarding his finding of an absence of material harm, Professor Radicati concluded that the fact that an objector is deprived of future use of a specific gTLD is not a material detriment under ICANN's Guidebook:

[T]he Amazon Community's inability to use the Strings [.amazon and the two IDNs] is not an indication of detriment, and even less of material detriment. The Objection Procedures are clear in specifying that "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment" (Section 3.5.4).

(Id., at 23 (Emphasis in the original).)

30. Further, supporting his finding of no material detriment to the Amazon community and region, Professor Radicati noted that the applicant, Amazon, has used the name "Amazon"

as a brand, trademark and domain name for nearly two decades also in the States [including Brazil and Peru] arguably forming part of the Amazon Community. . . . There is no evidence, or even allegation, that this has caused any harm to the Amazon Community's interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage.

... [I]t is unlikely that the loss of the '.com' after 'Amazon' will change matters.

(Id., at 23).

31. Regarding the absence of material detriment factor, Professor Radicati concluded:

More generally, there is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community, or that Amazonia and it specificities and importance for the world will be removed from the public consciousness, with the dire consequences emphasized by the IO. Were a dedicated gTLD considered essential for the interests of the Amazon Community, other equally evocative strings would presumably be available. ".Amazonia" springs to mind.

(Id., at 23.)

32. Another factor considered by independent expert Radicati was: "Whether there is substantial opposition to the Strings within the community." (Id., at 19.) In rejecting the IO objections, Professor Radicati, while aware of the Early Warning Notice of Brazil and Peru, was evidently unaware that they continued to object to the applied for strings, nor was he aware of the GAC advice. (Id., at 20-21.) Indeed, he stated:

As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure. The two Governments undoubtedly have significant stature and weight within the Amazon Community. However, as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant.

This is not without significance. Indeed, had the two Governments seriously intended to oppose the Application, they would presumably have done so directly. There is no reason to believe that they could have been deterred from doing so by the fear of negative consequences or by the costs of filing an objection. The Applicant is persuasive in arguing that the Brazilian and Peruvian Governments' attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed. Indeed, in assessing the substantial nature of the opposition to an objection regard must be had not only to the weight and authority of those expressing it, but also to the forcefulness of their opposition.

- (Id.) These considerations led Dr. Radicati to find that the IO has failed to make a showing of substantial opposition to the Applications within the purported Amazon Community. (*See* id.)
- 33. Professor Radicati was mistaken about the continued lack of opposition to the string, especially from Brazil and Peru. Had he been informed of their opposition and the GAC advice objecting to the strings, it would no doubt have changed his finding regarding

whether there was substantial opposition to the strings. Nevertheless, even though, in addition to factors negating detriment, he considered lack of serious opposition as "indirect confirmation" of lack of detriment, it does not appear that Professor Radicati's lack of knowledge regarding the GAC advice would have significantly impacted the reasons for his finding that there was no material detriment to the interest of the people and region proximate to the Amazon River by awarding the string to Amazon. (Id., at 23-24.)

- 34. The NGPC, rejected Amazon's applications on May 14, 2014. While the NGPC had Professor Radicati's expert rulings and determinations before it, it did not discuss nor rely upon his expert determinations, *inter alia*, regarding the lack of material detriment, in making its decision to reject Amazon's applications. (Ex. C-102, ¶ 2.)
- 35. In order to assist it in carrying out its functions, ICANN has various supporting organizations and advisory committees. One such committee is the GAC which is comprised of representatives of governments from around the world and several multi-lateral governmental organizations. (Atallah Tr., 98-99.)
- 36. Amazon's applications were discussed at meetings of the GAC in Beijing in April, 2013² and, later, in Durban, South Africa on July 16, 2013.
- 37. At its plenary session in Durban on July 16, 2013, the GAC discussed the applications for the .amazon strings. The session was transcribed. (*See* Ex. C-40.) At this meeting, representatives of various nations spoke. (Id.) Brazil and Peru led the opposition to

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² The Beijing GAC meeting was closed and there is no publicly available transcript of what was discussed respecting the application for .amazon and the related IDN strings in Japanese and Chinese characters.

Amazon's strings, and approximately 18 delegates of GAC member nations expressed general support for Brazil and Peru's position opposing the applied for strings. (Id.) With one or two exceptions of no significance, only the governments of Brazil and Peru expressed any actual reasons for opposing the applications, but if anything, Brazil and Peru's reasons at the GAC meeting were either less specific than the three they gave in their Early Warning Notice or they were not well-founded grounds for objecting to the applied for strings. The representative of Peru, for example, stated that the applications should be rejected because "Amazon" was an ISO "listed" geographic name in the Guidebook; a statement which the parties now agree was erroneous, but not corrected during the Durban meeting. ³ (Id., at 14-15.)

38. At the Durban GAC meeting, Brazil essentially pointed out that Brazil and other nations in the Amazon region of South America have a "concern" with the application to register the gTLD .amazon. (Id., at 11-13.) The reason for their concern, much less an articulated public policy concern, is not apparent. (Id.) For example, Brazil asked that the GAC reject the registration of "dot amazon by a private company in the name of the public interest." (Id., at 13.) Brazil does not define what the "public interest" for such a rejection would be. Moreover, how assigning .amazon to the applicant would harm the "public interest" was not explained. Brazil asserted that an undefined "community[,]" quite possibly, the people residing in the Amazon region, will "clearly be impacted[,]" but neither Brazil nor any other nation explained what this "impact"

³ We note that the word "amazon" can be traced back to ancient Greece as meaning large, powerful female warriors. (*See Amazon*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/amazon (last visited June 12, 2017).) This meaning of the word is found in Virgil's Aeneid. Indeed, it is one of the word's defined meanings in the English language. (*Id.*)

would be or how it would harm the population living in the Amazon region or be detrimental to its "bio systems." (Id., at 11-13). Brazil stated that it cannot accept the registration of .amazon to the applicant as "a matter of principle," but nowhere does it make clear what that "principle" is. (Id., at 13.) A Brazilian vice minister added that dot amazon affected "communities" in eight countries, and it is important to protect "geographical and cultural names." (Id., at 13-14.) Again, he did not articulate how such "names" would be harmed. (Id.)

- 39. At the Durban meeting, the representative of Peru set forth three "points that we think are crucial to understanding our request [to reject the applied for strings]." (Id., at 14.)

 According to the Peruvian representative, they were:
 - (1) "[L]egal grounds" found in the ICANN's Bylaws, in prior GAC advice and in the Guidebook, (Id., at 14.);⁴
 - (2) The string is a geographic name listed in the Guidebook and therefore requiring governmental consent (Id., at 14-15.);⁵ and
 - (3) The national and local governments of the countries through which the Amazon River flows "have expressed, in writing, their rejection to dot amazon." (Id., at 14-15, 24.).⁶

⁴ Based on our review, no "legal" grounds for rejecting the applications is apparent in those documents or elsewhere. (*See* Ex. C-48, at 7, 14.)

⁵ As noted elsewhere, the word "Amazon" is not a listed geographic name in the Guidebook. Therefore, government consent is not required.

⁶ See discussion supra, at 10 n. 1 (Individual governmental consent is not required by the Guidebook).

40. At the conclusion of the plenary session at Durban, after the representative of one nation acknowledged that "there are different viewpoints," the GAC Chair, Heather Dryden, asked:

So I am now asking you in the [GAC] committee whether there are any objections to a GAC consensus objection to the applications for dot Amazon, which would include their IDN equivalents? I see none. . . . So it is decided.

(Id., at 30.)

41. In a communique at the conclusion of its Durban meeting, the GAC issued consensus⁸ advice to the Board of ICANN recommending to the Board that it not proceed with Amazon's applications, stating:

The GAC Advises the ICANN Board that:

- i. The GAC has reached consensus [that the following application should not proceed] on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:
 - 1. The application for .amazon (application number 1-1315-58056) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591).

(Ex. R-22, at 3-4 (footnote omitted).)

42. In substance, the GAC "advice" or recommendation was that the Board should reject the applications for all three gTLDs applied for by Amazon. (Id.) No reasons were given by the GAC for its advice, nor did it provide a rationale for the same. (See Id.)

⁷ See Ex. C-40, at 29.

⁸ "Consensus" advice means, in essence, no nation objected to the position taken in the advice. It does not mean, however, that there was unanimous approval of the advice.

⁹ The Panel requested that the parties attempt to secure a written statement from Heather Dryden, who was the Chair of the GAC at the time of the Durban meeting, regarding the reasons for the

- 43. During the course of the GAC's meetings in Durban, Amazon Vice President and Associate General Counsel Scott Hayden stated that Amazon "asked the GAC to grant us the opportunity to distribute to the GAC background materials about the .AMAZON Applications and the proposals we had made but the GAC Chair rejected our request." (Hayden Statement, ¶ 37.)
- 44. At all times pertinent herein, ICANN's Board delegated its authority to decide all issues relating to new gTLD program that would otherwise require a Board decision, including decisions regarding whether an application for a gTLD should proceed or be rejected, to the NGPC.¹⁰ (Ex. C-54, at 6.)
- 45. Procedures set forth in the Applicant Guidebook, Module 3.1 provide for an opportunity for an applicant to provide a written response to GAC advice. Amazon submitted a response taking issue with the GAC advice. (*See* Ex. C-43.) Thereafter, regarding one of the issues raised by Amazon, that is, whether Brazil or Peru had a right under international law to the name indicating the geographic region or river called "Amazon," the NGPC commissioned an independent legal expert, Dr. Jerome Passa, a law professor at the Université Panthéon-Assas in Paris, France, to opine. (*See* Ex. C-48.)
- 46. In his March 31, 2014 report, Dr. Passa concluded that neither Brazil nor Peru had a legally cognizable right to the geographic name "Amazon" under international law, or for that matter under their own national laws. (Ex. C-48, at 7, 14; *accord* Forrest

GAC advice. (Order No. 2, at 4.) No longer the GAC Chair, Ms. Dryden declined to provide a statement. (Atallah Tr., 95.)

¹⁰ This delegation was made on April 10, 2012.

Report, 5, 9-12). In sum, he concluded that there was no legal principle supporting Brazil and Peru's objections. In other words, the legal objection of Brazil and Peru was without merit and did not provide a basis for the rejection of Amazon's gTLD applications.¹¹ (Ex. C-48, at 14.)

47. Moreover, Dr. Passa found that there was no prejudice to Brazil or Peru if the applied for strings were assigned to Amazon:

Beyond the law of geographical indications [which do not support Brazil and Peru's legal claims], the assignment of '.amazon' to Amazon would not in any event be prejudicial to the objecting states [Brazil and Peru] who, since they have no reason for linguistic reasons to reserve '.amazon', could always if they so wished reserve a new gTLD such as '.amazonia' or '.amazonas' which would create no risk of confusion with '.amazon'.

(Id., at 10; see also Ex. C-47, at 23.)

- 48. Both Amazon and the governments of Brazil and Peru were afforded an opportunity to respond to Dr. Passa's report. All three did so. (Ex. C-54, at 9-10.)
- 49. The NGPC considered Amazon's applications at several meetings. Following receipt of Dr. Passa's report and several letters responding thereto, the NGPC met on April 29, 2014 to consider the applications for the .amazon string and its Chinese and Japanese IDN equivalents. (*See* Ex. R-31, at 2-4.) The applications were discussed and the GAC advice referenced, but no decision was reached whether to allow the applications to proceed or to deny them. (Id.) Nor was any discussion or speculation by the NPGC

¹¹ Regarding whether Amazon had a legal right to be assigned the strings, Dr. Passa opined "no one can claim a TLD simply because the name it consists of is not included on the ISO list" and that Amazon did not have a legal right to the gTLD .amazon based on its registered trademarks for that name in Brazil, Peru and other nations. (Ex. C-48, at 10.) Amazon makes the point that it was not making a legal claim of right based on its trademarks. (Ex. C-51, at 2.)

regarding the rationale for the GAC advice, or any public policy reasons that supported it, reflected in the minutes of this meeting. (Id.)

- 50. At its May 14, 2014 meeting, the NGPC adopted a resolution¹² in which it rejected Amazon's applications. Under the heading "GAC Advice on .AMAZON (and related IDNs)," the NGPC resolved that: "[T]he NGPC accepts the GAC advice . . . and directs the [ICANN] President and CEO . . . that the applications . . . filed by Amazon EU S.à.r.l. should not proceed." (Ex. C-54, at 6-7.)
- 51. The resolution goes on to state:

The action being approved today is to accept the GAC's advice to the ICANN Board contained in the GAC's Durban Communiqué stating that it is the consensus of the GAC that the applications . . . should not proceed. The New gTLD Applicant Guidebook (AGB) provides that if "GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved." (AGB, § 3.1). To implement this advice, the NGPC is directing the ICANN President and CEO . . . that the applications . . . should not proceed.

52. After referencing the fact of Amazon's position opposing the GAC advice and stating that it considered the report of Dr. Passa "as part of the NGPC's deliberations in adopting the resolution," the resolution states: "The NGPC considered several significant factors during its deliberations about how to address the GAC advice"

(Id., at 8-10.) The resolution noted that the NGPC "had to balance the competing interest of each factor to arrive at a decision." (Id., at 10.) Then, after noting that it

¹² The minutes of the NGPC meeting on May 14, 2014 (Ex. R-83) are substantially the same and recite verbatim the NGPC resolution. (Ex. C-54).

lacked the benefit of any rationale from the GAC for its advice, it listed factors it relied upon, which were:

- (1) The Early Warning Notice submitted by Brazil and Peru that state as reasons for their concern, namely:
 - (a) The granting of the string to Amazon would deprive the string for use by some future party for purposes of protecting the Amazon biome and/or its use related to the populations inhabiting the Amazon region; and
 - (b) Part of the string matches the name in English of the Amazon Cooperation

 Treaty Organization. (Id., at 10.)¹³
- (2) Curiously, the NGPC considered correspondence reflecting that Amazon sought to amicably resolve Brazil and Peru's objections. We assume that Amazon's effort to informally resolve concerns of Brazil and Peru was not a factor that *supported* the NGPC's decision denying Amazon's applications.

 (Id., at 10-11.)¹⁴
- (3) The resolution correctly noted that, as it stood in the position of the ICANN Board, under the Guidebook the NGPC was called upon to "individually

¹³ On its face, it is difficult to see how this partial, one-word match in English to a treaty organization's name is a valid reason that supports the GAC advice and hence the NGPC's decision. Indeed, it was undisputed that this organization is commonly referred to as "OTCA," an acronym for its name in Spanish. (Hayden Statement, ¶ 16; Forrest Report, 27.) There appears to be no reason to believe that internet users would be misled or confused.

¹⁴ If so, this would be unwise policy for the same reason that evidence of settlement discussions is not to be considered against a party attempting to settle a matter. (*See*, *e.g.*, Fed. R. Ev. 408 (and international legal equivalents).)

- consider an application for a new gTLD to determine whether approval would be in the best interests of the Internet community." (Id., at 11.)¹⁵
- (4) The resolution goes on to list eighteen documents, including, for example, the Early Warning Notice, that the NGPC reviewed before deciding to reject Amazon's applications. (Id., at 11-13.) Aside from referring to the Early Warning Notice, there is no discussion in the resolution how any of these other documents impacted the NGPC's decision.
- 53. Thus, the only *reasons* articulated by the NGPC for its decision rejecting Amazon's applications were the strong presumption arising from the GAC consensus advice and, albeit without explanation, two reasons advanced by Brazil and Peru in their Early Warning Notice. Assuming that those reasons animated the GAC advice—and this is by no means clear¹⁶—there is no explanation by the NGPC in its resolution regarding why the reasons reflect well-founded and credible public policy interests.
- 54. The only live witness at the hearing was Akram Atallah, ICANN's Deputy Chief Executive Officer and President of its Global Domains Division. Mr. Atallah has held executive positions at ICANN since he joined in 2010, and, significantly, he attended all seven meetings of the NGPC at which Amazon's applications were agendized and discussed, and in particular the last two meetings on April 29 and May 14, 2014. (Atallah Tr., 86:14-24.)

¹⁵ This factor neither supports the grant or the denial of the application, but merely reinforces that NGPC's duty to make an independent and balanced determination in the best interests of the Internet community.

¹⁶ In her testimony before the *DCA Trust* IRP, GAC Chair Heather Dryden stated that Early Warning Notices, and the rationale of nations that issued them, do not reflect GAC's rationale for its advice. (Ex. CLA-5, 314:16-19; *see also* Atallah Tr., 306:12-24.)

- 55. In substance, Mr. Atallah testified that Amazon's applications would have been allowed to proceed, but for the GAC consensus advice opposing them. (Id., at 88-89).
- 56. Mr. Atallah testified that the NGPC did not consider the .ipiranga string, named for a famed waterway in Brazil, because neither Brazil nor the GAC opposed that string. Nor did Brazil submit an Early Warning Notice with respect to .ipiranga. (Id., at 90).
- 57. Regarding the impact of GAC consensus advice on the NGPC's decision, Mr. Atallah testified that ICANN is not controlled by governments, but ICANN procedures permit governments, through the GAC, to provide input, both as to ICANN policy matters and individual applications to ICANN. (Id., at 94-95.) The NPGC resolution (Ex. C-54) provides the entire rationale for the Board's (here, the NGPC's) decision to reject Amazon's applications. (Id., 93.) Because it lacks expertise, the NGPC, acting for the Board, did not and "will not substitute its decision" for the GAC's, especially on public interest issues. (Id., at 99-101, 128.)
- 58. Once the GAC provides the NGPC with consensus advice, Mr. Atallah explained, not only is there a strong presumption that it should be accepted, but it also sets a bar too "high for the Board to ignore." (Id.) Put differently, the bar is "too high for the Board to say no." (Id.) The Board, he said, defers to the consensus GAC advice as a determination that there is, in fact, a well-founded public policy reason supporting it. (Id., at 102). He added: "the board does not substitute its opinion to the opinion of the countries of that region when it comes to the public interest." (Id., at 128:16-18).
- 59. Mr. Atallah acknowledged that if GAC consensus advice was based upon the GAC's (or governments' advocating for a GAC consensus objection) mistaken view of

international law, it would outweigh the strong presumption and the advice would be rejected by the Board. (Id., at 127:11-128:4.) But the Board would not consider GAC consensus advice based on an anti-U.S. bias or "fear of foreign exploitation," whether rational or not, as grounds for rejecting such advice. (Id., at 129:21-130:9.)

- 60. Although the NGPC considered the reasons given in the Early Warning Notice, Mr. Atallah made clear that the NGPC made no independent inquiry regarding whether there was a well-founded public policy rationale for the GAC advice, (Id., 102:17-20), nor did the NGPC explain why the reasons given in the Early Warning Notice stated well-founded public policy concerns for rejecting the applications. Moreover, the NGPC in its resolution did not discuss, much less evaluate Brazil and Peru's reasons for their objection to the strings, (*see* Ex. C-54).
- 61. On August 22, 2014, ICANN's Board Governance Committee denied Amazon's request for reconsideration of the NGPC's decision. (Ex. C-67.)
- 62. On March 1, 2016, Amazon filed its Notice and Request for an Independent Review of the NGPC decision denying its applications.

III. PROVISIONS OF THE ICANN'S ARTICLES OF INCORPORATION, BY-LAWS AND APPLICANT GUIDEBOOK

63. The task of this Panel is to determine whether the NGPC acted in a manner consistent with ICANN's Articles of Incorporation, Bylaws and Applicant Guidebook.¹⁷ The most

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¹⁷ While the Bylaws refer only to the Articles of Incorporation and Bylaws as subjects for the IRP process, the Panel is also permitted to determine whether the procedures of the Guidebook were followed. (*See Booking.com B.V. v. ICANN*, Case No. 50-20-1400-0247, Final Declaration,

salient provisions of these governance documents are listed below.

64. Article IV, Section 3(4) of the Bylaws and Rule 8 of ICANN Supplementary

Procedures for Independent Review Process provide:

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 ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and c. Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interest of the company [i.e., the internet community as a whole]?

(See Bylaws, Art. IV, § 3(4).) Here, only compliance with requirements (ii) and (iii) is in issue.

65. Art. 4 of the Articles of Incorporation:

"[ICANN] shall operate for the benefit of the Internet community as a whole"

66. Art. I, Sec. 2 of the Bylaws: CORE VALUES¹⁸

In performing its mission, the following core values should guide the decisions and actions of ICANN:

. . .

- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interest 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. . . .
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

at ¶ 106 (Int'l Centre for Dispute Resolution, March 3, 2015), https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf; Resp't Prehearing Br., 6.)

¹⁸ All references to the Bylaws are to those in effect at the time of the NGPC's decision, that is, the Bylaws, as amended July 2014. (*See* Ex. C-64.)

- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. . . .
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness [such as the process of independent review].
- 11. While remaining rooted in the private sector, recognizing that governments . . . are responsible for public policy and duly taking into account governments' . . . recommendations.
- . . . 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.

67. Art. II, Sec. 3 of the Bylaws: NON-DISCRIMINATORY TREATMENT

"ICANN shall not . . . single out any particular party for disparate treatment unless justified by substantial and reasonable cause"

68. Art. III (TRANSPARENCY), Sec. 1 of the Bylaws: PURPOSE

"ICANN and its constituent bodies shall operate to the maximum extent feasible in a[] . . . transparent manner and consistent with procedures designed to ensure fairness."

69. Art. IV (ACCOUNTABILITY AND REVIEW), Sec. 1 of the Bylaws: PURPOSE

"... 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."

70. Art. IV (ACCOUNTABILITY AND REVIEW), Sec. 3 of the Bylaws:

INDEPENDENT REVIEW OF BOARD ACTIONS

The Board, or in this case, the NGPC final decision is subject to an "independent review" by this independent review panel to determine whether the Board/NGPC made

its decision in a manner consistent with ICANN's articles of incorporation, applicable Bylaws and the applicant guidebook, i.e., its governance documents.

71. Art. XI (ADVISORY COMMITTEES), Sec. 1 of the Bylaws: GENERAL

"Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board."

72. Art. XI, Sec. 2(1)(a) of the Bylaws

"The [GAC] should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly . . . where they may affect public policy issues."

73. Art. XI, Sec. 2(1)(j) of the Bylaws

"The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies."

74. Module 2 of the Applicant Guidebook 19

Module 2 of the Guidebook sets forth the evaluation procedures for gTLD strings, including string similarity, string confusion, DNS stability, reserved names and geographic names.

75. Sec. 2.2.1.4 of the Applicant Guidebook

"Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments . . . in geographic names. The requirements and procedure

¹⁹ The applicable version of the Guidebook for purposes of this IRP is Version 10 published on June 4, 2012. (*See* Ex. C-20; Resp't Prehearing Br., 10 n. 29.)

ICANN will follow in the evaluation process are described in the following paragraphs."

76. Sec. 2.2.1.4.2 of the Applicant Guidebook

"The following types of applied-for strings are considered geographic names and [require] . . . non-objection from the relevant governments" This is followed by a list of four specific categories, including, *inter alia*, cities, sub-national place names, etc.

77. Sec. 2.2.1.4.4 of the Applicant Guidebook

"A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic name For any application where the GNP determines that the applied-for string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required."

78. Attachment to Module 2 of the Applicant Guidebook, at A-1

"It is ICANN's goal to make the criteria and evaluation as objective as possible."

79. Module 3 of the Applicant Guidebook

Module 3 relates to Objection Procedures.

80. Sec. 3.1, GAC Advice on New gTLDs of the Applicant Guidebook

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities [i.e., may affect public policy issues].

. . .

... The GAC [may] advise[] ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN that the application should not be approved.

IV. PARTIES' POSITIONS AND REQUEST FOR RELIEF

- 81. 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 and then provides the reasons for its Declaration.
- 82. Amazon seeks a declaration that the NGPC, acting for the Board, acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its rejection of the Amazon applications. Distilled to their essence, Amazon makes the following contentions:
 - a. The GAC was required to state a reason(s) or rationale for its consensus advice,i.e., reason(s) for recommending that Amazon's applications be denied.
 - b. As a constituent body of ICANN, the GAC was required to adhere to the Bylaws' duties of procedural fairness under Article III, Section 1. To comply with this Bylaw, the GAC was either required to permit Amazon, as the potentially adversely affected party in interest, to appear before the GAC or, at a minimum, submit information to the GAC in writing before it issued consensus advice.
 - c. To warrant a strong presumption, GAC advice must be based upon a valid and legitimate public policy interest(s).
 - d. By failing to make an independent evaluation of whether or not there was a valid public policy rationale for the GAC advice, the NGPC abdicated its independent decision making function to the GAC, converted the strong presumption to be given to GAC consensus advice into a conclusive presumption or veto, and otherwise abandoned its obligation to make a sufficient due diligence

investigation of the facts needed to support its decision and/or failed to make an independent, merits-based decision in the best overall interest of the Internet community.

- e. To comply with ICANN's transparency obligations, the NGPC must give reasons for its decisions. The NGPC's resolution of May 14, 2014 is not a sufficient statement of reasons for its decision rejecting Amazon's applications in that the NGPC failed to state any public policy rationale for its decision and/or balance the interests of Amazon favoring the granting of the applications with public policy interests militating against granting same.
- f. The ICANN Board, acting through the NGPC, violated its obligation not to engage in disparate treatment of the applicant under Article II, Section 3 of the Bylaws by denying its application, whereas under similar circumstances a private Brazilian corporation was granted the gTLD of .ipiranga, a string based on the name of another celebrated waterway in Brazil.²⁰
- 83. As for relief, in addition to a declaration by this Panel that the NGPC acted inconsistently with ICANN governance documents, Amazon seeks affirmative relief in the form of a direction to ICANN to grant Amazon's applications. Alternatively, Amazon asks the Panel to recommend to the ICANN Board that its applications be granted and to set timelines for implementation of the Panel's recommendation, including a timeline for ICANN's "meet and confer" obligation with the GAC.²¹

²⁰ The Ipiranga is mentioned in the Brazilian national anthem.

²¹ In these circumstances, Amazon urges the Panel to retain jurisdiction until final resolution of this matter by the Board.

- 84. ICANN disputes each of Amazon's contentions and asserts that the NPGC did not violate the Articles of Incorporation, the Bylaws or the Guidebook. Fairly synthesized, it argues:
 - a. There is nothing in the Articles of Incorporation, applicable Bylaws²² or Guidebook that requires the GAC to state any reason for its consensus advice.
 - b. The procedural fairness obligation applicable to the GAC, as a constituent body of ICANN, did not require the Board to assure that a representative of a private company be able to appear before the GAC, nor did it require the Board to allow a potentially adversely affected party to be able to submit written statements to the GAC.²³
 - c. Although the GAC advice must be based on legitimate public policy considerations, even in the absence of a rationale for the GAC advice, there was sufficient support in the record before the NGPC for the NGPC to discern a wellfounded public policy interest, and it was proper for the NGPC to consider reasons given in the Early Warning Notice as providing a public policy reason supporting the NGPC decision.
 - d. Given the strong presumption arising from GAC consensus advice, the NGPC appropriately decided to reject Amazon's applications.

²² Although not applicable to this IRP, Section 12.3 of the new version of the Bylaws adopted in 2016 requires all advisory committees of ICANN, including the GAC, to include "the rationale for such advice." (*See* Ex. R-81; ICANN Bylaws, § 12.3 (eff. Oct. 1, 2016).) The new Bylaws indicate that they are not intended to be retroactive. (*See* ICANN Bylaws, § 27.4 (eff. Oct. 1, 2016.)

²³ ICANN also noted that Amazon had an opportunity to "lobby" governments in between the GAC meetings at which Amazon's applications were discussed and it, in fact, did so. ICANN argued that this overcomes any lack of procedural fairness regarding the GAC.

- e. The NGPC gave reasons for its decision, and the reasons given by the NGPC for denying Amazon's applications are sufficient.
- f. The NGPC did not engage in disparate treatment of Amazon. The anti-disparate treatment provision contained in the Article II, Section 3 of the Bylaws should be read, not as applying to ICANN as a whole, but as a limitation on actions of the ICANN Board. As there was no objection to .ipiranga, neither the NGPC nor the Board was ever called on to decide whether .ipiranga should be granted to a private company.²⁴ Accordingly, there could be no disparate treatment by the Board, or the NGPC acting for the Board, regarding the strings at issue in this proceeding.
- g. Amazon's challenge to a 2011 change in the Applicant Guidebook relieving the
 GAC of any requirement to provide reasons for its advice is untimely.
- 85. Further, ICANN takes issue with the relief requested by Amazon. It argues that the Panel's powers are limited under the Bylaws to declaring whether or not the Board, or in this case the NGPC, complied with its obligations under ICANN's governance documents. It acknowledges, however, that if the Panel finds that the NGPC acted in a manner inconsistent with the governance documents, the Panel may properly make remedial recommendations to the Board.

V. ANALYSIS OF ISSUES AND REASONS FOR DECISION

86. The majority of the Panel discusses *seriatim* each of the pertinent issues fairly raised by parties as part of the Independent Review Process.

²⁴ ICANN also argued that the Ipiranga, a small waterway running through Sao Paolo, paled by comparison to the Amazon River, both in length and importance.

A. Was the GAC required to state a reason(s) or provide a rationale for its advice?

- 87. There is little question that a statement of reasons by the GAC, when providing consensus advice regarding an application for an internet name, is desirable. Having a reason or rationale would no doubt be helpful to the ICANN Board in evaluating the GAC's advice and assuring that there is a well-founded public policy interest behind it. Nonetheless, there is no specific requirement that the GAC provide a reason or rationale for its advice, and therefore, we conclude that a rationale or statement of reasons by the GAC was not required at the time of its action in this matter.²⁵
- 88. Amazon argues the decision in the *DCA Trust* IRP, particularly paragraph 74, is precedent for proposition that the GAC must provide a reason for its advice. In that IRP, the Panel held: "As previously decided by this Panel, such accountability requires an organization to *explain or give reasons* for it activities, accept responsibility for them and to disclose the results in a transparent manner." (*See DotConnectAfrica Trust v. ICANN*, Case No. 50-2013-001083, Final Declaration, at ¶ 74 (Int'l Centre for Dispute Resolution, July 31, 2015), https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf (Emphasis added) [hereinafter *DCA Trust*].)
- 89. While prior IRP decisions are indeed precedential, although not binding on this Panel,²⁶ we believe that read in context, *DCA Trust* stands for the proposition that the Board, to meet its accountability and transparency obligations, must give reasons for its actions. We do not read this language as requiring the GAC to do so.
- 90. It is true that ICANN changed its Bylaws in 2016 and now the GAC is required to provide a rationale for its advice, but this change is not retroactive, and, contrary to

²⁵ See discussion supra, at 32 n. 22 (discussing a change in the Bylaws effective 2016).

²⁶ See Bylaws, Article IV, Section 3(21).

Amazon's argument, cannot be viewed as merely codifying the holding in *DCA Trust*. (*See* discussion *supra*, at 32 n. 22.)

B. Was Article III, Section 1's procedural fairness requirement violated?

- 91. This issue is evidently one of first impression. We have been unable to find any prior IRP matter that has considered this issue with respect to the GAC, and none was cited to us by the parties.
- 92. Article III, Section 1 of the Bylaws provides: "ICANN *and its constituent bodies* shall operate . . . with procedures designed to ensure fairness." (Emphasis added.)
- 93. The GAC is a constituent body of ICANN within the meaning of this Article. Indeed, ICANN does not argue otherwise. Nor is there any doubt, under the facts presented, that Amazon attempted to offer a written statement or materials regarding why the GAC should not adopt consensus advice opposing Amazon's applications. (Hayden Statement, ¶ 37.) It was not permitted to do so. (Id.) Nor is there any doubt that, as the applicant, Amazon stood to be materially adversely affected if the GAC issued consensus advice against its application, if for no other reason than there would be a strong presumption that, if the GAC did so, Amazon's application should be rejected by the ICANN Board.
- 94. Basic principles of procedural fairness entitle an applicant who request to have the opportunity to be heard in some manner before the GAC, as a constituent body of the ICANN. There is, however, a question of how much procedural fairness is required to satisfy Article III, Section 1. We need not decide whether such procedural fairness necessarily rises to the level normally required by administrative and quasi-judicial bodies. (See, e.g., Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313

(1950).) However, in matters relating to individual applications being considered by the ICANN Board itself, it is noteworthy that while individual applicants are not permitted to appear in person and make a presentation to the Board, ICANN's procedures permit an applicant, whose interests may be adversely affected by a decision of the Board regarding its application, to submit a written statement to the Board as to why its application should be permitted to proceed. The Panel is of the view that the same type of procedural fairness afforded by the Board required the GAC, as a constituent body of ICANN, to provide a comparable opportunity. Thus, under the facts of this IRP, the procedural fairness obligation applicable to the GAC, at a minimum, required that the GAC allow a written statement or comment from a potentially adversely affected party, before it decided whether to issue consensus advice objecting to an application. The Board's obligation was to see that the GAC, as a constituent body of ICANN, had such a procedure and that it followed it.

95. In this case, Amazon attempted to distribute written materials explaining its position to the GAC, but the GAC Chair denied its request. (Hayden Statement, ¶ 37.) Allowing a written submission would have given Amazon an opportunity, among other things, to correct the erroneous assertion by representatives of the Peruvian government that "Amazon" was a *listed* geographic name under the Guidebook. Amazon might have been able to submit information that neither Brazil nor Peru had a legal or sovereign right to the name "Amazon" under international or domestic law and that Amazon had registered the trademark or trade name of "Amazon" in many nations of the world, including Brazil and Peru. In any event, the failure to provide Amazon with an opportunity to submit a written statement - - despite its request that it be allowed to do

- so - to the very body of ICANN that was considering recommending against its application violated Article III, Section 1.
- 96. In the view of the majority of the Panel, while the GAC had the ability to establish its own method of proceeding, its failure to afford Amazon the opportunity to submit a written statement to the GAC governments at their meeting in Durban undermines the strength of the presumption that would otherwise be accorded GAC consensus advice. While our holding is limited to the facts presented in this matter, it draws support from the principle that a party has the right to present its views where a judicial or arbitral body is deciding its case. Indeed, this fundamental principle of procedural fairness is widely recognized in international law. Moreover, international law also supports the view that the failure to afford a party the opportunity to be present its position affects the value of the decision-making body's proclamations. For example, in the realm of international arbitration, the awards of arbitrators are given substantial, nearly irrefutable, deference. (See generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. III, V, July 6, 1988, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention").) However, the New York Convention allows a court to refuse to enforce an arbitration award—that is, refuse to show the arbitrators deference—if "[t]he party against whom the award is invoked was not given proper notice . . . or was otherwise unable to present his case." (Id., at art. V(1)(b).) Identical provisions allowing a party to either set aside an arbitration award or resist its enforcement appear in the Model Law on International Commercial Arbitration published by United Nations Commission on International Trade Law. (See United Nations Commission on International Trade Law, UNCITRAL Model Law on

- International Commercial Arbitration 1985, with Amendments as Adopted in 2008, arts. 34(2)(a)(ii), 36(1)(a)(ii) (Vienna: United Nations, 2008).)
- 97. We find that this principle, enshrined in international arbitration law by convention, is instructive here. While the GAC is indisputably a political body - not a judicial or arbitral body - its consideration of specific gTLD applications takes place within the framework of the ICANN Board's application review process where the GAC's consensus advice is given a strong presumption by the Board, which itself is functioning as a quasi-judicial body. Thus, under the facts before us, the GAC's decision not to provide a affected party with the opportunity to be present a written statement of its position, notwithstanding its specific request to do so, not only constitutes a violation of procedural fairness obligations under Article III, Section 1 of the ICANN Bylaws, it diminishes the strength of the strong presumption that would otherwise be warranted based upon GAC consensus advice.
- 98. It is true, as ICANN established at the hearing, that because Amazon's applications were considered at two GAC meetings, Amazon had an opportunity between those meetings to lobby one or more governments to object to consensus advice, and it attempted to do so. Whatever this opportunity was, however, it was not a procedure that the GAC made available when requested by an applicant. Moreover, attempting to influence governments, who have their own political agendas and trade-offs that could be extraneous to the merits of an application for an internet name, is not the same as procedural fairness provided by the GAC itself. That duty is independently mandated under the Bylaws and is not supplanted by an opportunity to lobby governments apart from or in-between GAC meetings.

99. Our decision regarding minimum procedural fairness required by Article III, Section 1 of the Bylaws finds support in the *DCA Trust* IRP. In that matter, the Panel noted that DCA Trust was not given "an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice[.]" (*See DCA Trust*, at ¶ 109.) The *DCA Trust* Panel went on to hold that this lack of procedural opportunity was "not [a] procedure[] designed to insure the fairness required by Article III, sec. 1." (*Id*.)

C. Must GAC advice be based upon public policy considerations?

100. The reasons for GAC Advice, even if not expressed, as is the case before us, must nonetheless be grounded in public policy. This proposition is fairly gleaned from several provisions of ICANN's governance documents. Thus, the Bylaws recognize that the GAC's purpose is to advise the Board regarding its activities "where they may affect public policy issues." (Bylaws, art. XI, § 2(1)(a).) So, not only does the GAC have an important role in providing recommendations and advice regarding policy development by ICANN, but it also can intervene regarding a specific application to ICANN provided that the application raises legitimate public policy concerns. The GAC Operating Principles reinforce the need for a nexus between GAC advice and legitimate public policy concerns. (See ICANN Governmental Advisory Comm. Operating Principles, art. I, principles 2, 4.) Although not a decision-making body, as reflected in its Operating Principles, the GAC views itself as providing advice and recommendations to the ICANN Board and operating as a forum to discuss "government and other public policy issues and concerns." (Id.) The Applicant

Guidebook indicates that the GAC may object when an application "violates national laws or raises sensitivities." (Guidebook, module 3.1.)

101. Moreover, the public policy concerns underlying GAC advice must be well-founded. Mr. Atallah acknowledged that if GAC consensus advice was based upon a mistaken view of international law, the Board would reject such advice. (Atallah Tr., 127:14-128:4.) Thus, we conclude that if, for example, in the unlikely event that GAC consensus advice was animated by purely private interests, or corruptly procured, the ICANN Board would properly reject it. Put differently, such advice, even if consensus advice, would not be well-founded and would not warrant a strong presumption, or any presumption at all. Similarly, if the only reason for the GAC advice was that the applied for string is a listed geographic name under the Guidebook, whereas in truth and in fact it is not a listed geographic name, that reason, although based on public policy concerns, would be not be well-founded and, therefore, would be rejected by the Board. Put differently, the objection based on such grounds would not warrant a presumption that it should be sustained. Similarly, if the reason for objecting to the string is that assigning it would violate international or national laws, consensus advice might warrant a presumption if well-founded, but that presumption would be overcome by expert reports that make clear that neither international law, nor national law of the

As noted, based on the record before us, the granting of Amazon's application would violate no country's national laws. As for sensitivities, it is noteworthy that nowhere in the record is there a claim, much less any support for same, that the people who inhabit the Amazon region would find the use by the applicant of the English-language string, .amazon, derogatory or offensive. Brazil's statement of concerns regarding the "risks" of granting the applications that relates to "a very important cultural, traditional, regional and geographical name related to the Brazilian culture" falls short of identifying what those "risks" are. (*See* Ex. C-40, at 11-13.) Nor did the delegates from Brazil or Peru articulate why the use of the string would be offensive to the sensibilities of people inhabiting the Amazon River basin. (*See* id.) There was no evidence in the record to support such an assertion, even had it been made.

objecting countries, prohibit the assignment of the string to the applicant. This is especially true where, as here, an independent expert report commissioned by the NGPC made clear that the legal objection of Brazil and Peru lacked merit. If the only reason for the consensus advice is that another entity, presumably a non-governmental organization (NGO), in the future would be denied the string, at a minimum the NGPC, acting for the Board, would need to explain why the Guidebook rule that deprivation of future use of a string, standing alone, is not a basis to deny a string is inapplicable. Further, if the public policy concern supporting the GAC advice is implausible or irrational, presumably the Board would find it not well-founded and would not be compelled to follow it, notwithstanding the strong presumption. (*Cf.* Atallah Tr., 128:24-129:20.)

102. The foregoing illustrates why it is highly desirable for the GAC to provide reasons or a rationale for its consensus advice to the Board. In this matter, the only arguably valid reason for the GAC advice is the assertion by Brazil and Peru that sometime in the future a NGO or other entity may wish to use the applied for English gTLD and equivalents in Chinese and Japanese characters to promote the environment and/or the culture of indigenous people of the Amazon region. This is no doubt a public policy concern. However, the evidence before the NGPC, in the form of expert reports of Dr. Passa and Dr. Radicati, indicates quite clearly that there is no prejudice or material harm to potential future users of the applied for strings. Ordinarily, the Board defers to expert reports, especially expert reports, such as Dr. Passa's, commissioned by the Board, or in this instance, by the NGPC functioning as the Board.

- 103. We conclude that GAC consensus advice, although no reasons or rationale need be given, nonetheless must be based on a well-founded public interest concern and this public interest basis must be ascertained or ascertainable from the entirety of the record before the NGPC. In other words, the reason(s) supporting the GAC consensus advice, and hence the NGPC decision, must be tethered to valid and legitimate public policy considerations. If the record fails to contain such reasons, or the reason given is not supported by the record, the Board, in this case acting through the NGPC, should not accept the advice.²⁸
- 104. As we explain more fully below, the Board cannot simply accept GAC consensus advice as conclusive. The GAC has not been granted a veto under ICANN's governance documents. If the NGPC's *only* basis for rejecting the applications was the strong presumption flowing from GAC consensus advice, this would have the effect of converting the consensus advice into a conclusive presumption and, in reality, impermissibly shifting the Board's duty to make an independent and objective decision on the applications to the GAC.
- 105. In this matter, the NGPC relied upon the reasons set out in the Early Warning Notice of Brazil and Peru as providing a rationale supporting the GAC advice. Although there is no clear evidence that the rationale for objecting to the use of the applied-for strings advanced by Brazil and Peru in the Early Warning Notice formed the rationale for the

²⁸ Under ICANN procedures, the Board would then engage the GAC in further discussions and give GAC a reason why it is doing so. (Atallah Tr., 121-128.) In this case, the reason might well be that there is no discernable valid and legitimate public policy reason for the GAC's recommendation. To the extent that reasons were given in the Early Warning Notice, the mere deprivation of the future use of the string does not appear to be a material reason, especially where there is no showing of harm or prejudice to the environment or inhabitants of the Amazon region.

GAC advice,²⁹ we believe it was appropriate for the NGPC to consider the reasons given by Brazil and Peru as support for the NGPC's decision, along with the presumption of valid public policy concerns arising from the consensus advice, as a basis for denying Amazon's application. Needless to say, however, the Early Warning Notice itself is not entitled to any presumption that it contains valid public policy reasons.

Notice do not appear to be based on well-founded public policy concerns that justify the denial of the applications. Further, Brazil and Peru's objection to the applications based on deprivation of future use of the strings is not supported by the record, including the expert reports that are part of that record. In these circumstances, we are constrained to conclude that there is nothing to support the NGPC's decision other than the presumption arising from GAC consensus advice. There must be something more than just the presumption if the NGPC is to be said to have exercised its duty to make an independent decision regarding the applications, especially where, as in this matter, the GAC did not provide the ICANN Board with a rationale or reasons for its advice.

D. Were the Early Warning Notice reasons relied on by the NGPC well-founded public policy reasons?

107. Because the NGPC did not set forth its own reasons or analysis regarding the existence of a well-founded public policy concern justifying its rejection of the applications, the Panel must undertake to review the record before the NGPC. Having done so, we are

²⁹ Indeed, the testimony of Heather Dryden, the former Chair of the GAC, in the *DCA Trust* IRP, part of the record in this IRP, indicates that there is no consensus GAC rationale for its advice. (Ex. CLA-5, 322:24-324:21.)

- unable to discern from the record before the NGPC a well-founded public policy rationale for rejecting the applications.
- 108. Four reasons were asserted by Brazil and Peru in their Early Warning Notice and the discussion at the meeting of the GAC in Durban on July 16, 2013:
 - a. Peru asserted that applications should be rejected because "Amazon" is a listed geographic name. ICANN, however, concedes that Peru's assertion, made at GAC's Durban meeting to rally support for GAC advice opposing Amazon's application, was erroneous. "Amazon" is not a listed geographic name. (*See* Ex. C-40, at 14-15, 24; Ex. C-102, ¶ 1.)
 - b. Brazil and Peru asserted legal rights to the name ".amazon" under international law, causing the NGPC to ask for an expert opinion on this issue. (Atallah Tr., 216:4-13.) Peru specifically claimed it had legal grounds to the name "Amazon," as it denotes a river and a region in both Brazil and Peru, (*see*, *e.g.*, Ex. C-40, at 14), and it invoked the "rights of countries to intervene in claims that include words that represent a geographical location of their own," (Ex. C-95, at 2). The legal claim of Brazil and Peru is without merit. Dr. Passa's report, part of the record before the NGPC, makes plain that neither nation has a legal or sovereign right under international law, or even their own national laws, to the name. (Ex. C-48.) There appear to be no inherent governmental rights to geographic terms. (*See* Ex. C-34; Forrest Report, ¶ 5.2.1.)
 - c. Brazil and Peru asserted in their Early Warning Notice that unidentified governmental or non-governmental organizations, who in the future may be interested in using the string to protect the environment ("biome") of the Amazon

- region or promote the culture of the people that live in this region, will be deprived of future use of the .amazon top level domain name if the applications are granted. (Ex. C-40, at 11-12.) We discuss this assertion below.
- d. Brazil and Peru also asserted that they objected to the applied-for string .amazon because it matched one of the words, in English, used by the Amazon Cooperation Treaty Organization. (*See* Ex. C-22, at 1.) A one word match is not likely to be misleading and is not a plausible public policy reason for an objection. (*See* discussion *supra*, at 22 n. 13.)
- 109. Only the third reason possibly presents a plausible public policy reason that could be considered to be well-founded. As discussed earlier, the record before the NGPC, however, undermines even this assertion as a well-founded reason for the GAC advice and, therefore, does not support the NGPC's decision denying the applications. First, it is noteworthy that under ICANN's own rules the mere fact that an entity will be deprived of the future use of a string is not a material reason for denying a domain name to an applicant. Indeed, the Guidebook prohibits ICANN from a finding of harm based solely on "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector." (Guidebook, § 3.5.4.) Thus, even had a non-governmental organization filed an application for the .amazon gTLD in order to promote the environment of the Amazon River basin or its inhabitants and objected to that string be awarded to the applicant, this would not alone justify denial of Amazon's applications. While not dispositive, it does lead us to conclude that there must be some evidence of detriment to the public interest in order to justify the rejection of the applications for the strings.

- 110. Even if, arguendo, deprivation of future use could be considered a public policy reason, the uncontroverted record before the NGPC, found in two expert reports, the report of ICC independent expert Professor Radicati di Brozolo and the expert report by Dr. Passa commissioned by the NGPC, was that the use of the string by Amazon was not prejudicial and would not harm such potential future interest in the name, because (1) no entity other than Amazon has applied for the string, (2) Amazon has used this tradename and domain name for decades without any indication it has harmed the geographic region of the Amazon River or the people who live there, and (3) equally evocative strings exist, such as "Amazonia" and "Amazonas" that could be used in the future to further the interests to which Brazil and Peru alluded in their Early Warning Notices. (See Ex. C-47, at 13-14, 21-23; Ex. C-48, at 10.) Although Professor Radicati was not informed of the GAC advice³¹, that alone does not undermine his determination that there was no material detriment to the interests of the people inhabiting the Amazon region by awarding the applicant the .amazon string. Moreover, his findings regarding the absence of prejudice or detriment are consistent with and are supported by those of Dr. Passa, the NGPC's independent expert, who was well aware of the GAC objection to the string.
- 111. The NGPC did not analyze Professor Radicati's or Dr. Passa's reports in its resolution denying the applications. In absence of any statement of the reasons by the NGPC for denying the applications, beyond deference to the GAC advice, we conclude that the NGPC failed to act in a manner consistent with its obligation under the ICANN

 30 It is noteworthy that Amazon agreed not to object to .amazonas and .amazonia, if they were to be applied for. (Hayden Statement, ¶ 21.)

³¹ The Panel is surprised and troubled that neither the IO nor Amazon informed Professor Radicati of the GAC advice objecting to the strings before he made his determinations.

governance documents to make an independent, objective decision on the applications at issue. (See Bylaws, art. IV, § 3(4); Supplementary Procedures, Rule 8(iii).)

Moreover, without such an explication of a reason indicating a well-founded public policy interest, the Panel is unable to discharge meaningfully its independent review function to determine whether the NGPC made an independent, objective and merits-based decision in this matter.

E. Was the NGPC required to state its reasons for its decision denying the applications?

112. Although the GAC was not required to state reasons for its action (see discussion supra at 34-35), under the circumstances presented in this matter we hold that, in order to comply with its governance documents, the Board, in this case the NGPC, was required to state reasons for its decision in order to satisfy the community that it rendered an independent and objective decision in this matter. "[A]ccountability requires an organization to explain or give reasons for its activities." (See DCA Trust, at ¶ 74; accord Vistaprint Ltd. v. ICANN, Case No. 01-14-0000-6505, Final Declaration, at ¶ 190 (Int'l Centre for Dispute Resolution, Oct. 9, 2015), https://www.icann.org /en/system/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf [hereinafter Vistaprint] (stating that the Board's decisions should be "supported by a reasoned analysis.") (quoting Gulf Cooperation Council v. ICANN, Case No. 01-14-0002-1065, Interim Declaration on Emergency Request, at ¶ 76 (Int'l Centre for Dispute Resolution, Feb. 12, 2015) https://www.icann.org/en/system/files/files/interimdeclaration-emergency-protection-redacted-12feb15-en.pdf).) Similar to GCC Final, para. 142, the NGPC resolution in this matter does not discuss the factors or reasons that led to its decision denying the applications, beyond the presumption flowing from

- GAC consensus advice. Suffice it to say, the minutes of the NGPC's May 14, 2014 meeting and its resolution adopted that date are bereft of a reasoned analysis.
- 113. To be clear, our limited holding is that under the facts of this IRP, where the NGPC is relying on GAC Advice and the GAC has provided no rationale or reason for its advice, the NGPC must state reasons why the GAC advice is supported by well-founded public interests. Otherwise, the NGPC is not acting in a transparent manner consistent with its Bylaws as there would be scant possibility of holding it accountable for its decision. (See Bylaws, art. I, § 2(8), art. III, § 1.) Here, the limited explanation of the NGPC is deficient. Certainly, there is no way that an independent review process would be able to assess whether an independent and objective decision was made, beyond reliance on the presumption, in denying the applications. The NGPC failed to articulate a wellfounded public policy reason supporting its decision. In the event the NGPC was unable to ascertain and state a valid public policy interest for its decision, it had a due diligence duty to further investigate before rejecting Amazon's applications. (Supplementary Procedures, Rule 8(ii); see also DCA Trust, at ¶ 74.)

- F. Absent a well-founded public policy reason, did the NGPC impermissibly give the **GAC** consensus advice a conclusive presumption?
 - 114. Implicit in the NGPC resolution is that the GAC advice was based on concerns stated by Brazil and Peru in their Early Warning Notice and that the reasons given in the Early Warning Notice by Brazil and Peru for objecting were based on valid, legitimate and credible public policy concerns. An Early Warning Notice, in and of itself, is not reason for rejecting an application. At a minimum, it would require that the Board independently find that the reason(s) for the objections stated therein reflect a well-

founded public policy interest. As there is no explanation in the NGPC resolution why any of the reasons given by Brazil and Peru supported its decision to reject the applications, we have concluded above that there was not a sufficient statement of the reasons by the NGPC to satisfy the requirement of the Bylaws that the Board give reasons for its decisions.

- 115. In his testimony, Mr. Atallah acknowledged that ICANN is not controlled by governments, even when governments, through the GAC, provide consensus advice.

 (Atallah Tr., 94-95.) Consensus advice from the GAC is entitled to a strong presumption that it is based on valid public policy interests, but not a conclusive presumption. In its governance documents, ICANN could have given consensus GAC advice a conclusive presumption or a veto, but it chose not to do so.
- advice against Amazon's applications, the bar was too high for the Board (NGPC) to say "no." (Atallah Tr., 100-101, 128.) Clearly, the NGPC deferred to the consensus GAC advice regarding the existence of a valid public policy concern and by so doing, it abandoned its obligation under ICANN governance documents to make an independent, merits-based and objective decision whether or not to allow the applications to proceed. By failing to independently evaluate and articulate the existence of a well-founded public policy reason for the GAC advice, the NGPC, in effect, created a conclusive or irrebuttable presumption for the GAC consensus advice. In essence, it conferred on the GAC a veto over the applications; something that went beyond and was inconsistent with ICANN's own rules.

- 117. Moreover, as observed above, we are unable to discern from the Early Warning Notice a well-founded public policy reason for the NGPC's action. There being none evident, and none stated by the NGPC, much less the GAC, the only rationale supporting the NGPC's decision appears to be the strong presumption of a public policy interest to be accorded to GAC consensus advice. But as that is the only basis in the record supporting the NGPC's decision, to let the NGPC decision stand would be tantamount to converting the strong presumption into a conclusive one and, in effect, give the GAC a veto over the gTLD applications. This would impermissibly change the rules developed and adopted in the Guidebook. And it would also run afoul of two important governance principles of ICANN:
 - That the Board state reasons for its decisions; and
 - That the Board make independent and objective decisions on the merits.
- 118. It is noteworthy that, while the NGPC's resolution listed many documents that it considered, the NGPC did not explain how those documents may or may not have affected its own reasons or rationale for denying Amazon's applications, other than its reference to the GAC consensus advice and its presumption. Moreover, nowhere does the NGPC explain why rejecting Amazon's application is in the best interest of the Internet community, especially where a well-founded public policy interest for the GAC advice is not evident.
- 119. Under these circumstances, the NGPC's decision rejecting the Amazon application is inconsistent with it governance documents and, therefore, cannot stand.

- G. Did the NGPC violate ICANN's prohibition against disparate treatment when it denied the applications?
 - 120. 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.
 - 121. It is accurate that ICANN's Bylaws prohibit discriminatory treatment by the Board in applying its policies and practices regarding a particular party "unless justified by substantial and reasonable cause." (Bylaws, art. II, § 3.) 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. 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.

H. Was Amazon's objection to changes to the applicant guidebook untimely?

122. In essence, Amazon argued that the GAC was required to state reasons for its advice under earlier iterations of the Guidebook. To the extent that earlier versions of the Guidebook supported Amazon's contention, the Guidebook was changed in 2012 and earlier requirements that the GAC state reasons for its advice or provide specific

- information were deleted. ICANN's launch documents, ICANN argued, are even more explicit regarding this change.
- 123. We agree with ICANN that to the extent that Amazon is challenging Guidebook changes made in 2011 in this proceeding, its attempt to do so is untimely. (*See Booking.com B.V. v. ICANN*, Case No. 50-20-1400-0247, Final Declaration, at ¶ 106 (Int'l Centre for Dispute Resolution, March 3, 2015), https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf; *Vistaprint*, at ¶ 172.) Any disagreement with proposed changes to the Guidebook must be made within 30 days of the notice of proposed amendments to the Guidebook. (*See* Bylaws, Art. IV, § 3.3.)

CONCLUSION

- 124. Based upon the foregoing, we declare that Amazon has established that ICANN's Board, acting through the NGPC, acted in a manner inconsistent with ICANN's Bylaws, as more fully described above. Further, the GAC, as a constituent body of ICANN, failed to allow the applicant to submit any information to the GAC and thus deprived the applicant of the minimal degree of procedural fairness before issuance of its advice, as required by the Bylaws. The failure by the GAC to accord procedural fairness diminishes the presumption that would otherwise attach to its consensus advice.
- 125. The Panel recommends that the Board of ICANN promptly re-evaluate Amazon's applications in light of the Panel's declarations above. In its re-evaluation of the applications, the Board should make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying Amazon's applications. Further, if the Board determines that the applications should

not proceed, the Board should explain its reasons supporting that decision. The GAC consensus advice, standing alone, cannot supplant the Board's independent and objective decision with a reasoned analysis. If the Board determines that the applications should proceed, we understand that ICANN's Bylaws, in effect, require the Board to "meet and confer" with the GAC. (*See* Bylaws, Article XI, § 2.1(j).) In light of our declaration, we recommend that ICANN do so within sixty (60) days of the issuance of this Final Declaration. As the Board is required to state reasons why it is not following the GAC consensus advice, we recommend the Board cite this Final Declaration and the reasons set forth herein.

126. We conclude that Amazon is the prevailing party in this matter. Accordingly, pursuant to Article IV, Section 3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 31 of the ICDR Rules, ICANN shall bear the costs of this IRP as well as the cost of the IRP provider. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US\$5,750 shall be borne by ICANN and the compensation and expenses of the Panelists totaling US\$314,590.96 shall be borne by ICANN. Therefore, ICANN shall reimburse Amazon the sum of US\$163,045.51, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Amazon.

127. Each side will bear its own expenses and attorneys' fees.

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Our learned co-panelist, Judge A. Howard Matz, concurs in the result. Attached hereto is Judge Matz's separate concurring and partially dissenting opinion.

SO ORDERED this 10th day of July, 2017

N7 C. O'B ...

Robert C. Bonner

Chair

Robert C. O'Brien

CONCURRING AND PARTIALLY DISSENTING OPINION OF A. HOWARD MATZ

128. I greatly admire my colleagues on this Panel and respect their diligent and thoughtful work in providing the foregoing Declaration. Moreover, for the reasons I will summarize at the end of this opinion, I concur in the outcome that they reach. But I do not believe that our authority, or that of any IRP Panel, permits us to invalidate a decision of ICANN based in substantial part on a finding that the GAC violated "basic principles of procedural fairness. . . widely recognized in international law. . ." To the extent that the Majority Declaration overturns ICANN's decision because the NGPC failed to remedy that supposed GAC violation, it extends the scope of an IRP beyond its permissible bounds. And in any event I also reject the factual basis for the Majority's conclusions about due process and fundamental fairness.

AUTHORITY OF AN IRP PANEL

129. The majority correctly states that "the task of this Panel is to determine whether the NGPC acted in a manner consistent with ICANN's Articles of Incorporation, Bylaws and Applicant guidebook." Majority Declaration, ¶ 63. The majority goes on to cite Article IV, § 3(4) of the Bylaws as follows:

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 ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and c. Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interest of the company [*i.e.*, the internet community as a whole]?

Id. ¶ 64.

- 130. What is troublesome about the Majority Declaration is that it does not comply with the clearly limited scope of review that we are duty-bound to follow. Article IV, § 3(4) specifically mandates that the IRP Panel "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 [those] provisions. . . . " (Emphasis added.) Instead of focusing on whether the *Board* acted consistently with its own responsibilities, the Majority Declaration devotes a considerable portion of the ruling to criticizing the GAC. Indeed, it does not merely criticize the GAC, but also finds that because the GAC supposedly violated a "fundamental principle of procedural fairness [that is] widely recognized in international law" [Majority Declaration ¶ 96] it thereby violated Art. III, § 1 of ICANN's Bylaws. See, e.g., Majority Declaration, ¶¶ 2(e); 94-99; 124. Nowhere does the majority provide support for the proposition that this IRP Panel is entitled to opine on whether general principles of international law require that "fundamental notions of due process" be imported onto GAC proceedings, especially when the parties did not even meaningfully brief those "general principles."
- 131. As stated in the Final Declaration in *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247 (Mar. 3, 2015),

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. ¶ 108. . . . Nor . . . does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. ¶ 110 . . . [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 the 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 (since, again, this IRP is not a challenge to those policies and

procedures themselves), but merely to apply them to the facts. \P 115.

132. The majority finds that the Board (NGPC) violated Article IV, § 3(4) of the Bylaws because it effectively and improperly granted the GAC advice a conclusive presumption, despite that advice having been undermined by the GAC's supposed unfairness. (See below.) In this respect and to this extent, then, although the holding in the Majority Declaration is explicitly based on the conduct of the Board (Majority Declaration ¶ 113), the result must be seen as a reflection of the majority's view about what the GAC did (or failed to do). If the conclusion that "the NGPC failed to exercise the requisite degree of independent judgment" (Majority Declaration, ¶ 2(a)) is dubious, as I think it is, then the Majority Declaration may have exceeded its proper scope.

WAS THERE REALLY A "DUE PROCESS" VIOLATION?

- 133. The claimed violation by the GAC of due process is based on the written testimony of Mr. Scott Hayden, who is Amazon's Associate General Counsel for Intellectual Property. He wrote, "We had asked the GAC to grant us the opportunity to distribute to the GAC background materials about the Amazon Applications and the proposals we had made but the GAC Chair rejected our request." Hayden Statement, ¶ 37.
- 134. It is noteworthy that Mr. Hayden did not disclose just who at Amazon asked just which GAC representative for leave to submit just which written disclosure, or when such request was made (although it was evidently before the Durban meeting). Even more noteworthy is the indisputable fact that *the GAC already knew* about those Amazon applications and proposals. Indeed, governments objecting to those applications could not have issued an Early Warning until and unless at least the Amazon application had

- come to their attention, and Brazil and Peru did not in fact issue the Early Warning until after they received Amazon's application.
- 135. Notwithstanding my view that it is not appropriate for this Panel to rest its decision, at least in large part, on whether the GAC was fair, I recognize that it is tempting to invoke Bylaws Article III, § 1 ("ICANN and its constituent bodies shall . . . ensure fairness") as the basis for doing so. "Fair is fair," after all, and it is not uncommon in an IRP for the disputing parties to challenge the fairness of their opponent's conduct. But even assuming the GAC was legally obligated to allow Amazon to make a direct written presentation in Durban, what was the impact of its failure to do so? The record shows that there was no impact at all; the claimed violation or error was utterly harmless.
- 136. The only supposed harm mentioned by the majority is that "allowing a written submission by Amazon would have given Amazon an opportunity, among other things, to correct the erroneous assertion by representatives of the Peruvian government that '.Amazon' was a *listed* geographic name under the Guidebook." *Id.* at ¶ 95. (Emphasis in original.) In fact, however, Mr. Atallah testified that if .Amazon had been on the list, the GAC would not even have been considering the issue in the first place. Tr., p. 208. As he put it,

So the only reason it's accepted as an application is because it was not on the list and everybody knew that. Otherwise, it wouldn't be an issue that required GAC Advice in the first place.

Id. at 209. This testimony was not rebutted.

137. Which leads to another concern that I have with the majority view: it is at odds with reality. It simply defies common sense to depict Amazon as having been effectively shut out of the process leading up to the GAC Advice or as the victim of one-sided,

heavy-handed maneuvering by Brazil, Peru, and the many other governments that joined in the Durban communique. Indeed, the facts show otherwise. At the hearing before this Panel, Amazon's counsel himself conceded that people other than government representatives were allowed to attend the GAC meeting in Durban: "I now understand that observers were permitted in Durban. So the transparency issue . . . there were observers there. . . . " Tr., p. 270. Their attendance, counsel further acknowledged, was a form of "participation." *Id.* at 269. In his written testimony, Mr. Atallah affirmed that at the Durban meeting on July 18, 2013 ICANN conducted a "Public Forum," at which several speakers commented on the GAC's advice regarding .Amazon. Amazon's representative, Stacy King, actually stated, "We disagree with these recommendations and object " *Id.* at ¶ 36. Moreover, ICANN introduced ample and unrefuted evidence that in the spring and summer of 2013 – before the GAC Advice was issued – Amazon communicated its response to the Brazil/Peru opposition to several countries, including Germany (Ex. R-67), Australia (Ex. R-69), the United Kingdom (Ex. R-66) and Luxembourg (Ex. R-68). Nor is it surprising that a company as large and influential as Amazon directly waged such a sustained lobbying campaign with numerous members of the GAC. Amazon, of all possible gTLD applicants, was probably the best equipped to communicate its position to everyone involved in the determination of whether ICANN should grant it a new gTLD. Just as it may be understandable to take into account the notion that "fair is fair" in assessing the GAC's conduct, so too should we recognize the reality that "Amazon is Amazon."

138. For these reasons, then, in my respectful opinion there is little merit in the majority's decision to "piggyback" the claimed due process violation by the GAC into a basis for

- "undermin[ing] the strength of the presumption that would otherwise be accorded GAC consensus advice." Majority Declaration, ¶ 96.
- 139. In addition to the foregoing factors, another reason why it is unfortunate that the Majority Declaration has declared that the GAC has a duty to adhere to international law-based principles of due process is that such declaration might well cause considerable confusion within ICANN. Article III, § 1 of the Bylaws, cited in ¶ 92 of the Majority Declaration, does indeed provide that both ICANN "and its constituent bodies shall operate. . . with procedures designed to ensure fairness." But just what are those bodies? How do they participate within ICANN? Do they all function in the same manner? Do they rely on committees? Are they entitled to representation on Board committees? On the Board's Executive Committee? If constituent bodies must permit direct presentations, would the Board and all its Committees also have to permit third parties to appear before them directly? These are legitimate questions to ask here, notwithstanding that the Majority Declaration states that it is limited to the facts of this case (¶ 113), because this IRP Declaration is entitled to be treated as precedent. (Bylaws Article IV, § 3(21).) But the questions are not even considered, much less answered.
- 140. Finally, given that it is the ICANN Board whose specific conduct we are reviewing, it must be stressed here that there is absolutely no evidence that it or the NGPC were unaware of both the GAC's thinking and Amazon's position. While I will return to the question of what the NGPC knew and what it did *infra*, at this point it is sufficient to note that as to the GAC's thinking, Mr. Atallah swore under oath that for those NGPC and Board members who attended the seven meetings dealing with Amazon's

application, it would not have been a benefit if GAC had provided a rationale with its advice. As he put it, "as an insider, you know exactly what is going on" Tr., p. 109. He went on to explain: "ICANN has three meetings a year, every year, where everybody gets together to actually develop policies and do the ICANN business. In every meeting the board actually meets with the GAC. And the issues that the GAC is facing are actually . . . told to the board, and so the board is aware of the issues that . . . the GAC members are bringing up . . . It's open meetings. And in several of those meetings, the South American countries had voiced their issues with the Amazon applications." Tr., p. 113. Mr. Atallah also testified that "when the GAC Advice came about, the board provided notice to Amazon to actually provide it with information, present their view, their side of the topic and they presented a large document to the NGPC which they reviewed and did their due diligence." Tr., p. 184.

<u>DID THE NGPC INDEPENDENTLY INVESTIGATE THE APPROPRIATE FACTS</u> AND FACTORS RELATING TO AMAZON'S APPLICATION?

141. The majority has concluded that "The Board, acting through the NGPC . . . failed in its duty to independently evaluate and determine whether valid and merits-based public policy interests existed supporting the GAC's consensus advice . . . [and thus] failed to exercise the requisite degree of independent judgment " Majority Declaration, ¶ 2(a). In my respectful opinion, the Majority Declaration either conflates or misapprehends the important difference between what ICANN initially *did* in looking into the GAC Advice re .Amazon and what it concluded after doing so.

- 142. The Majority Declaration acknowledges that under the then-applicable Bylaws, the GAC was not required to give reasons for its actions. Majority Declaration, ¶¶ 87-90. The Majority Declaration notes that even the decision in the *Dot Connect Africa Trust v. ICANN IRP* (ICDR Case No. 50-2013-001083) does not require the GAC to provide such reasons.³² But then the Majority Declaration essentially goes on to hold the *Board* responsible for GAC's supposed failure "to explain or give reasons for its activities. Majority Declaration, ¶ 112 (emphasis in original). It does so by construing the Board to have relied solely on the "strong presumption" that the GAC's advice is entitled to be implemented as if that presumption was conclusive. Majority Declaration, ¶¶ 104, 114. If that is what the Board did, such action would indeed fail to constitute "independence." But I do not agree that that is what the Board did.
- 143. Brazil and Peru, as GAC members, issued their Early Warning on November 20, 2012 and the GAC issued its Advice on July 18, 2013. Thereafter, ICANN notified Amazon, and the NGPC proceeded to solicit and receive from Amazon and others numerous documents and submissions, which were read and considered over the course of seven different NGPC meetings. (Exs. R-26 through R-31.) Also reviewed were Professor Radicati's Jan. 27, 2014 analysis (Ex. C-47); Dr. Passa's March 31, 2014 "expert"

Regrettably, however, the Majority Declaration does not sufficiently make clear that before the Applicant Guidebook was completed, quite a saga had unfolded over how applications for top level domains in names containing geographic meaning would be treated. Various grounds for objection were considered. The GAC is comprised of sovereign governments that by their very nature function through a political lens, but the GAC is vital to the very essence of the internet and ICANN. There could be no worldwide web without the support and cooperation of governments around the globe. The GAC pushed for the right to raise concerns and objections separate and apart from the otherwise generally available grounds. Recognizing this, the full ICANN community granted GAC the very powers that have been challenged here. The outcome was that the entire ICANN community agreed to allow the GAC to use the Early Warning and GAC Advice (without accompanying rationales) procedures. The written testimony of Mr. Atallah explained this in great detail. (¶¶ 11-23.)

opinion (Ex. C-48); the Early Warning (C-22); several letters from Peru (C-45; C-50; C-51); at least four letters from Amazon (C-35; C-36; C-44; C-46) and other items. (See Ex. R-83.) Mr. Atallah testified at length about what the NGPC did. He summarized it this way:

But the information that the NGPC went through was comprehensive. They looked at every opinion that the counterparties have [sic] and everything that was available to them, and they made their decision based on the process and as well as the issues at hand . . . and actually reviewed so much information, so much data, that the thing took ten month[s] . . ."

Tr., pp. 184-185.

144. I thus conclude that the NGPC did not in fact accept the GAC advice as conclusive. It displayed both due diligence and independent initiative in its effort to carry out its responsibilities. However, whether it actually succeeded in discharging its responsibilities requires us to ascertain whether that independent inquiry led to a conclusion consistent with what the mission or core values of ICANN require. To that analysis I now turn.

145. Paragraph 113 of the Majority Declaration states very clearly,

To be clear, our limited holding is that under the facts of this IRP, where the NGPC is relying on GAC advice and the GAC has provided no rationale or reason for its advice, the NGPC must state reasons why the GAC advice is supported *by well-founded* public interest [sic] concerns. Otherwise, the NGPC is not acting in a transparent manner consistent with its Bylaws, Article I, § 2(8), Article III, § 1.

In reaching this conclusion, I choose not to apply literally and indiscriminately Mr. Atallah's testimony to the effect that the NGPC made no independent inquiry as to whether there was a valid public interest rationale for the GAC advice. (Tr., p. 238.) For Amazon to rely so heavily on that off-the cuff statement, made at the very end of a full day's testimony and in response to a question from the Panel chair, is to take it out of fair context. Indeed Mr. Atallah followed that response with "But there was no reasons for us to believe that the public interests of the Brazilian people is [sic] misrepresented by their governments." *Id*.

(Emphasis added.)

- 146. I agree, at least as to Article III, § 1. For me, the key requirement is that there be a "well-founded" basis for the NGPC's conclusion, regardless of how procedurally adequate its inquiry otherwise was under the Bylaws. Amazon having at least rebutted the strong presumption supporting advice of the GAC, the burden of making that showing became ICANN's to bear. It failed to do so.
- 147. The GAC had every right to assert "cultural sensitivities" as the primary basis for its opposition to Amazon's application. See Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs: "New gTLDs should respect . . . the sensitivities regarding terms with national, cultural, geographic and religious significance." But Brazil and Peru needed to do more than raise those concerns in the conclusory manner that they did. Professor Radicati had sound reason to conclude that awarding the string ".Amazon" to Amazon would not in fact create a material detriment to the people who inhabit the wide region in South America that is part of the Amazon River and rain forest. As he put it, ". . . [T]here were many other parties defending interests potentially affected by the Applications (environmental groups, representatives of the indigenous populations and so on) that could have voiced some form of opposition to the Applications, had they been seriously concerned about the consequences. Particularly given the standing of at least some of those organizations, it is implausible that none of them would have been aware of the Applications." Ex. C-47, ¶ 93. Radicati went on to add, "[T]here is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community and its specificities [sic] and

- importance for the world will be removed from the public consciousness, with the dire consequences emphasized by the IO." Ex. C-47, ¶ 103. (Emphasis added.)
- 148. What the objectors, the GAC and the NGPC failed to demonstrate here stands in contrast with what the applicants for the ".persiangulf" gTLD pointed to in the "Partial Final Declaration" in the IRP in *Gulf Cooperation Council (GCC) v. ICANN* (ICDR Case No. 01-14-0002-1065). There, in fact, *both* the applicant (Asia Green) and its opponents presented greater support for their respective positions. For example, Asia Green noted,

There are in excess of a hundred billion of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .persiangulf gTLD will help change this. (¶ 14)

For its part, the GCC established that "the relevant community was substantially opposed to the ".persiangulf" application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string." (¶ 38)

149. So what, then, could Brazil and Peru have presented to the GAC that the NGPC should have looked for or relied on in order to reach a conclusion consistent with Art. 1, § 2 of the Bylaws, including such ICANN core values as "seeking . . . broad, informed participation reflecting . . . geographic and cultural diversity" (Core Value 4), "open and transparent policy development mechanisms" (Core Value 7) and "recognizing that governments. . . are responsible for public policy" (Core Value 11)? They could have presented: public opinion surveys; expressions of concern by existing native communities; resolutions by existing NGOs; and submissions by historians and

scientists in the Amazon region about the importance of cultural patrimony and ecological preservation. Had Brazil and Peru made at least some such information available to the GAC and had the GAC at least acknowledged that it had received such material, the NGPC's decision to uphold the GAC advice even in the absence of an explicit GAC rationale would have been sufficient, in my opinion.

- 150. In addition to the foregoing reasons for concurring in the result, there are other considerations that persuade me to join in the outcome of the majority's ruling. For example, as already indicated, I agree with several observations that are central to the majority's conclusion, including the following.
 - a. GAC advice must be based upon public policy considerations, even if not incorporated into a written "rationale." Majority Declaration ¶ 100.
 - b. The public policy considerations must be "well-founded," *Id.*, ¶ 101, and "ascertainable from the entirety of the record before the NGPC." *Id.*, ¶ 103.
 - c. It "is highly desirable for the GAC to provide reasons or a rationale for its consensus advice to the Board." Id., ¶ 102.³⁴
 - d. The Board "cannot accept GAC consensus advice as conclusive." *Id.*, ¶ 104. (Put another way, a "strong" presumption is not the same as an "irrebutable" presumption.)
- 151. Also, for the most part, Amazon's conduct in pursuing its application was commendably reasonable. For example, it explicitly agreed not to apply for gTLDs with the names (or words) "Amazonas," "Amazonia" and close variants thereof. Such a concrete effort at compromise should not be ignored or taken for granted.

So basic and compelling is this "desirable" factor that it now has become required in the 2016 Bylaws.

- 152. Moreover, given that the 2016 changes in the Bylaws now impose requirements on the GAC to provide reasons for GAC advice, to the extent that because the GAC did not explicitly do so in this case ICANN's decision has been found to be deficient, the outcome of this IRP will cause little or no detriment to ICANN going forward.
- "contribut[ing] to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here." ¶ 4. Here, too, there is a demonstrable benefit to the ICANN community that can result from further guidance about the minimum requirements that ICANN must meet in order to have its decisions about GAC advice upheld in the face of challenge. That benefit is especially applicable where, as here, the practical effect of the Panel's ruling is that the dispute is remanded for further proceedings. In other words, Brazil, Peru, the GAC and ICANN, as well as Amazon, may now supplement and strengthen their positions. The Applicant Guidebook states that the objective for ICANN is to "determine whether approval would be in the best interest of the internet community." § 5.1. Here, all the interested parties, including Brazil, Peru and the GAC, are members of that community. See Bylaws, Art. I, § 2(11). They all share a common objective and potentially a common benefit in promoting their respective interests anew in light of this Declaration.

Dated: July 10, 2017

A. Howard Maty

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS

Pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the *ICDR Supplementary Procedures for ICANN Independent Review Process*

Gulf Cooperation Council (GCC))	
Claimant)	
and)	ICDR Case No. 01-14-0002-1065
Internet Corporation for Assigned Names and Numbers (ICANN))	110. 01-14-0002-1005
Respondent)))	

PARTIAL FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL

Independent Review Panel

Lucy Reed, Chair Anibal Sabater Albert Jan van den Berg

I. INTRODUCTION

- This case concerns the dispute between the Gulf Cooperation Council ("GCC"), and the
 Internet Corporation for Assigned Names and Numbers ("ICANN") over the generic TopLevel-Domain name ("gTLD") ".persiangulf".
- 2. The underlying dispute is a broader one, concerning the name for the body of water separating the Arabian Peninsula from the Islamic Republic of Iran ("Iran"), which is a non-Arab nation historically called Persia. The Arab states, including members of the GCC, use the name "Arabian Gulf', while Iran uses the name "Persian Gulf'. The sensitivity of this geographical name dispute, which has gone on for over 50 years, is well-known. It is representative of deeper disputes between GCC members and Iran over matters of religion, culture and sovereignty, prompting sanctions such as the banning of maps and censorship of publications that use either "Arabian Gulf' or "Persian Gulf". (For purposes of neutrality, we will use the simple term "Gulf" in this Declaration.)
- 3. The particular dispute has its origins in the July 2012 application by a Turkish company founded by Iranian nationals, Asia Green IT System Bilgisayar San. Ve Tic. Ltd Sti ("Asia Green"), for registration of the ".persiangulf" gTLD as an international forum for people of Persian descent and heritage. The GCC has contested this application at every step of the ICANN gTLD review process, primarily on grounds that ".persiangulf" targets the Arabian Gulf Arab community, which was not consulted and opposes this use of the disputed geographical name.
- 4. The GCC initiated this Independent Review Process ("IRP") in December 2015 to challenge the ICANN Board's taking any further steps to approve registration of ".persiangulf" gTLD to Asia Green, alleged to violate the ICANN Articles and Bylaws.
- 5. Based on the IRP Panel's review and assessment of the Parties' submissions and evidence, our Partial Declaration is in the GCC's favor. At the Parties' joint request, the IRP Panel will allocate costs in a Final Declaration at a later stage.

II. THE PARTIES AND COUNSEL

- 6. The Claimant GCC is a political and economic alliance established in 1981 among six countries: the United Arab Emirates ("UAE"), Saudi Arabia, Kuwait, Qatar, Bahrain and Oman. The GCC is based in Saudi Arabia. Its address is Contact Information Redacted
- The GCC is represented by Natasha Kohne and Kamran Salour of Akin Gump Strauss Hauer & Feld LLP, Sawwah Square, Al Sila Tower, 21st Floor, P.O. Box 55069, Abu Dhabi, UAE.
- 8. The Respondent ICANN is a non-profit public benefit corporation established under the laws of the State of California, USA. ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems", including the domain name system. ICANN's address is 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA.
- ICANN is represented by Jeffrey A. LeVee, Eric P. Enson, Charlotte Wasserstein and Rachel Zernik of Jones Day, 555 South Flower Street, 50th Floor, Los Angeles, CA 90071, USA.

III. BACKGROUND FACTS

10. We set out below the basic background facts, which are undisputed except where otherwise noted. More detailed background facts are included in the separate sections below on the jurisdiction and merits issues in dispute.

A. ICANN's New gTLD Program

11. As set out in Article 3 of its Articles of Incorporation, ICANN is mandated to develop procedures to expand the number of top level domains and increase the number of companies approved to act as registry operators and sell domain name registrations. In

¹ ICANN's Response to Gulf Cooperation Council's Request for Emergency Relief ("Response to Emergency Request"), ¶ 6.

June 2011, ICANN launched a significant expansion with the "New gTLD Program". According to ICANN, this Program is its "most ambitious expansion of the Internet's naming system". To illustrate, ICANN approved only seven gTLDs in 2000 and another small number in 2004-2005² and then received almost 2000 applications in response to the New gTLD Program.³

- 12. ICANN developed an Applicant Guidebook through several iterations, with Version 4 of the New gTLD Application Guidebook dated 4 June 2012 ("Guidebook") being relevant here. The Guidebook, running to almost 350 pages, sets out comprehensive procedures for the gTLD application and review process. It includes instructions for applicants, procedures for ICANN's evaluation of applications, and procedures for objections to applications. In line with ICANN's policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment. ICANN may take such community comments into account in deciding whether an application meets the criteria for approval of a new gTLD registry operator.
- 13. Decisions on applications for new gTLDs are made by the New gTLD Program Committee of the ICANN Board ("NGPC").

B. The ".persiangulf" New gTLD Application

14. On 8 July 2012, Asia Green applied for the ".persiangulf" gTLD. In its application form, Asia Green identified the mission/purpose of the proposed gTLD in relevant part as follows:

There are in excess of a hundred million of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .PERSIANGULF gTLD will help change this.⁵

² Response to Emergency Request, ¶¶ 12-13.

³ https://newgtlds.icann.org/en/about/program.

⁴ Response to Emergency Request, Exh. R-ER-3/R-2 ("Guidebook").

⁵ Request for Independent Review Process ("Request for IRP"), ¶ 31 and 66.

15. Asia Green has also applied for a number of other gTLDs. Its application for ".pars" (referring to the ancient Persian homeland of Pars), which was based on essentially the same mission/purpose as ".persiangulf" to unite the Persian community, was successful and led to a registry agreement in 2014. Its applications for ".islam" and ".halal", however, were not accepted by ICANN.

C. The GCC's Objections to Asia Green's ".persiangulf" gTLD Application

16. The GCC objected to Asia Green's application within the mechanisms provided by ICANN.

1. Concerns Raised with the Governmental Advisory Committee to ICANN

17. ICANN, which is a complex global organization, relies on committees to provide advice from different constituencies. As relevant here, the Governmental Advisory Committee to ICANN ("GAC") consists of members appointed by and representing governments. The GAC was created to:

consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements, or where they may affect public policy issues.⁸

- 18. Module 3.1 of the Guidebook, which is entitled "GAC Advice on New gTLDs", allows GAC members to raise governmental concerns about a gTLD application. Such concerns are considered by the GAC as a whole, which may agree on advice to forward to the ICANN Board. Such GAC advice to the ICANN Board is one of two methods of governmental recourse against an application for a gTLD. (The second method, an "Early Warning Notice", is discussed below.)
- 19. As set out in Module 3.1 of the Guidebook, the advice from the GAC to the ICANN Board may take one of the following three forms:
 - a. A "Consensus GAC Advice", in which the GAC, on consensus, provides public policy advice to the ICANN Board that an application **should not** proceed, creating a strong

⁶ Request for IRP, ¶ 65.

⁷ Ibid., ¶ 61.

⁸ Guidebook, Module 3.1, p. 1.

- presumption of non-approval of the application by the ICANN Board; there is no equivalent form of consensus GAC advice that an application **should** proceed;
- b. The expression of concerns in the GAC about an application, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those concerns, and to give reasons for its ultimate decision; or
- c. Advice that the application should not proceed unless remediated, creating a strong presumption that the ICANN Board should not allow the application to proceed unless the applicant implements a remediation method available in the Guidebook.
- 20. On 14 October 2012, the UAE wrote to the GAC and ICANN expressing its disapproval and non-endorsement of Asia Green's ".persiangulf' application. Similar letters from Oman, Qatar and Bahrain followed. As members of the GCC and GAC, these governments objected to registration of ".persiangulf" as a new gTLD on grounds that the proposed domain refers to a geographical place subject to a long historical naming dispute and targets countries bordering the Gulf that were not consulted and did not support the domain, confirming that there was not community consensus in favor of the new gTLD. (The subsequent GAC consideration of these concerns is described below.)

2. Early Warning Process

- 21. During the public comment period for gTLD applications, the Guidebook (Module 1.1.2.4) also allows the GAC to issue an "Early Warning Notice" to the ICANN Board flagging that one or more governments consider the application to be sensitive or problematic. The Board in turn notifies the applicant for the gTLD. As the Early Warning is merely a notice, and not a formal objection, it alone cannot lead to ICANN's rejection of the application.
- 22. On 20 November 2012, the governments of Bahrain, Oman, Qatar and the UAE raised their concerns about Asia Green's ".persiangulf" application through the GAC Early Warning process. The reasons mirrored those of their GAC objections: "The applied for

⁹ Request for IRP, Annex 6.

¹⁰ Ibid. Annexes 7-9.

new gTLD is problematic and refers to a geographical place with disputed name"; and "Lack of community involvement and support". 11

3. Independent Objector Review

- 23. The Guidebook (Module 3, Articles 3.2.1–3.2.5) also provides an "Independent Objector" process, when there has been negative public comment before any formal objection. ICANN appoints an Independent Objector whose role, as the name indicates, is to exercise independent judgement in the public interest to determine whether to file and pursue a "Limited Public Interest Objection" or a "Community Objection" to the application.
- 24. In December 2012, the Independent Objector for the ".persiangulf" gTLD application, Professor Alain Pellet, issued his comments aimed at "informing the public of the reasons why the [Independent Objector] does not consider filing an objection" in relation to the ".persiangulf" application. 12 Professor Pellet concluded that a Limited Public Interest Objection was not warranted, because there were no binding international legal norms to settle the naming dispute. Likewise, he found a Community Objection to be "unadvisable". 13 Although Professor Pellet found that there was a clearly delineated Gulf community at least implicitly targeted by Asia Green's application and that a significant portion of that community opposed delegation of ".persiangulf", he considered it "most debateable" that the gTLD would "create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community" (meaning the Arab portion), which is a necessary criterion in the Guidebook for a Community Objection.¹⁴ He stated in this regard that:

it is a matter of fact that there is a long-term dispute over the name of the Gulf and that both designation[s] [i.e. Persian Gulf and Arabian Gulf] are in use. It is indeed not the mission of the gTLD strings to solve nor to exacerbate such a dispute; but they probably should adapt to the status quo and the [Independent Objector] deems it unsuitable to take any position on the question. He notes that it is open to the Arabian Gulf community to file an objection as well as the same community could have applied for a ".Arabiangulf" gTLD. 15

¹¹ Ibid., Annex 10.

¹² Independent Objector's Comments on Controversial Applications, Response to Emergency Request, Exh. R-ER-5.

¹³ Ibid., p. 6.

¹⁴ Ibid., p. 5.

¹⁵ Ibid., pp. 5-6.

4. Formal Community Objection by the GCC

- 25. Module 3 of the Guidebook also provides for formal objection by third parties to challenge a gTLD application. There are four types of formal objections, of which a "Community Objection" is one.
- 26. A Community Objection is made on the basis that "[t]here 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" (Module 3.2). Pursuant to Paragraph 3.2.3 of the Guidebook, the International Centre of Expertise of the International Chamber of Commerce ("ICC") administers disputes brought by Community Objection. One expert hears a Community Objection (Paragraph 3.4.4).
- 27. On 13 March 2013, the GCC filed a Community Objection to the ".persiangulf" application. The ICC appointed Judge Stephen M. Schwebel as the Expert Panelist to hear the Objection (Case No. EXP/423/ICANN/40). (Judge Schwebel's determination, which he issued on 30 October 2013, is discussed below.)

D. GAC Advice to the ICANN Board

- 28. Concurrent with the various opposition avenues described above, the GAC was considering the GCC's concerns in the course of its regular meetings.
- 29. In its 11 April 2013 meeting in Beijing, China, the GAC issued advice to the ICANN Board concerning a number of gTLD applications, using the typical format of a post-meeting Communiqué. Certain of the advice in the Beijing Communiqué was Consensus GAC Advice against gTLD applications, creating a presumption that the ICANN Board should **not** approve the relevant applications. In the case of certain geographically-based strings, including ".persiangulf", the Beijing Communiqué reflected that the GAC required time for further consideration. On that basis, the GAC advised the ICANN Board not to proceed beyond initial evaluation of Asia Green's application. ¹⁶

¹⁶ Request for IRP, Annex 23, p. 3.

- 30. The NGPC of the ICANN Board accepted this advice. The NGPC documented its decision in a Resolution with an annexed "Scorecard" setting out its response to each item in the GAC's Beijing Communiqué.¹⁷
- 31. In its 13-18 July 2013 meeting in Durban, South Africa, the GAC gave further consideration to the Asia Green application for ".persiangulf". Mr Abdulrahman Al Marzouqi, who represented the UAE and the GCC at the Beijing and Durban GAC meetings, testified that no consensus was reached to oppose or support the application. In his words:
 - 5. I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC's opposition to the PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because "Persian Gulf" is a disputed name. A substantial amount of GAC members in attendance shared these concerns.
 - 6. Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the "Persian Gulf" name, and Iran's GAC representative obviously does not share the other GAC members' concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson... pulled me to the side to express her frustration that GAC could not reach a consensus. ¹⁸
- 32. The Minutes of the Durban meeting ("**Durban Minutes**"), on which the GCC relies in these IRP proceedings, reported:

The GAC finalized its consideration of persiangulf after hearing opposing views, the GAC determined that it was clear that there would not be consensus of an objection regarding this string and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. (Emphasis added.)

33. The 18 July 2013 Durban Communiqué, on which ICANN relies as the document formally providing GAC advice to the ICANN Board, reported:

¹⁹ Request for IRP, Annex 34.

¹⁷ Response to Emergency Request, Exhs. R-ER-6 and R-ER-7.

¹⁸ Claimant's Request for Emergency Arbitrator and Interim Measures of Protection, Witness Statement of Abdulrahman Al Marzouqi (22 December 2014) ("Al Marzouqi Statement"), paras. 5-6.

The GAC has finalised its consideration of the following strings, and does not object to them proceeding:

. . .

- ii. .persiangulf (application number 1-2128-55439). 20 (Emphasis added.)
- 34. On 10 September 2013, relying on the Durban Communiqué, the NGPC of the ICANN Board passed a resolution to continue to process the ".persiangulf" gTLD application, with a notation that there was a Community Objection:

ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.²¹ (Emphasis added.)

- 35. The NGPC resolution and related Scorecard were posted on the ICANN website on 12 September 2013. The Board Minutes and related materials were posted more than two weeks later, on 30 September 2013.
- 36. It is the ICANN Board's decision on 10 September 2013 to continue to process Asia Green's ".persiangulf" gTLD application that the Claimant GCC challenges in these IRP proceedings.

E. Expert Determination of the Community Objection

- 37. On 30 October 2013, one month after ICANN's posting of the Durban Minutes, Judge Schwebel issued his Expert Determination dismissing the GCC's Community Objection.²²
- 38. Judge Schwebel first found that the GCC had standing to object to the ".persiangulf' application, as an institution created by treaty and having an ongoing relationship with a clearly delineated community, namely the Arab inhabitants of the six GCC states on the Gulf. He then proceeded to find in the GCC's favor on the first three of the four elements required by the Guidebook for a successful Community Objection (which, it bears noting, are not the same as the elements applicable to these IRP proceedings). Judge Schwebel found that: (a) the community invoked is a clearly delineated community; (b) the relevant

²⁰ Ibid., Annex 24.

²¹ Response to Emergency Request, Exhs. R-ER-9 and R-ER-10.

²² Case No. EXP/423/ICANN/40, Expert Determination of Judge Stephen M. Schwebel, Request for IRP, Annex 2.

- community was substantially opposed to the ".persiangulf" application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string.
- 39. Judge Schwebel, however, then found against the GCC on the fourth element, on grounds that the GCC had failed to prove that the targeted community would "suffer the likelihood of material detriment to their rights or legitimate interests". In his assessment, even though geographical name disputes such as the Arabian Gulf-Persian Gulf dispute can have significant impacts on international relations, "it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute". Like the Independent Objector before him, Judge Schwebel noted that the GCC could apply for its own "arabiangulf" string.
- 40. This Independent Review Process followed.

IV. THE INDEPENDENT REVIEW PROCESS: THE ARCHITECTURE

- 41. Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), of the ICANN Bylaws sets out the procedure for independent review of actions taken by the ICANN Board.
- 42. Paragraph 2 of Article IV, Section 3, provides:

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 of the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

43. Paragraph 7 of Article IV, Section 3, provides that "[a]*Il IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN*". As stated in the Supplementary Procedures for ICANN Independent Review Process ("Supplementary Procedures"), the ICANN Board has designated and approved

²³ Ibid., p. 11.

the International Centre for Dispute Resolution ("ICDR") as the Independent Review Panel Provider.²⁴

- 44. The Supplementary Procedures apply to these proceedings, in addition to the ICDR International Arbitration Rules ("ICDR Rules"). Pursuant to Article 2 of the Supplementary Procedures, in the event of any inconsistency between the Supplementary Procedures and the ICDR Rules, the former prevail.
- 45. The Parties dispute whether the ICANN Bylaws are also applicable to this procedure, in particular in relation to the determination of costs. (This is discussed in Section IX below.)
- 46. The ICANN Bylaws provide a three-question standard of review for the Independent Review Process. As set out in Paragraph 4 of Article IV, Section 3:

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?
- 47. Article 8 of the Supplementary Procedures replicates this standard of review in similar terms.

V. THE INDEPENDENT REVIEW PROCESS: PROCEDURAL HISTORY

48. On 5 December 2014, the GCC filed its Request for Independent Review Process with the ICDR ("Request for IRP"). The Claimant attached a number of Annexes, and the Expert Report of Mr. Steven Tepp.

²⁴ The standing panel of reviewers contemplated in Article, IV, Section 3, Paragraph 6, of the ICANN Bylaws has not been established. Claimant's Supplementary Request for Independent Review Process ("Supplementary IRP Request"), Annex S-8.

- 49. The Request for IRP invokes ICANN's accountability mechanisms for the independent review of ICANN Board action, as set out in Article IV, Section 3, of the ICANN Bylaws.
- 50. Also on 5 December 2014, the Claimant filed a Request for Emergency Arbitrator and Interim Measures of Protection ("Emergency Request"). In the Emergency Request, the GCC sought:
 - a. Timely appointment of an Emergency Arbitrator to hear its request for emergency relief to preserve its right to a meaningful independent review; and
 - b. An order enjoining ICANN from executing the ".persiangulf" registry agreement with Asia Green while the Request for IRP was pending.
- 51. On 9 December 2014, ICANN consented to the appointment of an Emergency Panelist.

 Mr. John A.M. Judge was appointed on the same day to fulfil that role.
- 52. On 17 December 2014, the Respondent submitted its Response to Gulf Cooperation Council's Request for Emergency Relief, asking that the Emergency Request be denied.
- 53. On 22 December 2014, the Claimant filed its Reply in Support of its Request for Emergency Arbitrator and Interim Measures of Protection. This submission included the Witness Statement of Mr. Al Marzouqi ("Al Marzouqi Statement").
- 54. On 23 December 2014, the Emergency Panelist conducted a hearing by telephone conference call.
- 55. On 20 January 2015, ICANN submitted its Response to Claimant's Request for Independent Review Process.
- 56. On 12 February 2015, Mr. Judge issued his Interim Declaration on Emergency Request for Interim Measures of Protection ("Emergency Declaration"). The Conclusion of the Emergency Declaration provided as follows:
 - 96. Based on the foregoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:

- a. ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;
- b. This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;
- c. This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and
- d. The costs of this Request for Interim Measures shall be reserved to the IRP panel.²⁵
- 57. Following the Emergency Declaration, the present IRP Panel was constituted. The chair was appointed on 4 December 2015.
- 58. On 6 January 2016, the IRP Panel held a preparatory conference call with the Parties. The Panel issued Procedural Order No. 1 on 8 January 2016 (corrected 13 January 2016), establishing the submissions and setting the timetable for the proceedings. The merits hearing by telephone conference call was scheduled for 17 May 2016.
- 59. Pursuant to Procedural Order No. 1, the GCC filed its Supplementary Request for Independent Review Process ("Supplementary IRP Request") on 12 February 2016. This submission included the Supplementary Witness Statement of Mr. Al Marzouqi ("Supplementary Marzouqi Statement"), which described the GCC's unsuccessful attempts to conduct a conciliation process with both ICANN and Asia Green after the GCC filed its Request for IRP.
- 60. On 14 March 2016, ICANN filed its Response to Claimant's Supplementary IRP Request ("Response to Supplementary IRP Request"). As was the case in the emergency proceedings, ICANN did not file any witness statements.
- 61. On 29 March 2016, the GCC submitted its Reply in Support of its Supplementary Request for IRP, with no additional witness statements. ICANN's Response followed on 12 April 2016, ("Rejoinder to IRP Request"), again with no witness statements.

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²⁵ Interim Declaration on Emergency Request for Interim Measures of Protection ("Emergency Declaration"), ¶ 96.

- 62. On 7 May 2016, the Claimant requested that the hearing be postponed until July 2016. ICANN did not oppose. The IRP Panel rescheduled the hearing for 7 July 2016.
- 63. The hearing took place by telephone conference call on 7 July 2016, lasting approximately two hours. The IRP Panel heard submissions from counsel for both Parties. As agreed by the Parties, there was no fact or expert witness testimony.
- 64. Having determined that there was no need for further submissions, the Panel declared the hearing officially closed on 19 October 2016, except as to costs.

VI. THE RELIEF SOUGHT

- 65. The Claimant GCC seeks a Declaration:
 - a. stating that the ICANN Board violated ICANN's Articles, Bylaws and the New gTLD Application Guidebook of 4 June 2012;
 - b. recommending to the Board that ICANN take no further action on the ".persiangulf' gTLD, including by enjoining ICANN from signing the registry agreement with Asia Green, or any other entity;
 - c. awarding the GCC its costs in this proceeding; and
 - d. awarding such other relief as the Panel may find appropriate or that the GCC may request.26
- The Respondent ICANN seeks a Declaration: 66.
 - a. denying the GCC's IRP Request;
 - b. awarding ICANN its reasonable fees and costs incurred, including legal fees, if it is the prevailing party.²⁷

Supplementary IRP Request, ¶ 63.
 Response to Supplementary IRP Request, ¶¶ 30 and 32.

VII. JURISDICTION: TIMELINESS OF THE REQUEST FOR IRP

A. The Issue and Legal Framework

- 67. A preliminary jurisdictional issue for decision is whether the GCC's Request for IRP is time-barred. ICANN argues that the Request is time-barred; the GCC disagrees.
- 68. As a starting point, the 30-day deadline for challenging an ICANN Board action appears in Article IV, Section 3, Paragraph 3 of the ICANN Bylaws ("IRP Deadline"), which provides in relevant part:

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.

- 69. Article IV, Section 3, of the ICANN Bylaws, together with the ICANN document entitled "Cooperative Engagement Process Requests for Independent Review" dated 11 April 2013 ("CEP-IRP Document"), 28 codify two exceptions to the IRP Deadline.
 - a. The IRP Deadline is tolled if the parties are engaged in a Cooperative Engagement Process ("CEP"), referred to in Paragraph 14 of Article IV, Section 3, of the ICANN Bylaws:

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.

Pursuant to the CEP-IRP Document (pp. 1-2):

If ICANN and the requestor have not agreed to a resolution of issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.

²⁸ Response to Claimant's Request for Independent Review Process ("Response to IRP Request"), Exh. R-5; Supplementary IRP Request, Exh. S-10.

- b. Pursuant to the CEP-IRP Document (para. 6), ICANN and an IRP requestor may agree, in writing, to extend the IRP Deadline.
- 70. To recall, certain relevant facts are undisputed. Following the Durban GAC meeting and Communiqué, ICANN posted the Durban Minutes and related materials on 30 September 2013. The GCC filed its Request for IRP on 5 December 2014. Obviously, 5 December 2014 is more than 30 days after the 30 September 2013 posting of the Durban Minutes and related materials.
- 71. It is also undisputed that the Parties neither initiated a formal CEP nor agreed in writing to extend the IRP Deadline.
- 72. Accordingly, the issue before the IRP Panel is whether the 30-day IRP Deadline was tolled or otherwise extended despite the absence of a CEP or written extension of the IRP Deadline.

B. The Respondent's Position

- 73. ICANN takes the firm legal position, as advocated in both its written submissions and during the 7 July 2016 hearing, that the IRP Deadline is mandatory and cannot be tolled or extended for non-codified reasons. To allow equitable tolling in general would be to create unacceptable uncertainty for gTLD applicants and IRP applicants. To allow tolling in the instant circumstances for the GCC, which waited over a year to file its IRP Request, would be to provide impermissible special treatment.
- 74. As for the specific circumstances alleged by the GCC (described below), ICANN denies that any dealings and communications between its officials and GCC representatives effectively substituted for the CEP process or excused the GCC's failure to initiate the CEP process. To recall, as in the Emergency Request proceedings, ICANN presented no witness statements from named or unnamed representatives or any other factual evidence.

C. The Claimant's Position

75. The GCC presents an equitable reliance defense to its delayed initiation of the IRP process.

The GCC argues, as a general matter, that ICANN should acknowledge non-written tolling

circumstances and, in the specific circumstances here, that the IRP Deadline must be deemed tolled by reason of the explicit and/or implicit representations made by ICANN officials to Mr. Al Marzouqi between October 2013 and November 2014.

- 76. The GCC asserts that "following the Board's September 2013 Board Action, ICANN represented repeatedly through its words and actions to the GCC that the deadline to file the IRP had not yet passed".²⁹
- 77. The GCC relies primarily on the Al Marzouqi Statement, and a 9 July 2014 letter from Mr. Mohammed Al Ghanim, Director General of the UAE Telecommunications Regulatory Authority, to ICANN CEO Mr. Fadi Chehade, to support this assertion. According to Mr. Al Marzouqi:
 - a. He and other GAC members expected that ICANN would treat the ".persiangulf" gTLD application in the same way it had treated the ".islam" and ".halal" applications, because all three applications "lack community support, and the .PERSIANGULF gTLD application, unlike the .ISLAM and .HALAL gTLD applications, also is strongly opposed by the Arab community because 'Persian Gulf' is a disputed name".³⁰
 - b. After the posting of the ICANN Board decision to proceed with the ".persiangulf" application on 30 September 2013, he "reached out to [his] ICANN counterparts to initiate an attempt at resolution" and they "instructed [him] to wait until the Independent Expert issued a declaration on the GCC's Community Objection", which he did.³¹
 - c. After Judge Schwebel dismissed the Community Objection on 30 October 2013, Mr. Al Marzouqi again reached out and his "ICANN counterparts advised they would get back to [him]".³²

²⁹ Supplementary IRP Request, ¶ 35.

³⁰ Al Marzouqi Statement, ¶ 7.

³¹ Ibid., ¶¶ 8-10.

³² Ibid., ¶ 11.

- d. "After several months of dialogue with [his] ICANN counterparts proved unsuccessful", he arranged for "high-level" meetings "in hopes of facilitating a resolution", which arrangements took substantial time due to schedules.³³
- e. In June 2014, Mr. Al Marzouqi and other GCC representatives met with the ICANN CEO, Mr. Chehade, during the GCC Telecom Council Ministers Meeting in Kuwait City.³⁴ According to Mr. Al Marzouqi, GCC representatives reiterated their objections to the ".persiangulf" application in that meeting.
- f. Mr. Al Marzouqi's testimony about the meeting is corroborated by a 9 July 2014 letter from Mr. Al Ghanim to Mr. Chehade. Mr. Al Ghanim reiterated the GCC's concerns about lack of community involvement and support for the gTLD, which is "problematic and refers to a geographical place with disputed name", and added:

While the GAC did not issue an advice objecting against the Application (due to lack of consensus because one particular country did not agree to the objection), this does not mean those countries which are port [sic] of the community targeted by the Application are agreeing to the Application to proceed and this certainly does not mean that ICANN should ignore this fact and continue to allow the Application to proceed.

- The security, functionality and stability of Internet rely greatly on a successful operation of the DNS system. It is worrying to see how a TLD being opposed by majority of the community targeted would be able to operate and sustain. We believe the motive behind this Application has nothing to do with Internet community interest, nor commercial interest. We request ICANN to analyze the Application from financial and sustainability angle given that the community continues to oppose the Application.³⁶
- g. Thereafter, Mr. Al Marzouqi's "ICANN counterparts again advised [him] that they had taken the GCC's position under advisement and would get back to the GCC with an answer". ³⁷ That answer, testified Mr Al Marzouqi, came in September 2014, when Mr. Al Marzouqi's "ICANN counterparts ... suggested to

³³ Ibid., ¶¶ 12-13.

³⁴ Ibid., ¶ 14.

³⁵ Ibid., attached Letter from Mr. Mohammed Al Ghanim to Mr. Fadi Chehade, 9 July 2014 ("Al Ghanim Letter").

³⁶ Al Ghanim Letter, p. 2.

³⁷ Al Marzougi Statement, ¶ 15.

[him] that the GCC's only recourse toward resolution may be to file a request for independent review of ICANN's Board action" (emphasis in original).³⁸

- h. Mr. Al Marzouqi spoke again with his "ICANN counterparts" in October 2014 at ICANN meetings in Los Angeles. As "ICANN's handling of geographic gTLD applications was a topic of discussion at those meetings", he "remained hopeful that the GCC and ICANN could finally resolve the dispute". ³⁹
- i. In November 2014, there having been no resolution at the October meetings, Mr. Al Marzouqi advised the GCC to proceed with the IRP process. 40 He learned only in December 2014 that ICANN intended to sign the registry agreement for "persiangulf", after which he advised the GCC to file the Emergency Request "to ensure that the independent review process would not be rendered meaningless". 41
- j. According to Mr. Al Marzouqi: "At no time from September 2013 to November 2014 did ICANN state, let alone suggest, that if the GCC engaged in resolution efforts it would be time-barred from seeking an independent review of the September 2013 Board action".⁴²
- 78. Mr. Marzouqi, in his Supplementary Witness Statement, describes further attempts at conciliation with both ICANN and Asia Green after the GCC filed its IRP Request. 43

 These attempts proved unsuccessful.
- 79. The GCC also relies, in support of its equitable reliance defense, on an email dated 19 December 2014 from Mr. Eric Enson, outside counsel to ICANN, to Mr. Kamran Salour, outside counsel to the GCC ("ICANN Counsel Email"). 44 The relevant language is as follows:

³⁸ Ibid., ¶16.

³⁹ Ibid., ¶ 17.

⁴⁰ Ibid., ¶ 18.

⁴¹ Ibid., ¶ 22.

⁴² Ibid., ¶ 19.

⁴³ Supplementary Marzouqi Statement, Exh. S-9, ¶ 2-16.

⁴⁴ Supplementary Request for IRP, Exh. S-11.

Fourth, during the call yesterday, you mentioned the possibility of entering a Cooperative Engagement Process ("CEP"), as set forth in ICANN's Bylaws. A CEP is supposed to take place before the filing of an IRP in the hope of avoiding, or at least minimizing, the costs associated with an IRP. That, obviously, did not happen in this matter. In addition, a CEP is supposed to be a dialogue between the parties, rather than counsel for the parties. ICANN is always willing to discuss amicable resolutions of issues, but I think we need additional information from the GCC before agreeing to engage in a CEP, at this point. First, ICANN would like to know whether the GCC believes that there is a realistic possibility that the GCC would dismiss its IRP based on CEP discussions. The reason this is important to ICANN is because ICANN representatives informed GCC representative[s], on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP.

80. The GCC considers this email to evidence ICANN's earlier tolling of the 30-day IRP Deadline, because ICANN expressed willingness to enter into a CEP despite the GCC's initiation of the IRP process on 5 December 2014.⁴⁵

D. The IRP Panel's Analysis and Decision

- 81. Turning first to the Parties' general arguments on whether and how the IRP Deadline can be tolled or extended other than by the two codified exceptions, we do not consider it our role as an IRP Panel to issue general directives. It suffices to record that, under an equitable reliance theory, a requesting party should be allowed to request an IRP after expiry of the 30-day IRP Deadline if that party can show reliance on a representation or representations by ICANN inviting or allowing extension of the IRP Deadline. Otherwise, ICANN would be allowed "to blow hot and cold" and ultimately undermine its own mandate. Such contradictory actions would be inconsistent with, for example, the core value set out in Article 1, Section 2, of the ICANN Bylaws, of ICANN's "[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness".
- 82. Beyond that general proposition, our Declaration must be focused on the facts and circumstances of the case before us. The issue is whether ICANN did make such a representation or representations here, either explicitly or implicitly by conduct.

⁴⁵ Claimant's Reply in Support of its Supplementary Request for IRP, ¶ 26.

- 83. We have carefully examined the GCC's evidence of contacts and communications between GCC and ICANN representatives between September 2013 and November 2014. Although the Marzouqi Statement was conclusory and short on detail, for example, in not providing names for his "ICANN counterparts" who participated in discussions after September 2013, he did provide a credible account of a series of communications with ICANN, commensurate with the credible level of serious GCC concerns about registry of "persiangulf" as a new gTLD.
- 84. We have not been helped by any contradictory or confirming witness statements, or other evidence, from ICANN, about that alleged series of contacts and communications. It is striking that ICANN does not dispute the fact that the meeting with its most senior representative, CEO Chehade, occurred in June 2014. ICANN does dispute other points of Mr. Al Marzouqi's testimony, for example, his description of the instruction by unnamed ICANN officials that the GCC wait until after the Expert Panelist's decision on the Community Objection to commence an IRP process, and his testimony that unnamed ICANN officials suggested an IRP process in September 2014 and participated actively in negotiations thereafter. However, ICANN provided no witness statements from ICANN representatives who did participate in the June 2014 meeting, no copy of any written response from ICANN to the Al Ghanim letter about the content of the discussions in that meeting, or any other factual evidence whatsoever countering Mr. Al Marzouqi's account.
- 85. Having weighed such evidence as there is in the record, we find as follows, on the balance of probabilities:
 - a. In October 2013, ICANN requested the GCC, through Mr. Al Marzouqi, not to commence dispute resolution proceedings which by definition encompass an IRP process until the Expert Panelist had resolved the GCC's Community Objection to the ".persiangulf" gTLD application. This request was in effect a representation that the IRP Deadline was tolled until Judge Schwebel issued his expert decision, regardless of when that might be.
 - b. The GCC relied on that representation from ICANN, to the effect that the 30-day IRP Deadline was not yet running, in not filing an IRP request within 30 days

- after the posting of the GAC's Durban Minutes and related materials on 30 September 2013.
- c. After Expert Panelist Schwebel dismissed the GCC's Community Objection on 30 October 2013, which happened to be the expiry of the IRP Deadline, ICANN continued to welcome if not actively encourage a series of communications and meetings to discuss the GCC's objections to registration of ".persiangulf". Having previously tolled the IRP Deadline, if ICANN at that point believed that the 30-day deadline was running or had expired, it is reasonable to assume that ICANN would have told the GCC. It is thus reasonable indeed, necessary to conclude that, while those communications and meetings were taking place, the IRP Deadline remained tolled.
- d. By far the most compelling evidence is that the ICANN CEO himself, Mr. Chehade, met with Mr. Al Marzouqi and other GCC representatives in June 2014 to discuss the GCC's objections to the ".persiangulf" gTLD application, a meeting testified to by Mr. Al Marzouqi and corroborated by the 9 July 2014 Al Ghanim Letter. Regardless of whether ICANN officials thereafter expressly advised the GCC that ICANN had taken the GCC's objections under advisement, as Mr. Al Marzouqi testified, CEO Chehade's personal involvement made it reasonable for the GCC to consider that their opposition to ".persiangulf" remained under active consideration by the ICANN Board through July 2014.
- e. Not long thereafter, in September 2014, an ICANN representative or representatives suggested to Mr. Al Marzouqi that an IRP request might be the GCC's only recourse toward resolution. Considering that the 30-day IRP Deadline had passed over a year before, and assuming good faith on the part of ICANN throughout, it is reasonable that the GCC considered the IRP Deadline to remain tolled at this time.
- f. The GCC pursued a further settlement attempt with ICANN at meetings in Los Angeles in October 2014, which reflects that the GCC continued to rely on ICANN's holding the IRP Deadline open in hopes of settlement. Those hopes

- dissipated by November 2014 when the GCC received nothing positive from the Los Angeles meetings.
- g. At this point, absent any further representations from ICANN about further negotiations, the limitations period reasonably ceased to be tolled and the IRP Deadline started to run.
- h. On 5 December 2014, within the 30-day IRP Deadline, the GCC filed its Request for IRP.
- 86. Exchanges thereafter in specific, the ICANN Counsel Email confirming that ICANN had entertained a CEP process support the conclusion that ICANN itself considered the deadline for the submission of an IRP to have been tolled. Those exchanges show that ICANN could and did continue discussions with the GCC aimed at resolving the ".persiangulf" gTLD dispute by way of a formal or informal CEP process even after the 30-day IRP Deadline had passed and before the GCC filed a Request for IRP. As confirmed in the ICANN Counsel Email, the CEP is a dispute resolution mechanism that typically precedes, and is aimed at avoiding, an IRP filing. We need not interpret Mr. Enson's email as confirmation that a CEP took place before the IRP was filed, to find that ICANN reasonably appeared to the GCC to remain open to a CEP, with certain conditions, well after 30 October 2013.
- 87. While there was no formal CEP, we conclude from the evidentiary record overall that ICANN explicitly and implicitly cooperated in a shadow conciliation process with the GCC. It was reasonable for the GCC to continue to participate in that process, without concern that ICANN would retroactively impose a strict 30 October 2013 time-bar for an IRP request should the shadow conciliation process fail.
- 88. In coming to this conclusion, we have not been swayed by the GCC's umbrella argument that ICANN should have formally notified the GCC, at very least in the December 2014 ICANN Counsel Email, that the IRP Deadline was mandatory and had expired by 30 October 2014. Nor have we been swayed by ICANN's mirror argument that the GCC should have formally reserved and documented its position that the IRP Deadline was tolled by ICANN's conduct. It is because neither Party took such formal action that this

dispute comes before this Panel, and we are tasked with evaluating the legal import of the actions the Parties did take.

- 89. Nor have we been swayed by the political context. While the well-known sensitivities around the disputed names "Persian Gulf" and "Arabian Gulf" cannot excuse ICANN's ignoring its own IRP Deadline for over a year, which implicitly encouraged the GCC to postpone filing its IRP Request, those sensitivities perhaps explain ICANN's reluctance to apply the IRP Deadline strictly in this case. It would seem that both Parties hoped that such a political dispute would somehow resolve itself.
- 90. Although neither Party asked the IRP Panel to take any formal action in relation to the status of the Emergency Declaration, it should be clear from our conclusion that we agree with the assessment of Mr. Judge that "the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable". 46 The Emergency Panelist cautioned that "the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself, 47 but, as it transpired, ICANN did not provide any such additional evidence concerning the conduct of its officials.
- To conclude, the Panel finds that: (a) at no point did the GCC cease its objections to 91. ICANN's registration of the ".persiangulf" gTLD; (b) through its conduct, ICANN made representations that the IRP Deadline, measured against the 30 September 2013 Board action, was tolled; (c) the GCC relied on those representations, in hopes of a resolution, in postponing a formal IRP process; and (d) the GCC timely submitted its IRP Request on 5 December 2014.

⁴⁶ Emergency Declaration, ¶ 83. ⁴⁷ Ibid., ¶¶ 83 and 86.

VIII. THE MERITS

A. The Standard of Review

92. As a preliminary matter, the Panel considers the standard of review to be clear. Pursuant to Article IV, Section 3, Paragraph 4, of the ICANN Bylaws (echoed in Article 8 of the Supplementary Procedures), we are:

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. . . . [and] 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.)

- 93. The IRP Panel agrees with the GCC that this is a *de novo* standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.⁴⁸ This is consistent with the very name of the IRP process an **independent** review of the contested Board action. Other IRP Panels have recognized and applied this *de novo* standard of review.⁴⁹
- 94. We also agree with ICANN that an IRP Panel cannot abuse this independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion.⁵⁰ This proposition is reflected in the language of Article IV, Section 3, Paragraph 4, of the Bylaws: an IRP Panel is not entrusted with second-

⁴⁸ Supplementary IRP Request, ¶¶ 9-11.

⁴⁹ Relying upon Annex S-3, 19 February 2010, Final Declaration in *ICM Registry LLC v. ICANN*; Annex S-4, 3 March 2015, Final Declaration in *Booking.com v. ICANN*; Annex S-5, 9 July 2015 Final Declaration in *DotConnectAfrica Trust v. ICANN*.

⁵⁰ Response to Claimant's Supplementary IRP Request ("**Response to Supplementary IRP Request**"), ¶ 5; Annex S-2, 9 October 2015, Final Declaration in *Vistaprint v. ICANN*, ¶ 124; Exh. R-24, Final Declaration in *Merck v. ICANN*, ¶ 21; Annex S-4, Final Declaration in *Booking.com v. ICANN*, ¶ 108.

- guessing the Board, but rather "with declaring whether the Board has acted consistently with the provisions of [the ICANN] Articles of Incorporation and Bylaws".
- 95. To recall, the contested ICANN Board action here is the Board's decision on 10 September 2013 to proceed with the ".persiangulf' gTLD application. It is irrelevant whether the IRP Panel considers this decision to be right or wrong on the merits, much less to be politically wise or unwise. Our role is to examine the **process** of the Board's decision-making, in specific to answer the questions in Article IV, Section 3, Paragraph 4, of the Bylaws: (a) did the Board act without conflict of interest? (b) did the Board exercise due diligence and care in having a reasonable amount of facts? and (c) did the Board members exercise independent judgment, believed to be in the best interests of ICANN?
- 96. If the answer to any of those questions is "no", the GCC will prevail in this Request.

B. The Claimant's Standing to Pursue the IRP

- 97. A second preliminary question goes, as we find below, to the GCC's standing to pursue this IRP proceeding.
- 98. The Parties devoted substantial attention in their written and oral submissions to the question of the type and level of harm that the GCC must establish it has suffered or will suffer as a result of the contested ICANN Board action. This question arises from the IRP-related test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws:

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. (Emphasis added.)

99. The Parties agree that the term "materially affected" must be distinguished from the term "material detriment", which is relevant in assessing the merits of a Community Objection to a gTLD application. One of the four elements to be proven for a successful Community Objection is 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" (emphasis added). Factors evidencing material detriment go to actual operation of the gTLD by the applicant, including the likelihood that operation will cause reputational, security, and/or economic harm to the community represented.

- 100. ICANN, however, effectively equates the two terms "materially affected" and "material detriment" by using them interchangeably. The basic inquiry for both tests, according to ICANN, is whether an IRP requestor will be materially injured or harmed by the actual operation of the relevant string.⁵¹ In ICANN's view, the GCC, however, has failed to identify any legally recognizable harm it will suffer if ".persiangulf is registered; the contention that a ".persiangulf" gTLD will create the false impression that the Gulf Arab nations accept the disputed name "Persian Gulf" is not a cognisable harm.⁵² To support its position, ICANN puts substantial weight on the findings of the Independent Objector and the Expert Panelist that the GCC fell short of proving that it would suffer harm reaching the level of "material detriment".⁵³
- 101. In comparison, the GCC in its Supplementary IRP Request argues that the only relevant inquiry is whether it suffered injury or harm connected to ICANN's alleged action inconsistent with the ICANN Articles or Bylaws.⁵⁴ The IRP Panel, according to the GCC, is to examine only whether that action here, the Board's 10 September 2013 decision to allow processing of the ".persiangulf" application did cause harm "materially affect[ing]" the GCC and its members.⁵⁵ The GCC identifies that harm to be the denial of its due process rights to an ICANN decision on the contested ".persiangulf" gTLD application in which its objections were fully considered by the Board, and apparent discrimination against its Arab members in favor of Iran.⁵⁶
- 102. The IRP Panel agrees with ICANN that the question of whether the GCC was "materially affected" for purposes of Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is one

⁵¹ Rejoinder to ICANN's Response to Gulf Cooperation Council's Reply in Support of Supplementary Request for Independent Panel Review ("**Rejoinder to IRP Request**", ¶ 15.

⁵² Ibid., ¶¶ 13-15; Response to Supplementary IRP Request, ¶ 25.

⁵³ Rejoinder to IRP, ¶ 14.

⁵⁴ Supplementary IRP Request, ¶ 41. The GCC took a position closer to ICANN's in this respect in its original Request for IRP; see, e.g., ¶¶ 70-74.

⁵⁵ Supplementary IRP Request, ¶ 49.

⁵⁶ Ibid., ¶ 42.

of standing.⁵⁷ This is the logical meaning of the language in Paragraph 2 that a "person materially affected" by an ICANN Board action perceived to be inconsistent with the Bylaws or Articles "may submit a request for independent review"; this cannot and does not presuppose a successful request for IRP. As a standing question, this question precedes the core IRP question of whether the ICANN Board acted inconsistently with its Articles or Bylaws.⁵⁸

- 103. However, we cannot agree with ICANN's effective conflation of the two tests of "materially affected" and "material detriment". Only the former test appears in, and is relevant to, the IRP-related standing test in Article VI, Section 3, Paragraph 2, of the ICANN Bylaws. To apply the "material detriment" test, which is a critical component of the Community Objection evaluation process under the Guidebook, would be to put the IRP Panel into a role it does not have to examine and offer its views on the merits of the ".persiangulf" gTLD application under the relevant ICANN criteria. The determinations of the Independent Objector and the Expert Panelist, which were made in the Community Objection context and hence necessarily focused on the likelihood of "material detriment" to the interests of the Gulf community, are therefore irrelevant. 59
- 104. In this connection, we do not need to address the submissions of the Parties as to whether the GCC could have minimized or avoided injury or harm by applying for an ".arabiangulf" gTLD, and whether such an application is or is not foreclosed in the future. This may have been a factor for the Independent Objector and the Expert Panelist to consider in the Community Objection context, but it is not a proper issue of standing in an IRP case.
- 105. We recognize that the "materially affected" test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is defined in relation to "injury or harm that is directly or causally connected to the Board's alleged violation of the Bylaws or the Articles". As Paragraph 2 goes to standing, however, it cannot reasonably be interpreted as requiring an IRP panel to find proof of concrete and measurable injury or harm at the time an IRP request is filed. It

⁵⁷ Rejoinder to IRP Request, ¶ 16.

⁵⁸ Ibid., ¶ 16.

⁵⁹ Supplementary IRP Request, ¶¶ 43-49; The Gulf Cooperation Council's Reply in Support of its Supplementary Request for Independent Review Process ("Reply to IRP Request"), ¶ 21.

must suffice for the IRP requestor, to meet the standing test, to allege reasonably credible injury or harm connected to the contested ICANN Board action. We are satisfied that the GCC has done so here by describing the harm caused to its Gulf members' due process rights, by definition, if the processing of the ".persiangulf" gTLD application were to continue on the basis of a Board decision made without regard to the GCC's objections. We now turn to the core merits question of whether the GCC has proven such inconsistent action by ICANN.

C. The Claimant's Position

- 106. The GCC's main submission is that ICANN failed to follow the GAC's advice from the Durban meeting, as well as the Guidebook procedures, in deciding in September 2013 to allow further processing of the ".persiangulf" gTLD.
- 107. The GCC relies on Module 3.1 of the Guidebook, which sets out three possible forms for GAC advice to the ICANN Board. These are set out at paragraph 19 above. Given that the GAC did not issue Consensus GAC Advice that the ".persiangulf" gTLD application should **not** proceed or advice that the application should not proceed unless remediated, by elimination the only available form of advice was an "expression of concerns in the GAC" about Asia Green's application, meant to prompt a dialogue between the GAC and the Board. The GAC did identify such concerns, in the Durban Minutes, which explicitly: (i) referred to the opinions of GAC members from the UAE, Oman, Bahrain and Qatar that the application should not proceed; (ii) noted that the GAC had heard "opposing views" on the application; and (iii) concluded that "it was clear that there would not be consensus on an objection". In the GCC's view, these vigorous comments were a fully recognizable expression of its members' concerns.
- 108. The GCC disagrees with ICANN that only the Durban Communiqué constituted recognizable GAC advice to the ICANN Board. The GCC relies on Principle 51 of GAC's Operating Principles, which does not limit the GAC's advice to a communiqué. Further, ICANN's failure to review the Durban Minutes before passing its resolution on the

⁶⁰ Supplementary IRP Request, ¶ 20.

⁶¹ Ibid., ¶ 18; Reply to IRP Request, ¶ 6.

⁶² Reply to IRP, ¶ 8.

".persiangulf" application was, in itself, a failure to exercise due diligence in making the decision, in violation of Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws. 63

- 109. In light of the foregoing, the ICANN Board was obligated to enter into a dialogue with the GAC to understand its members' concerns, and to give reasons for its ultimate decision to allow Asia Green's application to move forward which ICANN failed to do.
- 110. The GCC argues in the alternative that, even if ICANN was somehow correct in following the GAC's non-compliant advice to allow the ".persiangulf" application to proceed, ICANN violated several other Articles and Bylaws. Among others, the GCC identifies:
 - a. Bylaws, Article I, Section 2:

In performing its mission, the following core values should guide the decisions and actions of ICANN:

....

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.

....

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

....

- 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.
- b. Bylaws, Article II, Section 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.

c. Bylaws, Article III, Section 1:

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⁶³ Reply to IRP Request, ¶ 10.

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.

d. 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.

- 111. The GCC puts special emphasis on Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs, which directs that "New gTLDs should respect: ... the sensitivities regarding terms with national, cultural, geographic and religious significance".
- 112. Against this backdrop of ICANN constituent documents, the GCC argues that the ICANN Board failed to collect and independently assess all relevant facts before resolving to allow the ".persiangulf" gTLD application to proceed. The Board failed to review the GAC's Durban Minutes, which flagged that there were serious objections to the application and hence no consensus in favor of its proceeding. Nor did the Board explain, or even give any indication of, the reasons for its decision to allow the vigorously contested application to proceed. The bare Board resolution of 10 September 2013 gives no hint that the Board fulfilled its obligation to assess and balance the competing core values of ICANN. Neither that resolution nor any other document contains any reference to the ICANN core values guiding the Board in its 10 September 2013 decision on the ".persiangulf" application or any statement as to how the Board balanced core values that it found to be competing.
- 113. The Board also discriminated against the GCC by giving credence only to the Iranian position at the GAC and by ignoring the GCC's Community Objection and strong government opposition. If registered with Asia Green, the ".persiangulf" string will be discriminatory because "it will falsely create the perception that the GCC accepts the disputed 'Persian Gulf' name". 64 This is particularly egregious because the Persian

⁶⁴ Request for IRP, ¶ 58.

- community already has the benefit of the ".pars" string, already registered with Asia Green for purposes overlapping with the ".persiangulf" application.
- 114. Further, according to the GCC, the Board handled Asia Green's ".persiangulf" application inconsistently with Asia Green's ".halal" and ".islam" applications. In those cases, although the Independent Expert dismissed the Community Objections because he did not find substantial community opposition, the Board intervened to stop the processing of both strings. Here, where the Community Objection and the Durban Minutes documented substantial community opposition, the Board nonetheless decided to allow continued processing of the ".persiangulf" application.
- 115. Overall, says the GCC, the Board's NGPC acted unfairly in a non-transparent and discriminatory manner, without sensitivity to the national, cultural and geographic issues in the Gulf. 65 In reviewing the Board's decision to allow Asia Green's ".persiangulf' application to go forward, the Panel should follow the path of the IRP Panel in the DotConnectAfrica Trust v ICANN case. There, the IRP Panel held that the Board had breached its transparency obligations by simply adopting the GAC's consensus advice not to proceed with the application for the ".africa" gTLD, stating that it "would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust's application". 66

D. The Respondent's Position

116. ICANN's defense to the GCC's argument that the Board failed to follow the GAC's advice is straightforward: the ICANN Board followed the GAC's advice to the letter. According to ICANN, the GAC did **not** advise of any member concerns regarding the ".persiangulf" gTLD application, and so the proper course was for the Board's NGPC to allow Asia Green's application to progress. The Durban Communiqué expressly stated that the GAC had "finalised its consideration ... and does not object to [the ".persiangulf" application] proceeding", without advising of any concerns whatsoever. ICANN emphasizes that the Board did not make a decision to approve the ".persiangulf application" based on the

⁶⁵ Supplementary IRP Request, ¶ 23-26; Reply to IRP Request, ¶¶ 16-18.

⁶⁶ Ibid., Exh. S-5; Final Declaration, DotConnectAfrica Trust v ICANN, 9 July 2015, ¶ 113.

GAC's advice, but simply resolved to allow the ICANN staff to continue to process the application.⁶⁷

- 117. ICANN relies on GAC Operating Principles 51 to argue that the Durban Minutes, to the extent those Minutes say anything more than the Durban Communiqué, are not an official statement of GAC advice to the ICANN Board.⁶⁸ Nor were the Durban Minutes approved or posted until November 2013, and so they were not even before the Board for consideration at its meeting on 10 September 2013 to review and pass resolutions on the Durban Communiqué and Scorecard items. Further, in ICANN's view, the Durban Minutes are consistent with the Dublin Communiqué in reporting that there was no advice against the ".persiangulf" application proceeding. Comments made by individual GAC members at the Durban meeting, recorded in the Minutes, do not constitute GAC advice triggering Board duties under Module 3 of the *Guidebook*.⁶⁹
- 118. As for the GCC's alternative argument based on ICANN's failure to meet its mission and core value standards, ICANN denies both the theory and the facts. In ICANN's view, the Board independently evaluated the ".persiangulf" gTLD application, in an open and transparent fashion, as evidenced by: the posting of the Durban Communiqué and subsequent public comment period; the Board meetings to determine actions based on the GAC's advice in the Durban Communiqué, with a public record of the discussion on each item in the Durban Scorecard responding to the GAC's advice; and a unanimous vote adopting resolutions based on the Scorecard, again publicly posted. Nor can it be inferred that the Board failed to consider ICANN's core values simply because the Board did not explicitly state how it did so; it would be impossible for the Board to spell this out for the hundreds of resolutions it must manage each year. ⁷⁰ Further, the Bylaws do not oblige the Board to accept any and all advice from the GAC; Article XI, 2.1.j of the Bylaws only requires the Board to take GAC advice into account and, if the advice is not followed, to provide reasons for not doing so.

⁶⁷ Response to IRP Request, ¶ 21.

⁶⁸ Ibid., ¶ 10, Exh. R-25.

⁶⁹ Reply to IRP Request, ¶ 9.

⁷⁰ Response to IRP Request, ¶¶ 13-20.

- 119. ICANN argues that the IRP Panel's Declaration in the *DotConnectAfrica* case is inapposite, because the GAC provided Consensus Advice against the string proceeding. Similarly, as for the alleged inconsistent treatment of Asia Green's applications for ".halal" and ".islam", ICANN points out that in those cases, unlike the instant case, the GAC did in fact express concerns to the Board base on community concerns about the obvious religious sensitivities.
- 120. In sum, the ICANN Board's NGPC considered and followed the GAC's advice exactly as it was supposed to, fully consistently with the ICANN Articles and Bylaws.
- 121. Should the Tribunal find in the GCC's favor, ICANN contests the GCC's request for a declaration ordering ICANN to refrain from signing the registry agreement with Asia Green or any other entity. ICANN argues that, pursuant to Article IV, Section 3, Paragraph 3.11, of the Bylaws, an IRP Panel is limited to stating its opinion by "declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.

E. The IRP Panel's Analysis and Decision

- 122. We turn first to the GCC's main submission that the ICANN Board failed to follow the GAC's advice from the Durban meeting, as well as the Guidebook, in deciding on 10 September 2013 to allow the ".persiangulf' gTLD to proceed in the application process.
- 123. This turns on whether the GAC did in fact properly provide post-Durban advice to the Board. We find this to be a difficult question, which overlaps with the GCC's alternative submission concerning ICANN's overall compliance with its mission and core values under the Bylaws and Articles.
- 124. To recall, Module 3.1 of the Guidebook envisions three forms of GAC advice to the Board:(a) Consensus GAC Advice that an application should **not** proceed, creating a strong presumption of non-approval; (b) the expression of **concerns** within the GAC, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those

concerns and then give reasons for its decision; or (c) advice that the application should not proceed unless **remediated**. It is undisputed, and we agree, that the GAC did not issue Consensus GAC Advice against the ".persiangulf" application or suggest remediation, leaving only the second form of advice – the expression of **concerns**, meant to prompt interaction with the Board.

- 125. If, as ICANN argues, only the Durban Communiqué could provide GAC advice to the Board, then the GAC clearly did **not** express concerns about the ".persiangulf" gTLD application. That Communiqué stated no more than this: "The GAC has finalised its consideration of [the application] and does not object to [it] proceeding". This underlies ICANN's main defense that the ICANN Board followed the GAC's advice to the letter, by resolving to allow Asia Green's application to proceed.
- 126. We find ICANN's defense to be unduly formalistic and simplistic.
- 127. As we see it, the GAC sent a missive to the ICANN Board that fell outside all three permissible forms for its advice. The GAC's statement in the Durban Communiqué that the GAC "does not object" to the application reads like consensus GAC advice that the application should proceed, or at very least non-consensus advice that the application should proceed. Neither form of advice is consistent with Module 3.1 of the Guidelines. Yet the ICANN Board proceeded to resolve to allow the application to proceed, as a routine matter, based on the Durban Communiqué.
- 128. Some of the fault for the outcome falls on the GAC, for not following its own principles. In particular, GAC Operating Principle 47 provides that the GAC is to work on the basis of consensus, and "[w]here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board". The GAC chair clearly did not do so. Mr. Al Marzouqi testified to the views he expressed at the Durban meeting and that consensus proved impossible, which testimony stands unrebutted by ICANN here (quoted in paragraph 31 above):

⁷¹ ICANN Response to IRP Request, Exh. R-25.

- 5. I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC's opposition to the PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because "Persian Gulf" is a disputed name. A substantial number of GAC members in attendance shared these concerns.
- 6. Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the "Persian Gulf" name, and Iran's GAC representative obviously does not share the other GAC members' concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson pulled me to the side to express her frustration that GAC could not reach a consensus.
- 129. If the GAC had properly relayed these serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board. The directive of Module 3.1, which is a **procedural** protection for opponents to gTLD applications, bears emphasis:

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 rational for its decision.

- 130. It is difficult to accept that ICANN's core values of transparency and fairness are met, where one GAC member can not only block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue.
- 131. In any event, the IRP Panel is not convinced that just because the GAC failed to express the GCC's concerns (made in their role as GAC members) in the Durban Communiqué that the Board did not need to consider these concerns. The record reveals not only substantial sensitivity with respect to Asia Green's ".persiangulf" application, but also general discord around religious or culturally tinged geographic gTLD names. In addition to the Durban Minutes, the pending Community Objection, and public awareness of the sensitivities of the "Persian Gulf"-"Arabian Gulf" naming dispute, the Durban Communiqué itself on which ICANN relies so heavily here contained an express recommendation that "ICANN collaborate with the GAC in refining, for future rounds, the Applicant Guidebook with

regard to the protection of terms with national, cultural, geographic and religious significance". These materials and this general knowledge could and should have come into play, if not as a matter of following GAC advice then as part of the Board's responsibility to fulfil ICANN's mission and core values.

- 132. Although it is not necessary to the outcome of this IRP, the Panel cannot accept ICANN's argument that the GAC may provide official advice to the Board only through a Communiqué. It is Principle 46 of the GAC's Operating Principles that provides that "[a] dvice from the GAC to the ICANN Board shall be communicated through the Chair", while Principle 51 speaks only of the Chair's authority to "issue a communiqué to the Media" following a meeting.
- 133. Even if, as a matter of practice, ICANN is correct that the Durban Minutes were not a form of official communication from the GAC, the Minutes do express serious GAC member concerns and confirm that there was, in fact, no consensus in Durban in favor of the ".persiangulf" gTLD application proceeding. As quoted in paragraph 32 above, those Minutes recorded as follows:

The GAC finalized its consideration of persiangulf after hearing opposing views, the GAC determined that it was clear that there would not be consensus of an objection regarding this string and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. (Emphasis added.)

Given this language, we cannot accept ICANN's argument that the Durban Minutes are consistent with the Durban Communiqué, which succinctly stated that the GCC "does not object to [the application] proceeding", thereby creating the impression that GAC members took the position – whether by consensus or not – that the application **should** proceed.

134. It is difficult to accept that the Board was not obliged to consider the concerns expressed in the Durban Minutes if it had access to the Minutes. If it was not given the Minutes, it is equally difficult to accept that the Board – as part of basic due diligence – would not have

⁷² Request for IRP, Annex 24, Durban Communiqué, para. 7.

- asked for draft Minutes concerning GAC discussions of such a geo-politically charged application.
- 135. This failure of due diligence is compounded by the fact that, as noted by the NGPC itself in the Minutes of the critical 10 September 2013 meeting, the GCC's Community Objection was pending. The relevant Board resolution bears quoting again:

ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF. (Emphasis added.)

- 136. Yet there is no evidence or indication in the record that the NGPC bothered to consider the content of the Community Objection, before allowing the processing of the obviously controversial string application to proceed. Certainly, that the Expert Panelist some three weeks later dismissed the Community Objection cannot support the procedural propriety of the Board's decision on 10 September 2013 to allow the ".persiangulf" application to proceed.
- 137. In sum, ICANN may be correct that the Board followed all the routine steps of posting information about the application, meeting to review the application, and acting strictly on the basis of the Durban Communiqué and Scorecard items. The Board did post the Durban Communiqué on 1 August 2013 for public comment but it contained only the one-line conclusion that the GAC had "finalised it consideration of the [".persiangulf"] string, and does not object to it proceeding". The Board did meet on 13 August 2013 but the only discussion was whether to respond to the Durban Communiqué advice by Scorecard. The Board did meet on 10 September 2013 to discuss each of the Durban Scorecard items, and did vote unanimously in favor of continuing to process the ".persiangulf" application but the relevant entry on the Scorecard merely repeated the one-line Durban Communique reporting that the GAC "does not object" to the ".persiangulf" application proceeding. The Minutes of the Board meetings were publicly posted.
- 138. In the IRP Panel's assessment, these were empty steps. ICANN's insistence in its Response to the Supplementary IRP Request (at paragraph 2) and Rejoinder to IRP Request (at paragraph 10) is equally empty. At the end of the day, there is simply no

evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC's serious concerns before resolving to allow the ".persiangulf' application to proceed. ICANN's willingness to meet GCC representatives after the 10 September 2013 decision to allow the application to proceed was belated and could not cure or validate its failure to conduct due diligence and engage with the GCC before that uninformed decision.

- 139. If the Board had undertaken a modicum of due diligence and independent investigation, it would readily have learned about the GCC's serious concerns as raised in the GAC meetings in Durban and in Beijing, and how and why the GAC failed to reach consensus in Durban against the ".persiangulf" application. The GCC may be right or wrong in submitting that it was Iran's solitary support for the application in Durban that motivated the message in the Durban Communiqué. The correctness of the GCC's position on this point is irrelevant in this IRP. The relevant issue is whether the Board's decision to allow the ".persiangulf" application to proceed was consistent with the Bylaws and Articles.
- 140. While not binding upon this Panel, the IRP precedent that we find most helpful is the decision concerning the application by DotConnectAfrica Trust for the ".africa" string, in which the IRP Panel found that the actions and inactions of the ICANN Board were inconsistent with its Articles and Bylaws. In particular, the IRP Panel held that the ICANN Board had breached its transparency obligations by rotely adopting the GAC's Consensus Advice not to proceed with that application. The Panel stated that it "would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust's application". Contrary to ICANN's attempt to distinguish the DotConnectAfrica case, we find that ICANN's transparency obligations arose here despite the absence of Consensus GAC Advice. Indeed, transparency and the related need for further due diligence were more compelling in this case, given the pending Community Objection concerning a sensitive application.
- 141. Overall, based on the submissions and evidence in the record, we are constrained to find that the Board passed a bare-bones resolution, based on a bare-bones GAC Communiqué

⁷³ Note 66, supra.

and Scorecard, to allow Asia Green's ".persiangulf" application to proceed, to virtually certain registration and operation. We can only regard the Board's routine treatment of the non-routine ".persiangulf" gTLD application to have been non-transparent, unfair and essentially oblivious to the well-known geo-political sensitivities associated with the name "Persian Gulf". This treatment consequently fell far short of the mission and core values enshrined in ICANN's Articles of Incorporation and Bylaws, specifically Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.

- 142. In this connection, we are sympathetic to ICANN's argument that the Board cannot be expected to spell out considerations going to mission and core values in every resolution passed on every gTLD application. However, our finding is not based on inferences from the lack of discussion about mission and core values in the Board's 10 September 2013 decision to allow the ".persiangulf" application to proceed. As noted, there was no discussion of any factors whatsoever in that decision. This cannot be reconciled with the requirement in Article 1, Section 2, of the Bylaws that ICANN "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".
- 143. In related vein, we are not here second-guessing the Board's assessment of a difficult application against the backdrop of its mission and core values. That is because, if nothing else, we have no evidence or indication of what, if anything, the Board did assess in taking its decision. Our role is to review the decision-making process of the Board, which here was virtually non-existent. By definition, core ICANN values of transparency and fairness were ignored.
- 144. Having made findings on the Board's duties to make decisions fairly and transparently, we do not need to make an additional finding on the GCC's allegation that the Board discriminated against the GCC, or failed to provide the GCC with consistent treatment, in failing to intervene to stop the ".persiangulf" application as it did with Asia Green's application for the ".halal" and ".islam" gTLDs, to which the GCC had also objected. We do note that it would seem mechanistic indeed for ICANN to justify the different treatment

of ".halal" and ".islam" on the basis that the GAC expressed member concerns about those strings based on community objections and religious sensitivity, when the GAC failed to relay similar member concerns about ".persiangulf". This is despite the glaring fact that the Independent Expert reviewing the GCC's Community Objections against all three strings dismissed them all on the same grounds.

- 145. In conclusion, turning to the IRP standard of review in Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws, we conclude that the ICANN Board failed to "exercise due diligence and care in having a reasonable amount of facts in front of them" before deciding, on 10 September 2013, to allow the "persiangulf" application to proceed. We find, on the balance of probabilities on the basis of the Parties' submissions and evidence, that this decision effectively was an unreasoned vote on an unreasoned Scoreboard entry reciting the one-line Durban Communiqué statement that the GAC "does not object" to the application proceeding. Under the circumstances, and by definition, the Board members could not have "exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company", as they did not have the benefit of proper due diligence and all the necessary facts. This reflects Board action inconsistent with the Articles and Bylaws, contrary to Article IV, Section 3, Paragraph 4(c), of the ICANN Bylaws.
- 146. As a final matter, we do not accept ICANN's position that we lack authority to include affirmative declaratory relief. Like the IRP Panel in the *DotConnectAfrica Trust* case, we consider that Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws does give us "the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act" inconsistently with its Articles of Incorporation and Bylaws.⁷⁴ That Bylaw bears repeating:

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. (Emphasis added.)

147. Recalling that, under Article IV, Section 3, Paragraph 2, of the Bylaws, the IRP process is designed to provide a remedy for any person "materially affected" by suffering injury or harm causally connected to the relevant Board violation, we agree with the

⁷⁴ Ibid, ¶ 126.

DotConnectAfrica Trust IRP Panel that the "language and spirit" of Paragraph 11(d) empowers us to recommend redress for such injury or harm. The words "shall" and "opinion" reflect that, similar to any decision maker, the Panel may and should recommend affirmative steps to be taken by the Board to correct the consequences of actions it took inconsistent with the Bylaws and Articles of Incorporation. Here, given the harm caused to the GCC's due process rights by the Board's decision – taken without even basic due diligence despite known controversy – to allow Asia Green's ".persiangulf" gTLD application to go forward, adequate redress for the GCC requires us to recommend not a stay of Asia Green's application but the termination of any consideration of ".persiangulf" as a gTLD. The basic flaws underlying the Board's decision cannot be undone with future dialogue. In recognition of ICANN's core values of transparency and consistency, it would seem unfair, and could open the door to abuse, for ICANN to keep Asia Green's application open despite the history. If the issues surrounding ".persiangulf" were not validly considered with the first application, the IRP Panel considers that any subsequent application process would subject all stakeholders to undue effort, time and expense.

IX. FIXING OF COSTS

- 148. The Parties disagree on whether the procedural rules governing this IRP include the ICANN Bylaws. This is potentially relevant because of differences in language between the costs sections of the Bylaws and the Supplementary Procedures, connected to the good faith pursuit of the cooperative engagement and conciliation processes.
- 149. Article 9 of the ICANN Supplementary Procedures provides:

The IRP 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.

⁷⁵ Ibid, ¶ 128.

- 150. Article IV, Section 3, of the ICANN Bylaws provides:
 - 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.
 - 18.... 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 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.
- 151. The Parties agreed to postpone final submissions on costs, including on the question of whether Paragraphs 16 and 18 of Article IV, Section 3, of the ICANN Bylaws apply in this IRP.
- 152. As the IRP Panel has determined that the GCC is the prevailing party, no question arises as to the application of Paragraph 16 of Article IV, Section 3, of the ICANN Bylaws.
- 153. We will await further submissions from the Parties before allocating all or a percentage of the costs of the proceedings to the GCC.

X. DECLARATION

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

- 1. The action of the ICANN Board with respect to the application of Asia Green relating to the ".persiangulf' gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN. These are, in specific: Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.
- 2. Pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, the IRP Panel recommends that the ICANN Board take no further action on the ".persiangulf" gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the ".persiangulf" gTLD.

- 3. The GCC is the prevailing Party in this IRP.
- The Parties are to file submissions on costs by 18 November 2016. Following those submissions, all or a percentage of costs will be allocated against ICANN in favor of the GCC.

This Partial Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Partial Declaration of this IRP Panel

19 October 2016	Lun Roed	
Date	Lucy Reed, Panelist - Chair	
19 October Zo16		
Date	Anibal Sabater, Panelist	
1900TUBER 2016	1	
Date	Albert Jan van den Berg, Panelist	

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS Pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the International Arbitration Rules of the ICDR, and the Supplementary Procedures for ICANN Independent Review Process

Gulf Cooperation Council (GCC)))
Claimant)	
and)	ICDR Case No. 01-14-0002-1065
Internet Corporation for Assigned Names and Numbers (ICANN)))	NO. 01-14-0002-1065
Respondent))

FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL AS TO COSTS

Independent Review Panel

Lucy Reed, Chair Anibal Sabater Albert Jan van den Berg

I. INTRODUCTION

- 1. The Independent Review Panel, in our Partial Final Declaration of 19 October 2016 (
 "Partial Declaration"), declared the Claimant Gulf Cooperation Council ("GCC") to be
 the prevailing Party. We found that the action of the Respondent Internet Corporation for
 Assigned Names and Numbers ("ICANN") with respect to the application by Asia Green
 for the generic Top-Level-Domain name ("gTLD") ".persiangulf" was inconsistent with
 several Articles of Incorporation and Bylaws of ICANN. We further recommended,
 pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, that the
 ICANN Board take no further action on the ".persiangulf" gTLD application, and in
 specific not sign the registry agreement with Asia Green, or any other entity, in relation to
 the ".persiangulf" gTLD. At the Parties' request, we postponed final submissio s and the
 decision as to costs.
- 2. This Final Declaration awards all costs to the GCC as the prevailing Party, for the reasons set forth below.

II. THE APPLICABLE STANDARD

3. Starting first with the applicable standard, it is undisputed that all costs of the Independent Review Process ("IRP"), which include the fees and expenses of the Panelists and the ICDR as the IRP Provider, are to be awarded to a prevailing claimant except in extraordinary circumstances, taking into account the reasonableness of the parties' positions and their contribution to the public interest. This standard appears in both Article 11 of the ICANN Supplementary Procedures and Article IV, Section 3, paragraph 18 of the ICANN Bylaws.¹

Article 11 of the ICANN Supplementary Procedures provides:

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¹ In extraordinary circumstances, Article 11 of the ICANN Supplementary Procedures envisions allocation of up to half of the total costs to the prevailing party while Article IV, Section 3, paragraph 18 of the ICANN Bylaws may limit that allocation to the IRP Provider administrative costs. Neither Party has argued for such a limitation here.

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.

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.

Article IV, Section 3, of the ICANN Bylaws provides, in relevant part:

18.... 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 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.

4. The issue for decision, therefore, is whether the circumstances h re are extraordinary and hence warrant allocating up to half of the total IRP process costs to the GCC despite its status as prevailing Party.

III.THE PARTIES' POSITIONS

A. The Claimants' Position

5. The GCC submits that no extraordinary circumstances exist. In short, the GCC argues that ICANN's position "was anything but reasonable" throughout its treatment of the ".persiangulf" application, citing the Panel's conclusion that ICANN's actions were "unduly formalistic and simplistic" (Partial Declaration, para. 126). Nor, argues the GCC, did ICANN's position contribute to the public interest, because the ICANN Board "picked a side on a decades-long divisive Gulf naming dispute and its treatment of the .PERSIANGULF gTLD application was, as this Panel declared, 'essentially oblivious to the well-known geo-political sensitivities associated with that dispute" (Partial Declaration, para. 141).

B. The Respondent's Position

6. ICANN submits that the GCC should bear its own costs because this IRP was extraordinary, for three main reasons. First, both sides presented "reasonable and thorough positions on novel issues of geopolitical sensitivity". Second, the Parties' briefing of these issues served the public interest. Third, the GCC failed to engage in ICANN's Cooperative Engagement Process before initiating the IRP, and so failed to narrow the issues and reduce the costs.

IV. THE PANEL'S ANALYSIS AND DECISION

- 7. Having considered the Parties' submissions against the background of the overall record and the Partial Declaration, the Panel cannot find any extraordinary circumstance warranting deviation from the undisputed standard that all IRP process costs go to the GCC as the prevailing Party. As this conclusion is based on the unique circumstances of this case, we did not find the IRP precedents cited by the Parties also based on unique circumstances helpful. Our analysis can be brief.
- 8. First, we weigh the reasonableness criterion in the GCC's favour. While ICANN is correct that both sides put forth thorough reasons for their positions, we state and explain in our Partial Declaration why the ICANN Board did not act reasonably in allowing the ".persiangulf" application to proceed without at least entering into a dialogue with the Government Advisory Council to discuss member concerns. We found "simply no evidence or even the slightest indication that the Board collected facts and engaged with the GCC's serious concerns" (Partial Declaration, para. 138) and, absent any independent investigation, the only possible conclusion was that the ICANN Board's position was "simplistic and formalistic" (Partial Declaration, para. 126) rather than reasonable.
- 9. Second, we do not consider that the public interest criteria favors either side's position in relation to costs. The GCC is correct that we found ICANN to be "essentially oblivious to the well-known geo-political sensitivities associated with the name 'Persian Gulf'"

(Partial Declaration, para. 141). However, it is important to recall that our mandate was to review the Board's process and not the merits of the ".persiangulf" application. The Parties' agreement that the geopolitical issues associated with "Persian Gulf" are themselves extraordinary does not make the ICANN Board process issues extraordinary. We do not see that the GCC contributed to the broader public interest by prevailing in this process review or that the ICANN Board failed to benefit the public in taking the stance it took. The public interest factor, to us, is neutral.

- 10. This is not the case with ICANN's third argument, which faults the GCC for not first invoking the Cooperative Engagement Process and thereby narrowing issues and reducing costs. In this situation where ICANN is not the prevailing Party as addressed in the second paragraph of Article 11 of the ICANN Supplementary Procedures, it is unclear whether this argument goes to the reasonableness or public interest factor, but the outcome would be the same. In our jurisdictional analysis in the Partial Declaration, we found that "ICANN explicitly and implicitly cooperated in a shadow conciliation process" (Partial Declaration, para. 87), which obviously proved unsuccessful. There is no reason to believe that a formal Cooperative Engagement Process would have been any more successful than this informal conciliation process proved to be, or that it would have reduced the GCC's ultimate costs.
- 11. In sum, in the absence of any extraordinary circumstances, the GCC is entitled to reimbursement of its full costs in relation to the IRP process. This includes the administrative expenses of the ICDR, the Independent Review Panel panelists' fees and expenses, and the emergency IRP panelist's fees and expenses ICANN did not contest the GCC's claim for the fees and expenses of the emergency IRP panelist in addition to this Panel's fees and expenses and the ICDR administrative expenses.
- 12. As per the last sentence of Article IV, Section 3, paragraph 18 of the ICANN Bylaws, each Party shall bear its own expenses, including legal representation fees.

V. DECLARATION AS TO COSTS

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

- 1. There are no extraordinary circumstances to justify allocating less than full costs to the Claimant GCC as the prevailing Party, under Article 11 of the ICANN Supplementary Procedure and Article IV, Section 3, paragraph 18 of the ICANN Bylaws.
- 2. The Respondent ICANN is to bear the totality of the GCC's costs in relation to the IRP process, including: (a) the ICDR administrative expenses of \$7,500.00; (b) the Independent Review Panel panelists' fees and expenses of \$150,273.30; and (c) the emergency IRP panelist's fees and expenses of \$50,575.00. Accordingly, ICANN shall reimburse the GCC the sum of \$107,924.16 upon demonstration by GCC that these incurred costs have been paid.
- 3. 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 the Final Declaration of this IRP Panel.

15 December 2016	hun Keed	
Date	Lucy Reed, Panelist – Chair	
15 December 2016		
Date	Anibal Sabater, Panelist	
15 December 2016	13-5	
Date	Albert Jan van den Berg, Panelist	

REFERENCE MATERIALS – BOARD SUBMISSION NO. 2017.09.23-0b

TITLE: Further Consideration of *Gulf Cooperation Council vs. ICANN* Independent Review Process Final Declarations

The following attachments are relevant to the Board's further consideration of the Panel's Final Declaration as to the merits and the Final Declaration As To Costs in the Gulf Cooperation Council (GCC) vs. ICANN Independent Review Process (IRP):

- Attachment A is the Panel's Final Declaration on the merits issued on 19 October 2016.
- Attachment B is the Panel's Final Declaration As To Costs issued on 15 December 2016.

Other Relevant Materials:

The documents submitted during the course of the GCC IRP are available at: https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en.

GAC Early Warning against the .PERSIANGULF application, issued on 20 November 2012, available at:

https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197754/Persiangulf-AE-55439.pdf.

The IO's decision to not file an objection against the .PERSIANGULF application is available at: http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/persiangulf-general-comment/.

GAC Beijing Communiqué is available at:

https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf.

NGPC Resolution 2013.06.04.NG01 is available at: https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en.

GAC Durban Communiqué is available at:

http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%C3%A9%20-

%20Durban,%20South%20Africa.pdf.

GAC Durban Meeting Minutes are available at IRP Request Annex 34: https://www.icann.org/en/system/files/files/gcc-irp-request-annex-26-05dec14-en.pdf.

NGPC Resolution 2013.09.10.NG03 is available at: https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c.

ICC expert determination on 30 October 2013 that the GCC's Community Objection against the .PERSIANGULF application did not prevail is available at:

 $\underline{https://newgtlds.icann.org/sites/default/files/drsp/12nov13/determination-1-1-2128-55439-\underline{en.pdf}.$

Submitted by: Amy Stathos, Deputy General Counsel

Date Noted: 7 September 2017

Email: amy.stathos@icann.org

EXHIBIT A TO ICANN BOARD SUBMISSION NO. 2017.09.23.1c

Report on the Transfer of the .CI (Cote d'Ivoire) top-level domain to Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI)

7 September 2017

This report is a summary of the materials reviewed as part of the process for the transfer of the .CI (Cote d'Ivoire) top-level domain. It includes details regarding the proposed transfer, evaluation of the documentation pertinent to the request, and actions undertaken in connection with processing the transfer.

FACTUAL INFORMATION

Country

The "CI" ISO 3166-1 code is designated for use to represent Cote d'Ivoire.

Chronology of events

Since 1994, the Institut National Polytechnique Felix Houphouet Boigny (INP-HB) has been the manager of the .CI top-level domain. In 1995, INP-HB established the Network Information Center - Cote d'Ivoire (NIC-CI), a non-profit organization to be responsible for administrative and technical operations of the .CI top-level domain under the authority of INP-HB.

Until 2012, the .CI top-level domain was recorded to only have 1800 domain registrations. The government compared .CI's registration to that of other comparable ccTLDs, and decided to further promote the .CI domain by changing how it is managed.

On 21 March 2012, the President of Cote d'Ivoire issued Decree number 2012-293 on *Telecommunication and Information and Communication Technologies*, assigning the management of .CI to Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI).

The organizational structure and functioning of ARTCI was established in Decree number 2012-934 on 19 September 2012. Under this decree, ARTCI is responsible for the technical, administrative and financial management of .CI.

On 31 December 2013, an agreement was signed between ARTCI and INP-HB on transferring the management duties of the .CI top-level domain. ARTCI then took

over the day-to-day management responsibilities of .CI in January 2014 whilst INP-HB continued to be the recognized manager of the domain.

In December 2015, ARTCI held a seminar on the adoption of management rules for the .CI top-level domain. Various participants representing significantly interested parties attended the seminar.

In March 2017, ARTCI conducted an online questionnaire asking the significantly interested parties for their opinion on the transfer of .CI top-level domain to ARTCI. Responses from the questionnaire were later submitted as evidence of local community support for the transfer.

On 2 June 2017, ARTCI commenced a request to PTI to transfer the management of the.CI top-level domain to Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI).

Proposed Manager and Contacts

The proposed manager is the Autorité de Régulation des Télécommunications/TIC de Côte d'Ivoire (ARTCI). It is based in Côte d'Ivoire.

The proposed administrative contact is Houndji Mireille epse Bote, Head of the Department of Numbering and Domain Name .CI of ARTCI. The administrative contact is understood to be based in Côte d'Ivoire.

The proposed technical contact is Kouadio Assi Donald Landry, Head of the Specialized Center .CI.

EVALUATION OF THE REQUEST

String Eligibility

The top-level domain is eligible for transfer as the string for Côte d'Ivoire is presently listed in the ISO 3166-1 standard.

Public Interest

The following letters from significantly interested parties were provided:

- Andre A. Apete, Cabinet Director of the Ministry of Digital Economy and Postal Service
- Alpha Omega Services, a local registrar
- Awebsi, a local registrar
- Akassoh, a local registrar
- Gotic CI, an assosication of IT operators
- Femmes et TIC, a non-government organization
- Web Entrepreneur Club Cote d'Ivoire

- Amazoon du Web, a non-government organization
- ANSUT, National Agency for Universal Service of Telecom
- CICG, a government registrar

The application is consistent with known applicable laws in Côte d'Ivoire. The proposed manager undertakes responsibilities to operate the domain in a fair and equitable manner.

Based in country

The proposed manager is constituted in Côte d'Ivoire. The proposed administrative contact is understood to be a resident of Côte d'Ivoire. The registry is to be operated in Côte d'Ivoire.

Stability

At the time of request evaluation, the transfer of domain management had already taken place, therefore stability aspects relating to registry transfer have been evaluated with the view that the transfer has already taken place.

The application is not known to be contested.

Competency

The application has provided information on the technical and operational infrastructures and expertise that will be used to operate the domain.

Proposed policies for management of the domain have also been tendered.

EVALUATION PROCEDURE

PTI is tasked with coordinating the Domain Name System root zone as part of a set of functions governed by a contract with ICANN. This includes accepting and evaluating requests for delegation and transfer of top-level domains.

A subset of top-level domains are designated for the significantly interested parties in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains (ccTLDs), and are assigned to responsible managers that meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the manager has from its local Internet community, its capacity to ensure stable operation of the domain, and its applicability under any relevant local laws.

Through the IANA Services performed by PTI, requests are received for delegating new ccTLDs, and transfering or revoking existing ccTLDs. An investigation is performed on the circumstances pertinent to those requests, and, the requests are implemented where they are found to meet the criteria.

Purpose of evaluations

The evaluation of eligibility for ccTLDs, and of evaluating responsible managers charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet's unique identifier systems.

In considering requests to delegate or transfer ccTLDs, input is sought regarding the proposed new mangaer, as well as from persons and organizations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focused on the capacity for the proposed manager to meet the following criteria:

- The domain should be operated within the country, including having its manager and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.
- Significantly interested parties in the domain should agree that the prospective manager is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

Method of evaluation

To assess these criteria, information is requested from the applicant regarding the proposed manager and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the manager to operate the domain; the legal authenticity, status and character of the proposed manager; and the nature of government support for the proposal.

After receiving this documentation and input, it is analyzed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed manager should the information provided in

the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed manager's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries correctly. Should any anomalies be detected, PTI will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed manager and its suitability to operate the relevant top-level domain.

GAC Advice – Johannesburg Communiqué: Actions and Updates (23 September 2017)

DRAFT Version 3.3 Updated 1 September

GAC Advice Item	Advice Text	DRAFT Board Understanding Following Board-GAC Call	GNSO Review of Johannesburg Communiqué	DRAFT Board Response
§1.a.l – §1.a.III,	1. Intergovernmental	The Board understands that the GAC	The GNSO Council notes that the	The Board acknowledges the GAC's
Intergovernmental	Organization (IGO) Protections	wishes that Intergovernmental	GAC has reiterated its previous	Advice and its concerns. The Board
Protections		Organization (IGO) protections:	advice regarding access to curative	reiterates that as part of a PDP, the
	a. The GAC reiterates its Advice		dispute resolution mechanisms by	Working Group has an obligation to duly
	that IGO access to curative	1. Be modeled on, but separate	IGOs. Similarly, we refer the Board	consider all inputs received*.
	dispute resolution mechanism	from, the existing Uniform Dispute	to our earlier responses, noting that	
	should:	Resolution Policy;	the work of the Policy Development	The Board notes that the GNSO Council
			Process (PDP) on this topic	has informed the Board that all public
	I. be modeled on, but	2. Provide standing for IGOs within	(IGO/INGO Access to Curative	comments and input received by the PDP
	separate from, the	curative dispute resolution	Rights) is ongoing, and this group	Working Group, including from the GAC
	existing Uniform Dispute	mechanisms based on their status as	anticipates publication of its Final	and IGOs, have been extensively
	Resolution Policy (UDRP)	public intergovernmental	Report and recommendations prior	discussed by the Working Group. The
		institutions; and	to ICANN60 in Abu Dhabi.	Board notes, further, that the GNSO
	II. provide standing based			Council considers the upcoming ICANN60
	on IGOs' status as public	3. Facilitate appeals relating to the	The PDP recently conducted a Public	meeting to be an opportunity for further
	intergovernmental	curative dispute resolution	Comment period on its Initial	discussions among the community. The
	institutions, and	mechanisms exclusively through	Report, and received multiple	Board will continue to facilitate these
		arbitration.	thoughtful submissions including	discussions and encourages participation
	III. respect IGOs'		many from IGOs. Each comment	in them by all affected parties.
	jurisdictional status by	The Board understands that the GAC is	from the community containing new	
	facilitating appeals	concerned that the GNSO PDP Working	data or ideas was extensively	
	exclusively through	Group on IGO-INGO Curative Rights	considered and discussed by the	
	arbitration.	Protection Mechanisms may issue	PDP working group, and the PDP	
		recommendations that differ from GAC	leadership reports that its Initial	
	The GAC expresses concern that a	Advice. The Board understands that the	Report is likely to be materially	
	GNSO working group has indicated	GAC wishes that the ICANN Board apply	amended as a result of taking these	
	that it may deliver	its oversight responsibilities to the work	comments on board.	
	recommendations which	of the GNSO PDP Working Group so that		

GAC Advice Item	Advice Text	DRAFT Board Understanding Following Board-GAC Call	GNSO Review of Johannesburg Communiqué	DRAFT Board Response
	substantially differ from GAC Advice, and calls on the ICANN Board to ensure that such recommendations adequately reflect input and expertise provided by IGOs.	recommendations and input from the entire community are acknowledged and considered in accordance with the GNSO's operating procedures.	Previous GAC Advice on this topic included the "IGO Small Group Proposal" from October 2016, which outlined a separate dispute resolution process tailored exclusively for IGO/INGOs. In addition to comments posted to the ICANN Public Comments forum, the PDP also considered the "IGO Small Group Proposal", and included it in their analysis. But as the PDP nears the conclusion of its work, it is clear to Council that their Final Recommendations will diverge from GAC Advice and the "IGO Small	* From the GNSO Operating Procedures: "Public comments received as a result of a public comment forum held in relation to the activities of the WG should be carefully considered and analyzed. In addition, the WG is encouraged to explain their rationale for agreeing or disagreeing with the different comments received and, if appropriate, how these will be addressed in the report of the WG".
			Group Proposal" in at least two respects. First, the PDP working group does not recommend the creation of a new, separate dispute process solely for the use of IGO, but instead outlines the means by which these organizations can better access existing processes like UDRP and URS. And secondly, the PDP does not conclude that it is within their (or the GNSO's, or ICANN's) remit to grant, extend, or restrict the jurisdictional immunity protections of IGOs, or to limit the legal rights of	

GAC Advice Item	Advice Text	DRAFT Board Understanding Following	GNSO Review of Johannesburg	DRAFT Board Response
		Board-GAC Call	Communiqué	
			registrants who are party to a	
			dispute with an IGO.	
			The GNSO Council chartered this	
			PDP with the objective of ensuring	
			that IGOs and INGOs have access to	
			low-cost and effective rights	
			protection mechanisms, in order to	
			mitigate abuse of their identities in	
			the DNS and aid in their work	
			serving the public needs of citizens	
			across the globe, and the PDP	
			working group believes that its Final	
			report will meet that goal. We	
			eagerly await publication of the	
			PDP's recommendations, and	
			further discussions among the	
			Community at ICANN60.	





The Business Case for the Information Transparency Initiative

May 2017

Table of Contents

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What problem does the Information Transparency Initiative solve?

Over its 19-year history, the ICANN organization has professionalized and improved its operations in key areas except one – the stewardship of its information. The problem ICANN faces is that we have no centralized system in place to preserve, organize, and secure the large volume of information we have produced and continue to produce each day. Preservation and organization happens in many ways. But our lack of centralized content governance has directly resulted in our inability to make this information transparent and searchable across the organization, and easily available for both internal and public use. And with content growth rates of 25-35% per year, our problem is only getting worse. The growth of our over 104,000 pieces of disorganized and unstructured content has reached a crisis point. Without swift and direct action, we risk financial and reputational consequences for our organization, the community, and the Board.

Why do we need to solve this problem now?

Our information is ICANN's most valuable asset. It represents our history and our institutional memory, and supports our accountability and our policymaking dialogues. We need to take additional steps to safeguard that information and make it more readily accessible. **This duty to protect our information is not optional, but a critical component of our viability.** It is our collective responsibility to resolve this content crisis.

We have made post-Transition commitments to and requirements for accountability and transparency. Current and easy-to-find public information in all six official U.N. languages is a vital part of achieving those commitments. The level of scrutiny of our ability to meet and track those commitments through our system of record for information – and in particular, public-facing policies, contracts, and bylaws – will only increase.

There is some urgency to resolve this issue while reasonable options remain available. Each day that our content grows, the amount of effort and cost to fix the problem also grows. As such, reasonable options dwindle and our solutions to fix the problem become more expensive, resource-intensive, and constrained. It is not only the fact that we will face serious financial consequences the longer we wait to resolve this issue, but we risk being unable to meet our post-Transition commitments in the future. We need to change our thinking about the importance of information governance and apply the same strict and acknowledged standards to our information that we apply to operational, financial, and legal management.

How do we solve this problem?

To solve our content crisis, mitigate risk, continue to meet our post-Transition commitments, and transform our content into a more readily accessible strategic asset, we propose the Information Transparency Initiative. Its five primary goals are:

- 1 Develop content governance based on a consistent taxonomy, a comprehensive creation and publication workflow, and a user-centric information architecture and navigation.
- 2 Improve findability of content.
- 3 Improve publishing speed and content quality.
- 4 Future-proof and secure our content.
- **5** Ensure appropriate public content is translated into the U.N. six languages.

We implement these five goals in three stages

STAGE 1	STAGE 3	STAGE 3
For the first time in ICANN's history, we will audit and tag all externally facing content. The outcomes of this audit will serve as the basis for creating content governance with a taxonomy, information architecture (IA), and improved workflows upon which the entire ICANN public-facing information ecosystem will be built.	Implement content governance through a document management system (DMS) and migrate all public content into the DMS.	Integrate the DMS with a new content management system (CMS) and surface the content through the CMS. Organize the content in a user-centric fashion with improved multifaceted search to allow the public easy access to our public-facing content and help us meet our post-Transition commitments.

What are the benefits of the solution?

The Information Transparency Initiative will help us meet our post-Transition commitments, reduce our financial risk, and result in the following outcomes:

- A complete governance infrastructure for writing, tagging, and translating content will improve the findability, transparency, security, and quality of our content to different stakeholders across the globe.
- The maintenance costs will decrease as content creation and publishing move to the content owners. In addition, the solution consolidates or sunsets 15 separate external content properties into one external property, which further reduces maintenance costs.
- The tagging, taxonomy and information architecture will ensure our content is future-proof, as metadata will be added to all public-facing content, and will be transferable to any future platforms.
- 4 new foundation for the ICANN ecosystem will be laid, enabling system-wide search and a shared governance of ICANN's information assets. This system consolidation further reduces maintenance costs.
- Full translation of appropriate public content will improve accessibility to stakeholders in the six U.N. languages.

What are the risks of the solution?

As with any project involving new technologies, we face several risks if we obtain approval for the Information Transparency Initiative including:

TRANSPARENCY INITIATIVE	MITIGATION
The Information Transparency Initiative budget and contingency are underestimated.	Platforms and appopriate vendors underwent a RFP process to ensure ICANN secured a competitive price for the underlying technology platforms and for qualified, proven vendors. Additionally, a significant contingency of 30% was added to address any potential shortfalls or unforeseen costs.
Future technological advancements render the chosen DMS and CMS obsolete or ineffectual.	The metadata, information architecture and content strategy will help futureproof our content and ensure it would be transferrable to new technology platforms.
Other priorities divert resources and attention away from the Information Transparency Initiative.	Seeking committment from the Board and the Executive Team in support of the goals and the work involved in the Information Transparency Initiative and have committed to ensuring it remains a priority throughout its implementation. Partnered with CFO to ensure the budget is structured to fund the Initiative for the duration of the project through to its completion.
Mission creep sets in as the community demands features beyond the scope.	Make clear what is in and out of scope for phase one. The Information Transparency Initiative includes a communication strategy to share the goals and limits of the project with the community, early and often. It also includes a process whereby the community is asked to provide limited window feedback as features and content are developed. This progress will be shown and feedback collected through an externally-facing testing platform.
The wrong DMS and CMS are chosen to implement the content strategy.	The DMS and CMS were chosen to fit our workflows, content governance requirements, content types, publishing needs and budget limitations.
Internal staff resources are limited to tackle a project of this scope.	Staff backfill costs have been factored into the budget and contractors with ICANN experience have been identified to help tackle labor-intensive audit work, which requires knowledge about ICANN and its content.
Board and Executive Team commitment to the project wavers.	The Initiative passed an extensive review by the Executive Team and earned its full support. If the Initiative earns Board support, regular progress reports and feedback will be provided to allow for ongoing Board and Executive Team oversight and support.

How are we mitigating other risks?

We understand there may be reticence to commit the time and devote the resources to a project of this size and scope. ICANN has failed in previous efforts to improve the findability of our public content, and we do not have a proven track record with large projects involving technology. However, past is only prologue if we don't learn from our mistakes.

Previous efforts at improving the findability of our public content failed because:	We learned from these failures and migrated our risks by:
There was no content governance created to serve as the foundation for the project.	Placing content governance creation as the foundational element of this initiative.
The technology platforms chosen were ill-suited to our content types and required extensive maintenance support beyond the capabilities and resources of ICANN staff.	Choosing technology platforms to implement the content governance that will shift creation and publishing to content owners.
The goals of the project were unclear.	Establishing clear goals for the project to decrease the chances of mission creep.
There was an unrealistic project timeline on deliverables.	Developing and scrutinizing our project plan deliverables to ensure the timelines are realistic.
There were inadequate resources provided to tackle a project of this scope.	Working with established vendors to ensure we have the resources and skillset to deliver.

What is the recommended solution and its time, cost and impact on staff, the Board and community?

The recommended solution is build a complete content governance system and DMS/CMS implementation designed to cover 104,000 pieces of externally-facing content, and consolidate or sunset 15 separate external content properties.

Confidential Negotiation Information





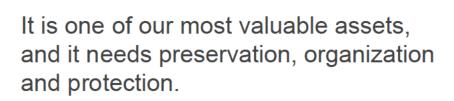
Information Transparency Initiative

Göran Marby | March 2017

Why is ICANN's Content Important?

Our information represents our history, our institutional memory, our policymaking dialogues, and the knowledge we are obligated to share with our stakeholders.







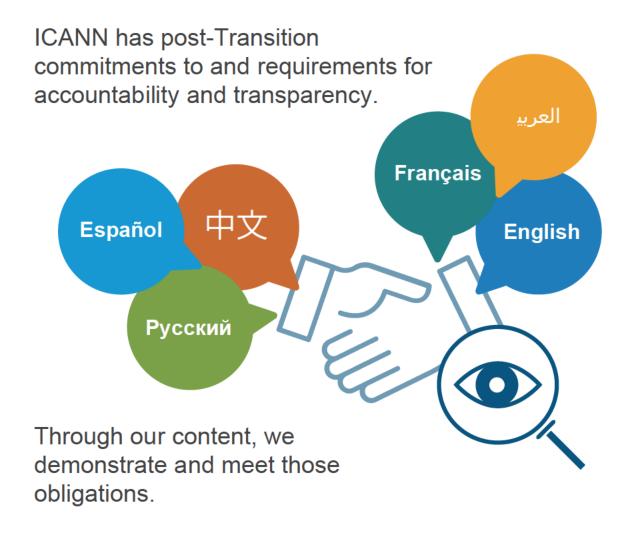
Why is Our Content at Risk?

ICANN has not invested the time or the resources to safeguard our information.

Our current, de facto document management system (DMS) is ICANN.org, and it has rendered our content undiscoverable to many stakeholders.



Our Post-Transition Commitments



Current and easy-to-find information in all six U.N. languages is a vital part of achieving those commitments.



Why are Those Commitments At Risk?

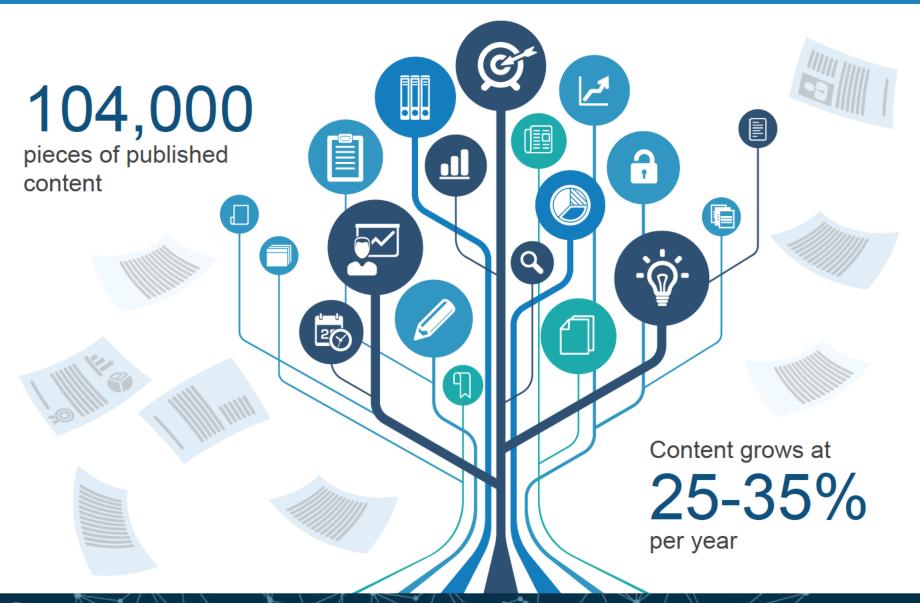
Without a DMS to enforce content governance, we make it difficult for stakeholders to find and track information.

ICANN.org cannot easily surface this content either through its site search or its information architecture.



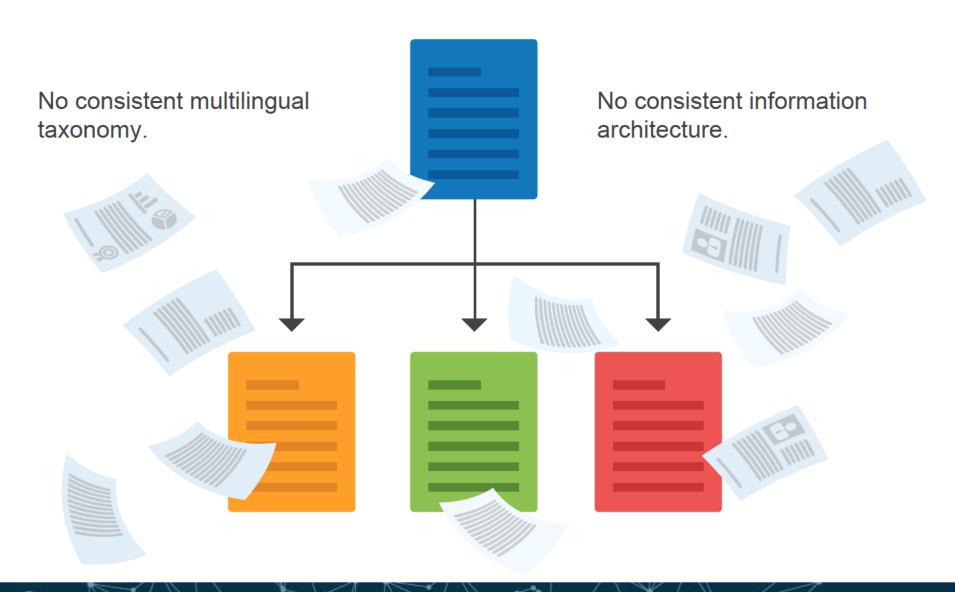


ICANN has a lot of Content, and It's Growing



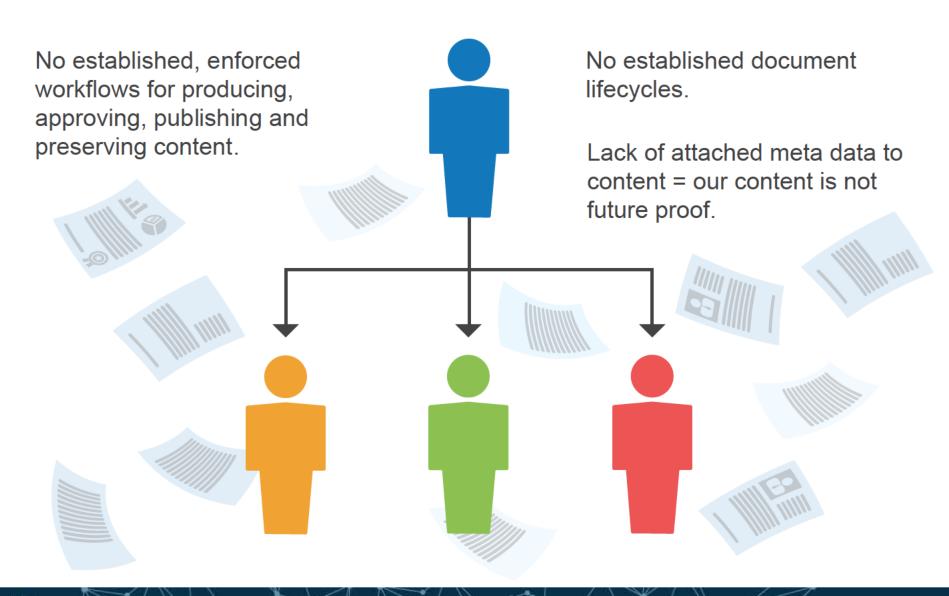


Our Content is Uncategorized and Disorganized





We Have No Content Governance





We are Not Serving Our Global Community

A significant amount of our published content is not translated into the U.N. six languages there is no consistency to what is translated and content is difficult to find due to the lack of governance and organization.





Time & Cost to Fix The Problem Grows Each Year

Engagement becomes more difficult as untagged, unindexed, not translated and non-Search Engine Optimized (SEO) content further erodes search.

- Growing content means search quality continues to decline because of its unstructured nature and cluttered organization.
- ✓ We miss engagement opportunities with new users and are not making it easy for our stakeholders to find content and stay informed
- ✓ If we continue to neglect our document management, we risk our reputation and our ability to meet post-Transition commitments.
- ✓ The status quo is an option we can no longer afford and the Cost of Ignoring means we are abdicating our responsibilities to the global community, undermining our ability to meet our commitments, while also increasing the costs we bear down the road.



Five Project Goals

and implementation of features that enable us to meet ICANN's accountability and transparency goals and reflect its technical mission. Increase content findability through the creation of a taxonomy, digital content strategy, improved information architecture and user experience.

Develop a mobile first approach, ensure accessibility standards are met and provide a translated user experience in the U.N. six languages.

Create and enforce staff content governance and increase publishing speed through distributed content management and improve the writing and develop audience-specific, multimedia content offerings.

Improve engagement with new and existing stakeholders and enable power users to select content preferences, registrations and perform work Confidential Business Information

Create a scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

ACCESSIBLE



Timeline

Confidential Negotiation Information



Appendix



CONTENT STRATEGY

A content strategy is the vision for how we transform our content into an asset through the planning of content creation, delivery and governance. The content strategy includes the auditing, taxonomy, information architecture, UX, content matrix and content governance. Content governance is a key pillar of any content strategy. It involves the processes and resources that govern how staff create, publish, store and preserve content. This governance includes documenting content ownership and roles, enforcing standard workflows, producing policies on content lifecycle and training staff on these governance rules.



TECHNOLOGY

The content strategy defines our technology choices and is implemented through these platforms. The DMS (Alfresco) and the CMS (dotCMS) serve as the backbone for ICANN.org, and will become the technological infrastructure for all of our SO/AC sites. In addition to the DMS and the CMS, the Information Transparency Initiative will also require integrations with scheduling, registration, data visualization, automated content delivery, user profile/engagement measurement and analytics platforms.







Information Transparency Initiative Project Executive Summary

March 2017

Executive Summary

ICANN produces, collects and stores a large volume of information. This knowledge represents our history, our institutional memory, our accountability and our policymaking dialogues. It is one of our most valuable assets, and it needs preservation, organization and protection.

Unfortunately, ICANN has not invested the time or the resources to safeguard this information. Our current, de facto document management system (DMS) is ICANN.org, and it has rendered our content undiscoverable to many stakeholders. At current content growth rates of between 25-35% per year, our findability problems will only deepen. At a time in our history when our accountability and transparency are under a brighter spotlight, our publically-facing DMS has put us at risk.

To mitigate that risk, guard our information and transform our content into a strategic asset, we propose the Information Transparency Initiative. Its primary goals are to develop a content governance with a robust taxonomy, establish better content organization, ensure content is translated into the U.N. six languages, improve publishing speed and future proof our content. It is important to stress that the primary goal of the Information Transparency Initiative is not an ICANN.org revamp, rather we view ICANN.org as the route by which stakeholders access a new, publically-facing DMS.

The Information Transparency Initiative does not propose an overly complicated set of features or applications. We propose performing an eyes-on-audit of all our content to inform a verifiable taxonomy and information architecture. This work underpins the entire project.

Think of the Information Transparency Initiative as two connected and interdependent pieces – content and technology - where technology is a means to implement the content governance and strategy. The Information Transparency Initiative team has identified five main objectives:

- Focus on a content strategy and implementation of features that enable us to meet ICANN's accountability and transparency goals and reflect its technical mission. Increase content findability through the creation of a taxonomy in the U.N. six languages, and an improved information architecture and user experience.
- 2. Create and enforce staff content governance and increase publishing speed through distributed content management and improve the writing in the U.N. six languages and develop audience-specific, multimedia content offerings.
- 3. Develop a mobile first experience and ensure accessibility standards are met and provide a translated user experience.
- 4. Improve engagement with new and existing stakeholders in the U.N. six languages, and enable power users to select content preferences, registrations and perform work through a universal profile environment and automated content delivery system.
- Create a scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

ICANN has post-Transition commitments to and requirements for accountability and transparency. Current and easy-to-find information in all six U.N. languages is a vital part of achieving those commitments. ICANN.org is where we demonstrate and meet those obligations. It is our only publically-facing system of record for policies, contracts and bylaws. Our reliance on and demands of ICANN.org to make that information available will only deepen in the coming

years, and the level of scrutiny of our ability to meet and track those commitments through our content will also increase.

Without a DMS to institute content governance, we are making it increasingly difficult for stakeholders to find and track information. ICANN.org cannot easily surface thousands of pages of content either through its site search or its information architecture. There is little or no meta data attached to our content, there is no holistic taxonomy and no logical organization of information. Additionally, the site does not enable an environment for stakeholders to plan and track their engagements, policy work or content preferences. This means ICANN will struggle to meet its post-Transition commitments to increased accountability and transparency.

Previous patchwork approaches have directly resulted in the issues we must now address. The resources and effort required to establish control over our content is significant. Currently, there are over 100,000 pieces of untagged content. With each passing year, our content problem grows larger and larger, and it is a very public problem that is not going away. At this point in ICANN's history, the status quo is an option we can no longer afford, and the Cost of Ignoring (COI) means we are abdicating our responsibilities to the global community, undermining our ability to meet our commitments, while also increasing the costs we must bear down the road.

We have outlined a case which argues that our lack of attention to our content governance puts us at risk for meeting our post-Transition commitments to accountability and transparency. The Information Transparency Initiative will help us meet these commitments and result in the following outcomes:

- 1. A complete governance for writing, tagging and translating content will improve the quality and accessibility of our content to different stakeholders across the globe.
- 2. A fully translated site accessible to stakeholders in the six U.N. languages.
- 3. The stress on web administration decreases as content creation and publishing is moved from web administration directly to the content owners. This allows web administration to focus on digital projects that require more expert knowledge.
- 4. The tagging and taxonomy will ensure our content is future proof, as meta data will be added to all content, and will be transferable to any future platforms.
- 5. Confidential Business Information
- 6. The DMS and CMS setups are foundational work on which all SO/AC sites will be built, enabling ICANN ecosystem wide search and a common, shared governance.
- 7. A universal, shared ICANN glossary will bring consistency and order to our terminology and definitions of those terms.
- 8. Confidential Business Information

9.

The Information Transparency Initiative will kick off content governance across our external and internal content, and build a shared technological infrastructure for all externally-facing web properties across the ICANN organization and the ICANN community.





Information Transparency Initiative

Göran Marby | May 2017

Problem Statement

No centralized system in place to preserve, organize, and secure the large volume of information we have produced

Over **104,000** pieces of disorganized and unstructured content has reached a crisis point

- → Results in financial and reputational risk for our organization, the community, and the Board
- → Risk increasing over time

Symptoms



Inability to find ICANN content, both internally and externally



Inconsistent content

- → Translations
- → Quality
- → Navigation





Underlying Condition



Wildly inconsistent information infrastructure

- * Multiple, independent content platforms with foundational technologies that are broken, not scalable, and unfit for purpose
- Absence of scalable systems/processes to manage documents
- * Incoherent information architecture



No comprehensive content strategy

- No ICANN ecosystem-wide taxonomy
- Inconsistent standards for content quality and translation
- Lack of governance and fluidity over creation and editorial process

Cure Characteristics



Coherent and consistent content strategy

→ Comprehensive taxonomy, information architecture and content governance applied to external content



Implementation of scalable infrastructure

- → Deployment of unified Document Management System (DMS) with taxonomy and information architecture
- → New external content property on a singular, scalable, and secure platform
 - Leverages new content strategy and new infrastructure

Proposed Cure: The Information Transparency Initiative

What is the Information Transparency Initiative?

- Continuous operational activity to improve existing content infrastructure and governance
- Build a foundation of content governance by tagging content, and creating a functional information architecture and consistent work flows
- Migrate content and implement internal content governance through a new DMS, which will serve as the infrastructure for ICANN ecosystem-wide governance (introduce ICANN's first-ever DMS)
- Surface improved content and search to stakeholders through a new content management system (CMS) which will serve as the backbone for all external ICANN properties

Benefits



Improves findability, transparency, security, and quality of content



Decreases yearly maintenance costs, and consolidates 15 separate external content properties



Ensures content is future-proof and transferable to future platforms



Lays foundation for ICANN shared ecosystem, enabling system-wide search and governance, further reducing maintenance costs



Improves accessibility to stakeholders in the six U.N. languages



Helps meet our post-Transition commitments and reduces financial risk

Options For Consideration

The Information Transparency Initiative

- → Limited to tagging 104,000 pieces of public content
- → Implementation of DMS for this content
- → Simultaneous implementation of CMS for this content, consolidating or sun-setting (with migration) 15 external content properties, including ICANN.org

Continue As-Is

- → No improvement to content governance or information architecture
- → Continue to support and maintain multiple external platforms and infrastructures
- → Less expensive in the immediate term

Risks

The Information Transparency Initiative

Lack of internal resources may delay/derail progress

Improvements are not seen until later stages of the project

Other ICANN priorities may divert resources and attention

Mission creep sets in as community demands features beyond scope

As Is

Lack of content governance impedes transparency and accountability

Community engagement becomes more difficult

Cost and time to address content issues increases each year

Ability to find content continues to degrade

Why We Recommend the Information Transparency Initiative



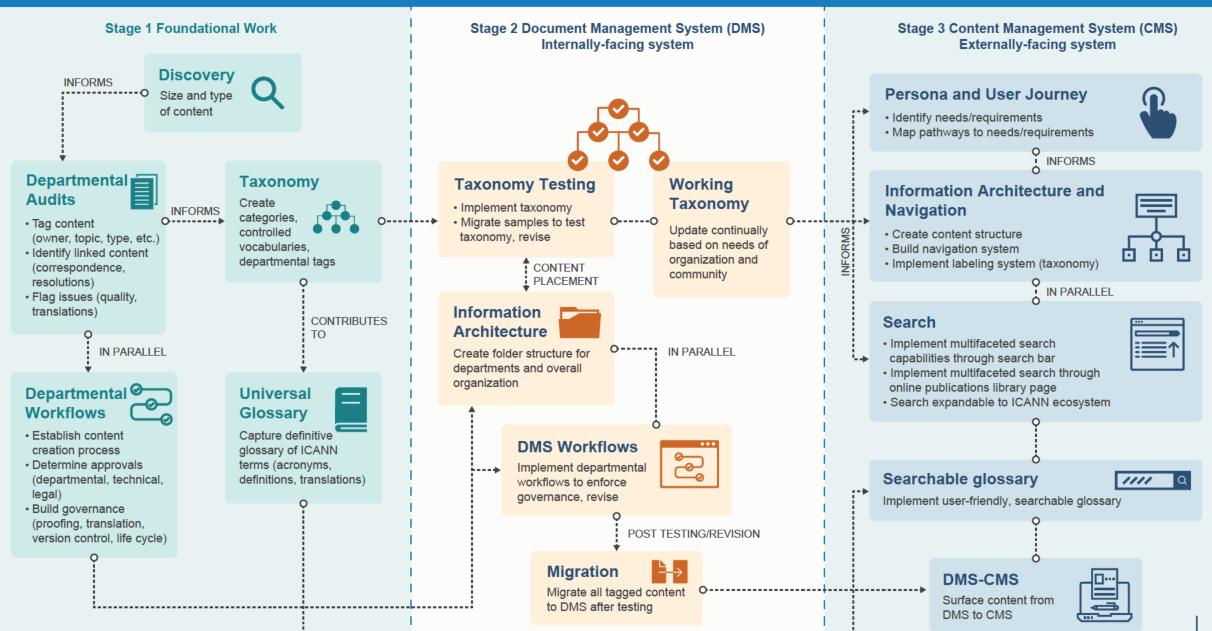
Install a fit-for-purpose DMS for ICANN to build the foundation for information accountability and transparency commitments

- → Simplifies translations of documents into all six UN languages
- Improve findability and provide its historical context
- Retire external websites
 - → Remove the need to support/pay for those sites
- Reduce technical debt and decrease maintenance costs over time

This approach mitigates risk by drawing on expert third parties for time-bound support, best practices, and an implementation path based on lessons from previous projects.

Appendix

ICANN Content Governance Roadmap



ICANN community and organization content ecosystem

ICANN manages 38 content properties



7 additional community properties not supported by ICANN:
GNSO Business Community, GNSO gTLD Registries Stakeholder Group, GNSO Internet Service Providers & Community Providers, GNSO IP Constituency, GNSO NonCommercial Users Constituency, GNSO Not-for-Profit
Operational Concerns Constituency

Confidential Negotiation Information

Information Transparency Initiative

Financial information for BFC diligence



Xavier Calvez
Chief Financial Officer

August 2017

Table Of Contents

The content of this document is organized in accordance with the standard diligence that the BFC conducts to recommend Board approval of expenses as per the Contracting and Disbursement policy:

- Q1: Are the ITI cost estimates reasonable?
 - Project cost analysis slides 3 & 4
 - ITI Budget breakdown slide 5
 - Breakdown of expenses by vendor slides 6 to 10
- Q2: Was the ICANN Procurement process followed for the ITI project?
 - Platform overview slides 11 & 12
 - Vendor justification slide 13
 - Vendor selection process slide 14
 - Contracting slide 15
- Q2: Are the ITI costs affordable?
 - Project and Annual Operating Expenses Funding slide 16
 - Funding discussion and ICANN Cash Flow overview slides 17 & 18





Explanation of Operating Costs

As-Is Scenario Operating Costs are higher than the Post-Information Transparency Initiative Operating Costs.

- In the As-Is scenario, some feature development and technical infrastructure improvements would need to be made if the Information Transparency Initiative does not proceed. If the Information Transparency Initiative is approved, there would be no need to improve the As-Is technical environment, as this environment would be replaced with the new DMS/CMS. The current environment would exist in parallel to the Information Transparency Initiative until the project is complete.
- In the Post-Information Transparency Initiative scenario, there will be a reduction in development staff dedicated to maintaining the 15 sites included in the project. This is due to the fact that the DMS/CMS will allow content owners, in most cases, to publish content directly to the sites, without the need for development support.
- The majority of the maintenance costs and upkeep for the DMS/CMS would be performed in-house using existing Engineering & IT staff, who would obtain extensive training on these new platforms. Staff training is part of the ITI project costs. Additionally, the licensing costs for Alfresco and dotCMS include support, and this is included in the operating cost.
- There is some risk that Engineering & IT staff could experience difficulty learning the new platform; however, this risk is mitigated with the time that has been set aside for training with the dotCMS experts at Architech. The current ICANN development team has existing experience with the platform due to the GAC project and developers have transferrable Java skills, as dotCMS is Java-based. Regarding Alfresco, the ICANN organization's development partner Zensar has some previous experience with Alfresco and again, extensive training will be provided (pending approval of the project) to members of the Engineering & IT team (costs accounted for in project costs).













Platform Overview 1/2

To meet the requirements of the Information Transparency Initiative, it is necessary to implement two integrated platforms in a Document Management System (DMS) and Content Management System (CMS). This slide provides a summary of how these platforms were selected.

Platform Selection

As mentioned in Slide 15, a competitive selection process was conducted for each platform. The following table illustrates the vendors under consideration:

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Similar Technology Landscape

A review of other organizations with similar technology landscape was conducted through either the same platform combination or platforms with a Java foundation.

Platform overview 2/2

The organization has conducted and completed important work in support of the Information Transparency Initiative:

<u>Technology Platforms:</u>

- An RFP was conducted for the DMS resulting in the selection of Alfresco.
- A competitive selection process was conducted for the CMS with a nine-month review of five systems resulting in the selection of dotCMS.
- Alfresco and dotCMS yearly platforms costs are incurred in existing engineering budget and are not part of Information Transparency Initiative costs.

Other Work:

- An Alfresco preferred vendor, Zia, has set-up the DMS environment to best practices.
- New GAC site used dotCMS as its CMS, which provided valuable learnings.
- Content strategy firm, Formative, completed foundational content strategy work. (See page 12 of White Paper).
- These costs have already been incurred and are not part of the Information Transparency Initiative costs.

Vendor Justification

The selection process for the ICANN organization content strategy and technical implementation vendors was based upon several factors. The following table provides some of the key assessment criteria used in the evaluation of vendors:

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Vendor Selection Process (Vendors not contracted yet)

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Contracting

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Appendices











DRAFT - Version 2

BOARD OVERSIGHT OVER THE PROPOSED ITI PROJECT Questions / Criteria 29 May 2017

OVERSIGHT ROLE

The ICANN Board has oversight responsibility over significant projects undertaken by ICANN Org. Significant means that the Board considers that a project has one or more of the following characteristics:

- Strategically important
- Mission critical
- High cost
- High risk
- Considerable impact on the ICANN Community.

The Board therefore classifies the ITI Project as a significant project.

APPROACH

The Board will undertake its oversight role over the ITI Project in six steps:

Step 1: Board defines its requirements/guestions.

The Board will submit to ICANN Org a list of questions that require answers before the Board approves the ITI project. These questions fall into two categories:

- A Project Plans (scope, options considered, risks, milestones, deliverables, timescales, etc.)
- B Project Costs & Funding.

Step 2: Staff prepares answers to Board questions.

Staff will prepare answers to the Board questions (Categories A & B).

Step 3: BTG signs-off on the Project Plans

The BTG will review the answers to Category A questions. Once the BTG has reached closure with ICANN Org. on the Project Plans, the results will be reported to the BFC and the full Board.

Step 4: BFC signs-off on the Project Costs & Funding

The BFC will review the answers to Category B questions and signs-off on the

Project's Costs & Funding and submit a report to the full Board. The BFC will meet after the BTG signs-off on the ITI Project Plans and not before, because it is possible that the <u>scope</u> of the ITI Project may change as a result of BTG's review of the Project Plans.

Step 5: Board makes a Final Decision on a Project

The Board will review the recommendations made by Management, BTG and the BFC and make a final decision on the ITI Project.

Step 6: On-going Monitoring of Progress

The BTG will interact with ICANN Org on an on-going basis to monitor progress of the ITI Project, and report to the Board.

SCOPE OF THIS DOCUMENT

This document contains the list of questions approved by the Board for both Categories A & B for the ITI Project.

CATEGORY A QUESTIONS - ITI PROJECT PLANS

This set of questions is aimed at providing the BTG (on behalf of the Board) with a sound understanding the ITI Project Plans, starting with the scope of the project.

Project Scope

- 1. What is the scope of the ITI project?
 - A new DMS serving as the backbone for all ICANN content and new CMS for presenting all published content.
 - Consolidation of a portion of 16 web content properties ICANN currently maintains. Details are on slide 16 of the "May 2017 ITI Presentation"
 - A centralized ICANN glossary (there are presently at least seven unique glossaries maintained)
 - Establishing a consistent translated experience
 - Mobile-first user experience for surfacing the content
- 2. Describe the problems that ITI is trying to solve without reference to any technical implementation framework.
 - Inability to find ICANN content, both internally and externally. Not just search, but fulfilling DIDP, Subpoenas, etc
 - Inconsistent content

- o Translations
- o Quality
- o Navigation
- Resource and time intensive publishing process
- Incoherent ecosystem of external ICANN websites
- 3. If the major problems are (1) the poor condition of ICANN information's public ace through the web site(s), and (2) the difficulty in finding historical documents, how much of the second problem would be mitigated if the first were solved well?

Correct that one of the major problems is the poor condition of ICANN content through the website. The second problem of historical content findability will be immediately addressed through tagging and improved information architecture (i.e. navigation)

4. What is the relative value of making documents being produced now and in the future more findable relative to the value of increasing the findability of historical documents (a now (b) in one year © in two years. Please make your arguments without considering some notion of complete transparency.

While transparency is a key value of improved findability, another way to look at the problem of findability is the poor structure of how we publish content today. At a time when ICANN needs to tighten up on spending, inadequate use of resources has a direct cost impact. One of those areas is the costs incurred in maintaining or misusing various teams for managing content:

- content operations team \$300k/yr
- development Many of our pages have to run through the development cycle which is a wasted use of our development skillset as ICANN would be better served with focus on providing features to the community

The lack of an appropriate information architecture adds further complexity to the publishing process and combined with above, leads to the findability issues. By creating a well-defined information architecture driven by a structured taxonomy, the need for a full-time content operations team diminishes and the development team is freed up to work on more value-add capability. This ultimately not only improves findability, but allows ICANN to increase value while reducing costs over the long run.

Another way to look at this problem is through community productivity / efficiency. The community commonly complaints about its inability to find

information and since most have "day jobs", any delay in finding the information they need adversely impacts their ability to efficiently do their work.

5. What is the value of doing this work retroactively?

- Number of pieces of content: While there are over 100,000 pieces of untagged content, only around 25% of the content requires a full eyes-on audit. The remaining content would be tagged either through automation for simple tagging, or surfaced and searchable through a database.
 - o 48,000 Monthly Registry Reports (surfaced through database)
 - o 18,700 Registry Agreements (automated)
 - o 12,000 translated content (linked to English)
 - o 3,200 images (eyes-on to meet Accessibility requirements)
 - o 22,000 pieces of content (eyes-on)
- Improve findability: One of the core problems we are trying to solve is findability. Currently, ICANN.org has no taxonomy or content categorization. In order to improve content findability, we need to audit existing ICANN.org content. We cannot develop a taxonomy and tagging language without knowing what content we have. This audit will answer questions like: who is the content owner, what is the subject, when was the content created, does the content have a life cycle (regular updates), what is the quality of the content, etc. The answers to these questions enable us to develop the tagging language. ICANN has never developed a taxonomy for its content, and this is a standard process of implementing a useable document management system, and multifaceted search capabilities. Without an audit, we'd been unable to develop a taxonomy that covers our content needs. Additionally we'd be unable to structure a navigation based on this taxonomy. It would not be worth it to implement a document management system without a workable taxonomy.
- Establishes content governance and future proof: There is no doubt that the audit is labor intensive work, but we view it as short-term pain we need to endure in order to establish a proper content governance. All new content would use this taxonomy and we'd never need to audit our content again, as it is now future proof.
- Improve quality and accuracy: A large percentage of explanatory content that exists and is weaved throughout the site, is of poor quality and in many cases, contains factual or other problematic errors. For example, there may be upwards of 300 instances of "domain name owner" contained in ICANN.org content, when the correct term is "domain name holder." This is a distinction ICANN legal has indicated is worrisome. There are other instances like this, where the description

- of a function or term on the site is inaccurate or inconsistent. Poor quality content would be flagged for revision during the eyes-on and would be improved.
- <u>Create system-wide governance:</u> Creating the taxonomy for ICANN publically-facing content will allow us to apply to taxonomy to the SO/AC family of site. This will create a system-wide taxonomy to enable multifaceted search across the ICANN ecosystem of sites.
- Linked content: In order to ensure content that is related is linked and easily accessible, the eyes-on audit would include a related content field to ensure documents to identify and group related content. As an example, drop catching and zero value registries are issues currently being discussed by the Board, and there are old documents that some Board members knew about and were able to locate on these issues. However, none of the documents around the issue of drop catching and zero value registries are tied together through a taxonomy, so using simple Google search does not provide a proper account of content related to these issues and so unless you knew exactly what you were looking for you wouldn't have found the relevant documents. This applies to many topics and content types, particularly new gTLD issues. The ability to "build a story" for any given document has contextual value to the community
- 6. Why not tag the 20% of docs that "really" matter vs. a full sweep? (More than 90% of docs do not contain relevant tags, page titles, or meta descriptions. 100,000 untagged docs. 35,000 new docs per year are being added).
 - Because we don't currently have a taxonomy or proper categories for our content, it would be difficult to choose 20% of content that is a good representation of all ICANN content. For example, a sample of our most accessed content would not provide a good representation of all of our content because the most accessed content concerns only a few topics around registrar complaints. Additionally, the remaining 80% of untagged content, would be outside the taxonomy, therefore not accessible through the multifaceted search and navigation. Lastly, without a comprehensive tagging of all content, ICANN will be unable to capture the interlinking of related content that GDD and Legal has highlighted as particularly important to our stakeholders and business needs.
- 7. How do you know that document retrieval with tagging will work effectively? What are the measures of effectiveness? It is important not to view ITI as a technology-driven project. Project failure occurs when there is a lack of planning and lack of clear goals. The goal of ITI is to establish document / content governance and a content strategy. This is an important part of the planning process and requirements gathering, which are the foundational elements of the entire

project. The technology is a means to enable that governance and strategy. In coordination with a content strategy firm formally selected through an RFP process, ICANN is ensuring we're following best practices. Proper tagging of content will yield a better experience of findability as measured below:

- Faceted search for public content
- Improved bounce rate (<40%) from search results page
- Improved rate for searches requiring more than one attempt (<17.5%)
- Improved navigation resulting in finding content without search (<31%)
- System-enforced workflows ensuring content is not prematurely published without legal and quality controls.
- Decreased internal workloads and timeframes for publishing and document management
- 8. Will MylCANN be maintained in the DMS?

No - MylCANN does not house its own content. Instead, it serves features (https://features.icann.org) and a content aggregator to provide subscription services to the community. The former will be migrated to ICANN.org and the latter will be replaced by a more scalable and cost-effective solution.

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10. "Stakeholders can accuse ICANN of burying information and of not being accountable and transparent" - How would building the DMS and CMS will relieve ICANN of these risks?

Agreed the risks will not be completely eliminated. However, the risks will be mitigated considerably as content findability will increase. Additionally,

ICANN Legal has identified our current content findability puts us at risk of not meeting our transparency and accountability commitments now and in the future. After consultation with ICANN Legal, we do view this as a risk. Tagging historical content will give us the ability to "build stories" and provide context to issues.

11. What is the rationale of web sites in scope and out of scope? Why New gTLD site and PTI site among others are out of scope? (white paper p.7 – What is and is not included in the ITI)

While the proposed ITI scope is a large effort, rationale for what is in vs out was primarily focused on making progress with content iteratively and as expeditiously as possible to show progress while delivering value. In addition to the estimated 25,000 pieces of content that would need to be audited and tagged, the new gTLD site has at least a couple development-centric pages that would need to be converted.

While content strategy would be minimal for PTI, it was ultimately left out of scope because it would require a separate infrastructure to be implemented and maintained. However, it could be considered "on the bubble" as a potential add to ITI, but we felt the scope was pretty full already.

Options Considered

1. What are the various options considered and what criteria have been used to evaluate these options?

The Information Transparency Initiative team explored several options over the last 18 months to try and tackle our findability and content governance issues including:

- Improving the search capabilities of public content without changing
 the existing technical landscape. We rejected this option as the current
 technical environment does not include a document management
 system to create and enforce content governance. Further, the current
 technical environment hampers our publishing process and scalability.
 Due to the heavy reliance upon custom development, the existing
 technological architecture is flawed and adding a third platform
 (Document Management System) will only make it worse even as a
 short-to-midterm solution.
- Focusing content tagging and governance on a limited amount of content created within the project timeframe. We rejected this option as it would restrict our ability to create a thorough ICANN-taxonomy and document management system, content quality and user experiences

- would be widely inconsistent, search would only be improved for a limited amount of content and multifaceted search would only be enabled for a subset of the content.
- Using internal ICANN organizational and engineering strategic partner (Zensar) for content strategy and technical implementation. We rejected this option as the ICANN organization does not have either the capacity or the necessary capability for a project of this scope. This creates a significant risk to be able to deliver in an acceptable timeframe. A recent example is the current GAC content project. The GAC produces less than 10% of ICANN's public content and the technology will not not include a Document Management System in the initial release, yet will have taken almost as much time as the proposed ITI timeline to complete. ICANN has shown a better track record when partnering with premier partners on new platform implementations.
- Using a single contractor for the content strategy and technical implementation of the DMS and CMS. We rejected this option based upon our experience with the 2014 project involving ICANN public content. ICANN engaged with only one contract partner and focused primarily on technical implementation over content strategy. That experience did not result in improved findability, content governance or search. Our assessment is that it involves too much risk to engage with only one vendor, as opposed to finding vendors who are respectively experts in our specific technical implementation and content strategy. We also determined the approach would not result in significant cost savings while significantly reducing the project benefits.
- Breaking the content strategy and technical implementation into smaller chunks. We rejected this option because the only way to establish a complete taxonomy and identify how content is interrelated requires an exhaustive content audit. Not having the content strategy complete upfront would require revisiting previously tagged content at a later point, resulting in a longer timeline and higher backfill costs. Further detail on the results of our investigation into this approach are included in the attached deck.
- Starting a small proof of concept to substantiate architecture before tackling the larger set of public content. We rejected this option because the proof of concept needed to be relevant, yet not already established. SSAC and RSSAC were considered, but ultimately do not have a suitable amount of content to provide a sampling to establish content strategy goals such as taxonomy. Additionally, this approach provides little community value and would further delay the much more urgent need of tackling the larger set of external content.
- 2. Why is the proposed solution presented to the Board considered to be the only feasible option?

This approach was the result of months of collaborative effort between

ICANN org and selected content strategy and technical partners. It mitigates risk by drawing on expert third parties for time-bound support, their experience with best practices, and ICANN's lessons learned from previous projects.

3. How it has been ensured that the choices of package software and vendor/consultant is the best and capable to fulfil the project purpose?

A risk assessment regarding project deliverables is included in the enclosed supplemental material. At the program's core, there are two key risks - cost and time overruns. These two fundamental risks have been mitigated through the planning process by:

- Adding a 30% contingency for any potential cost overruns
- Allocating \$900k for backfill to minimize staff disruption and put us in an improved position to meet milestones
- Scheduling a six-month buffer into the timeline to account for any unforeseen circumstances including project stalls
- A robust list of system requirements (Content and Document Management Systems) were compiled culminating in selection of scalable systems that meet ICANN's needs
- Premier partners were selected with extensive experience in the platforms and content strategy work purposed as part of ITI

Architecture

1. What is the functional architecture of the proposed solution?

Content will initiate in the DMS, leveraging native capabilities for enforcement of tagging and content consistency as well as systematic workflows for content quality and self-service publishing. Content will be automatically published to the appropriate location on the site based upon business logic driven by the content strategy.

2. What is the technical architecture of the proposed solution?

There are two integrated enterprise systems that serve as the core platforms:

- DMS System of record for all ICANN content
- CMS Presentation layer for approved public content

Other systems such as Marketo for content subscription capability and an as yet to be determined calendaring solution will be integrated into the core..

3. Will the pieces fit together as planned?

Yes, a formal selection process was followed to ensure the DMS and CMS both meet ICANN's functional requirements, fit into our development platform strategy (Java), and offer integration scalability through REST API. Further, we engaged our DMS and CMS partners to ensure an integrated solution architecture from both perspectives.

4. Where are the checkpoints regarding functional behavior?

Premier partners for our DMS and CMS have already been engaged and would serve as our ITI technical implementation vendors, to ensure both systems were implemented to best practices. The first phase of the technical work stream of ITI is foundational and intended to establish a scalable integration between the two systems. There are additional releases through the course of the project that will serve as further checkpoints. A detailed project plan with milestones is available upon request which builds in testing of migrated content types before full migration.

5. Where are the checkpoints regarding system performance?

Performance of the DMS and CMS have been scrutinized individually during recent engagements. Alfresco (DMS vendor) has already established the infrastructure with load testing and scalability complete. The CMS has been tested with GAC as the pilot project and the ITI vendor Architech, has performed a security and configuration audit. Additionally, dotCMS support has provided best practices setup for the GAC, which can be repurposed for ICANN.org. At the end of the foundational phase of the project, these same load testing tools and best practice documentation provided by our vendors will be expanded to verify the integration points meet the same level of performance quality.

6. How the taxonomy and document architecture will be ensured to be future proof or not to obsolete?

Through the workflow functionality the DMS provides, we will be able to enforce governance that ensures content is appropriately tagged prior to publication. It will also future proof our content, as the meta data added to the content can be easily migrated should we need to transition away from our chosen platform.

Estimated Effort & Timescales

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2. What are the main assumptions underlying the estimates?

Assumptions were driven by initial analysis from premier partners based upon scope, a sample content audit conducted in October 2016, and interviews with each executive on available capacity. Based upon this analysis, timeline and budget were established.

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3. What is the overall elapsed time?

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4. Provide a summary chart showing the main tasks, corresponding effort and timeline.

Summary Chart including tasks and efforts are included in the high-level timeline in the latest ITI presentation.

Milestones & Deliverables

1. What are the key milestones and the corresponding dates?

Milestones, including corresponding dates are included in the high-level timeline in the latest ITI presentation.

2. What are the key deliverables and the corresponding dates?

Key deliverables including corresponding dates are included in the high-level timeline in the latest ITI presentation.

Transition Plans

1. What is the transition plan from the old (as-is) to the new (ITI) system?

We recognize the importance of providing the community with visibility into the Information Transparency Initiative, and encouraging the community to submit feedback. To support that effort, we will launch an Alpha version of the site called evolution.icann.org. This site will show progress on the external benefits of a document management system and how this improved content governance will manifest itself externally and be displayed on ICANN.org and what content types will look like on the new

ICANN.org. We'll solicit "limited window" feedback opportunities. We'll incorporate this feedback to improve user experience. The community is central to what ICANN staff do and evolution. icann.org reflects their importance in the decision-making process. While we build the DMS and new ICANN. org, the current ICANN.org will continue to serve as the official ICANN site.

Resources

1. What is the impact on ICANN Org resources?

For the content strategy (primarily the eyes-on audit), ICANN organization resources will be impacted depending upon the amount of content each owns. For those at risk of impacting daily work, we have budgeted for backfill to ease the burden.

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Risks

Worst case scenarios.

1. What are the worst case scenarios that could happen: Complete project failure

Corruption of data

Inability to handle needs.

How have you mitigated against catastrophic issues like these?

These above risks have been mitigated through the planning process by:

- Complete project failure
 - o If ITI fails completely, the as-is system remains and is still functional, except for new functionality provided by ITI. As such,

the worst thing that can happen is the money/time/staff/reputation investment in ITI is thrown away Confidential Negotiation Information

- o Continuing to run current icann.org until ITI is ready
- Corruption of Data
 - Automated A/B testing to ensure source / target data are equivalent
 - o Manual QA eyes-on validation data sampling
 - Legacy systems remain available in read-only state for determined period of time
 - o Full backup of legacy systems before transition
- Inability to handle needs
 - A robust list of system requirements aimed at addressing current and anticipated needs was defined prior to selection process for CMS and DMS platforms

As-is risks include: "Degraded ability to find content":

- 2. What is the need to find content in the current document set? Who is being harmed?
 - Internally, the need is driven by requirements to identify and/or compile
 documents based on a particular format. There is no consistent
 mechanism by which documents can be searched. Instead, searches
 are done manually, typically interrupting staff work in the cases of time
 sensitive searches (e.g., DIDPs or authorized requests from law
 enforcement)
 - Externally, there are a constant and increasing number of complaints voicing frustration with the current site and the inability to find various forms of content, and those complaints are increasingly targeted at the ICANN Board and staff:
 - Almost 40% of users exit the site after conducting an onsite search which indicates users are not finding what they want through site search
 - o Onsite search is limited (ineffective multifaceted and advanced search options), which results in 40% of users exiting the site after conducting search

- o Navigation issues contribute to ICANN's high average bounce rate of 66% (industry average is 41%)
- o A sample audit revealed that 3.76% of URLs of the 3,298 most popular pages on ICANN.org led to error pages, an unacceptable level of errors. For example, one error URL for a ccTLD page has been clicked 11,740 times over a 12-month period. Redirects also pose a problem for version control, technical management
- o The site does not meet W3C WCAG Level ADA Guidelines. An accessibility assessment performed in February 2016 reviewed 504 ICANN selected URLs and uncovered 302 accessibility related issues, 78% of which were Level A issues, the most severe type.
- o Additionally, ICANN Legal has identified our current content findability puts us at risk of not meeting our transparency and accountability commitments now and in the future. After consultation with ICANN Legal, we do view this as a risk.
- o Content is inconsistently translated and is not available/findable on the website outside of English
- 3. What is the damage to the corporation due to not having the ability to have tagged content? (this appears to be a solution in search of a problem)
 - The site search does not perform well and we don't have functional multifaceted search. This is directly related to the lack of metadata (applied taxonomy) on our content. If we neglect doing the heavy lifting, the content governance piece, we will find ourselves in the same position as the current site. This work underpins the entire project. We do not recommend proceeding with ITI if this foundational work is omitted.
 - There's value in being able to track back any document to its origination and be able to associate that path with other documents
 - As with any initiative involving technology, the implementation is only as good as the data it holds. ICANN.org ranks poorly in search results because it does not follow even the minimal best practices for SEO as identified by a third party evaluation. The following are specific issues found:
 - o ICANN.org content consistently ranks poorly in Google
 - o ICANN.org content does not have meta descriptions which impacts the user's ability to understand the nature of a search result and if it will meet their needs
 - ICANN.org content does not use proper page structure elements which negatively impacts a search engine's ability to understand content priority on a page, devaluing the ranking of content

o Additionally, ICANN Legal has identified our current content findability puts us at risk of not meeting our transparency and accountability commitments now and in the future. After consultation with ICANN Legal, we do view this as a risk.

All of the above issues impact the communities' ability to find content which could be perceived as ICANN not delivering upon its accountability and transparency obligations in the future.

As-is risks include: "Community engagement more difficult" :

- 4. What are the metrics that indicate that community engagement will become better in a new architecture?
 - Our engagement teams work hard to drive people to engage with and participate in ICANN, our bounce rates and the number of "new" visitors that we lose when they get to icann.org is showing that we have a "hole in the bottom of the bucket" that no matter how much we spend on bringing new participants into the work and policy development there will be a significant performance/conversion loss/risk given the site.
 - ICANN.org will utilize Google Analytics, or other web analytical tools, as well as Marketing Automation that will provide content subscription metrics.
- 5. What promises are ICANN making regarding community engagement in the new system?
 - Improved content quality translated in the six UN languages with improved findability and multifaceted search capabilities will improve community engagement.
 - A complete governance for writing, tagging and translating content will improve the quality and accessibility of our content to different stakeholders across the globe.

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- The DMS and CMS setups are foundational work on which all SO/AC sites will be built, enabling ICANN ecosystem wide search and a common, shared governance.
- A universal, shared ICANN glossary will bring consistency and order to our terminology and definitions of those terms.

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As-is risks include: "Transparency and accountability impeded":

- 6. Is this true? Are there complaints about this, if yes, how many and from whom?
 - The Executive Team and the Core Team have identified our current content findability puts us at risk of not meeting our transparency and accountability commitments now and in the future. After consultation with ICANN Legal, we do view this as a risk.
 - Our information is ICANN's most valuable asset. It represents our history and our institutional memory, and supports our accountability and our policy making dialogues. We need to take additional steps to safeguard that information and make it more readily accessible. This duty to protect our information is not optional, but a critical component of our viability. It is our collective responsibility to resolve this content crisis.
 - We have made post-Transition commitments to and requirements for accountability and transparency. Current and easy-to-find public information in all six official U.N. languages is a vital part of achieving those commitments. The level of scrutiny of our ability to meet and track those commitments through our system of record for information – and in particular, public-facing policies, contracts, and bylaws – will only increase.
 - There is some urgency to resolve this issue while reasonable options remain available. Each day that our content grows, the amount of effort and cost to fix the problem also grows. As such, reasonable options dwindle and our solutions to fix the problem become more expensive, resource-intensive, and constrained. It is not only the fact that we will face serious financial consequences the longer we wait to resolve this issue, but we risk being unable to meet our post-Transition commitments in the future. We need to change our thinking about the importance of information governance and apply the same strict and acknowledged standards to our information that we apply to operational, financial, and legal management.
- 7. What are the measures for "unimpeded" transparency and accountability? The Board should agree upon these measures
 - We are trying to make published ICANN content as findable and open as we are able to, in the six UN languages.
 - Yes we are seeking the Board's input and views on how to treat this
 matter. From an architectural viewpoint, we have created a closed
 environment for all content which is not visible to the public until an

explicit workflow is initiated with appropriate levels of review and release authority. Only then would the content visible to the community.

ITI risks include: "Lack of internal resources":

8. Why is this a board issue? If the board approves the project and management is unable to procure internal resources, it indicates management failure.

We agree to remove this as a risk

9. This is a generic risk that is equally true of any project We agree to remove this as a risk

ITI risks include: "Reprioritization since benefits take long time to manifest": Confidential Negotiation Information

11. If reprioritization of this project happens for the stated reason, it is a leading indicator that the project is not important enough and should be immediately shelved. What are the plans for that eventuality?

This is an incorrect assertion: re-periodization merely means that some other project has taken a higher priority. This could be for an unanticipated, time-sensitive, critical requirement. It doesn't mean the project is "not important enough", rather that something else is more important. It is possible that a higher priority project drains resources from ITI. It is always a risk.

- 12. If reprioritization of this project occurs for the stated reason, it is also a leading indicator that the benefits were of a speculative nature. How can we be reassured of the benefits not wishful thinking?
 - There has been a misinterpretation of the reason for re-prioritization.
 - As stated above, we would not anticipate the project being re-prioritized as a result of not achieving benefits, but rather the result of another unknown initiative takes on greater important and need. That is something that we cannot mitigate or plan for, rather is dependent on the composition of the Board and the Executive Team, and their views and stated priorities.

ITI risks include: "Mission creep from community input":

13. What is the acceptable level of mission creep? What is the unacceptable level?

An acceptable level of mission creep are requests that do not impact project timeframe, costs and provides overall project value. When those requests are identified, each will be analyzed to ensure they meet the above stated criteria. An unacceptable level of mission creep are requests that impact the project timeframe and / or costs, and are outside of the agreed upon project goals and deliverables.

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ITI promises "improved accessibility":

- 15. How is improved accessibility measured? Improved by what %?
 By using Level A and Level AA as outlined in the W3C Web Content
 Accessibility Guidelines (WCAG) 2.0 outlined below.
 - Level A: These are the most severe errors to be addressed as they violate minimum requirements for accessing web content.
 - Level AA: These are the most common errors, ensuring these are addressed is considered in compliance with accessibility guidelines.

Conformity to this standard will be measured through use of an automated testing platform procured in 2016 for accessibility.

16. To what standard/SLA?

ICANN has adopted the W3C Web Content Accessibility Guidelines (WCAG) which is a commonly adopted standard for accessibility throughout the world.

CATEGORY B QUESTIONS - ITI PROJECT COSTs & FUNDING

This set of questions is aimed at providing the BFC (on behalf of the Board) with a sound understanding the ITI Project Costs and Funding.

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1. How will the ITI Project be funded? Describe the trade-offs between:

- Adjusting the Strategic Plan. The Board was informed in Geneva that ICANN funding over the next three fiscal years is not sufficient to fund the three years left in the Strategic Plan and that some adjustments to the Strategic Plan are required. The Board therefore needs to understand which projects in the Strategic Plan/Operating Plan need to be eliminated or downsized to make room for the ITI project.
- Replenishing the Reserve Fund. The Reserve Fund is nowhere near
 the level it should be, as it was severly depleted by almost USD 30
 millions to fund the Transition. The Board therefore needs to know why
 funding the ITI Project is more important than replenishing the Reserve
 Fund.
- <u>Reducing Operating Expenses.</u> What measures ICANN Org will take to identify savings from operations over the next three years to fund fully or partially the ITI Project.
- <u>Usage of the net asset surplus</u> (approx USD 1 generated during FY16 and FY17. The Board needs to know how this money will be used.
- 2. What else will ICANN not do if the Board approves this project?

It has been determined that FY18 will be covered by excess funds from FY17 so nothing needs to be adjusted from the current FY18 plan. ITI would be part of the normal FY19 planning so other initiatives would be prioritized accordingly..

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3. If as-is such a bad option, why is the cost of maintenance not rising sharply in future years as the current system becomes more unstable, shaky and difficult to manage? The current maintenance plan appears to apply a straight-line approach, which is unreasonable if the system is bad.

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It is difficult to determine what the costs of maintaining the current site
will be in the years to come. We experience new problems with the site
each day, and are constantly reacting to fixing bugs, and site
improvements are either greatly delayed and/or deferred. For example,
the level of redirects means that often content returns an error page.
 We can continue to maintain this site in the manner with which we

have, however, this poses security and reputational risks. Maintaining the current site however we believe only defers the inevitable ITI (or ITI like) price tag that will in itself be higher as time goes on. So, whether we do ITI now or later, this is a bill that we face and cannot avoid, as the system is unsustainable. Not only is the technical infrastructure unsustainable, but the staffing is unsustainable as there is no staff dedicated to maintain a site of this size and scope.

- 4. Why is the cost so high for a newly architected and newly built system?
 - There is a resource cost for consistent quality and timely delivery of content, which we don't have with the current site. We have a technical and content debt from the current site(s). Resources were never properly allocated to maintain a site of this size and scope, and demands from our stakeholders for content and standard features have only increased. There are no dedicated staff to maintain the current ICANN.org from a quality control, development or project management perspective. Each staff person is only a part-time resource to the site, resulting in a massive backlog of requests and bug fixes. ITI factors in minimal but dedicated resources to maintain a site of this size on an ongoing basis. Although most content creation and publishing will be performed directly by content owners, eliminating the need for development or web team resources, there are quality and lower level but continual development resources and management that will still be required.
 - Secondly, ITI only addresses content published on ICANN.org in Phase 1. There is still a maintenance cost for the SO/AC sites until they are consolidated into the DMS/CMS architecture. Once consolidated on the new platform, development resources will be reduced further.

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5. The maintenance cost of the ITI system should increase as we get to the later years of the project. Is that reflected appropriately?

This is reflected in the fact that the rise in maintenance costs for ITI will be flatter than continuing as is. The maintenance costs will actually decrease slightly as we continue platform consolidation post-ITI with the other SO/AC sites. Maintenance costs will decrease as the bugs and lack of features inherent in new system deployment are remedied.

7. Are there any components in the current system that are vulnerable to catastrophic events (such as a vendor going out of business)?

The existing systems have been implemented to scale against common catastrophic events such as earthquake, fire, etc. However, we are dependent upon Zensar as our strategic development partner for institutional knowledge gained in our systems. Going out of business would cause a lag in development until replacements are sourced and trained. Given our current environment is heavily dependent upon developers for publishing, this would pose a threat to timely content publishing.

8. Are there any components in the new system that are vulnerable to catastrophic events (such as a vendor going out of business)?

There are always risks with any system, but we have worked and will continue to monitor, mitigate and diversify to ensure we are as well placed as appropriate for business continuity and disaster recovery in the light of a catastrophic event as part of ICANN organization's wider strategy. The DMS and CMS platforms offer an open source variant ICANN can use as a fall-back to buy time until suitable replacement platforms can be identified. Product support would be the only impact which can continue through the same premier partners we will leverage for ITI if required. However, the ITI platform architecture is less complicated, and has fewer dependencies.

Other:

9. What is the cost of tagging the 20% of docs that really matter vs a full sweep?

Because we don't currently have a taxonomy or proper categories for our content, it would be difficult to choose 20% of content that is a good representation of all ICANN content. For example, a sample of our most accessed content would not provide a good representation of all of our content because the most accessed content concerns only a few topics around registrar complaints. It also prevents our ability to "build a story" as mentioned above. Additionally, the remaining 80% of untagged content, would be outside the taxonomy, therefore not accessible through the multifaceted search and navigation. Lastly, without a comprehensive tagging of all content, ICANN will be unable to capture the interlinking of related content that GDD and Legal has highlighted as particularly important to our stakeholders and business needs.

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Information Transparency Initiative Risks & Mitigation

In a program with the size and scope of the Information Transparency Initiative (ITI), it is important to conduct a thorough risk analysis and mitigation strategy. This risk assessment examines high-level risks and our mitigation plan and includes a more detailed risk assessment broken down by quarter and deliverable.

High-level risks and mitigation for ITI

Risk	Mitigation
The ITI budget and contingency are underestimated.	Platforms and respective expert vendors underwent a RFP process to ensure ICANN secured a competitive price for the underlying technology platforms and for qualified vendors. Confidential Negotiation Information
Future technological advancements render the chosen DMS and CMS obsolete or ineffectual.	The metadata, information architecture and content strategy will help futureproof our content and ensure it would be transferrable to new technology platforms.
Other priorities divert resources and attention away from ITI.	We obtained commitment from the Executive Team in support of ITI's goals and work. They have committed to ensuring it remains a priority throughout its implementation. We have also partnered with the CFO to ensure the budget is structured to fund the Initiative throughout the duration of the project through to its completion. We are in the final stages of matching that commitment with the Board, through a consistent engagement with the Board ITI subcommittee. Additionally, we drafting a plan for how we will build support with the community to ensure the SO/ACs support ITI's goals, work, and cost.
Mission creep sets in as the community demands features beyond the scope.	In the lead up to and throughout ITI, we plan a consistent communication strategy about what is in and out of scope for phase one. This includes sharing the goals and scope of the project with the community, early and often. It also includes an online process, through a site called evolution.icann.org whereby the community is asked to provide limited window feedback as features and content are developed. To encourage actionable responses, we will provide a

	structured and specific feedback process.		
The wrong DMS and CMS are chosen to implement the content strategy.	The DMS and CMS were chosen with configuration capabilities to handle our workflows content governance requirements, content types, publishing needs, and budget limitations.		
Internal staff resources are limited to tackle a project of this scope.	Staff backfill costs have been factored into the budget and contractors with ICANN experience have been identified to help tackle labor-intensive audit work, requiring knowledge about ICANN and its content. We recognized ICANN does not have the capacity to tackle the heavy lifting involved in creating the content strategy and implementing the DMS and CMS. While the organization is providing the leadership and institutional knowledge of the content and technical aspects of the project, we are relying on expert external vendors to perform most of the work.		
Technology Failure	The as-is system remains as a rollback option and is still functional keeping any issues seamless from the end user.		
Premiere partners no longer available	We will engage our platform vendors for a new partner as necessary. For CMS, it would mean a non-premier partner. Content strategy can be replaced by leveraging a combination of CMS and DMS partners.		
Project leadership no longer available	Internal backup resources identified to fill leadership roles.		
Board, community, and Executive Team commitment to the project wavers.	The Initiative passed an extensive review by the Executive Team and earned its full support. If the Initiative earns Board and community support, regular progress reports and feedback opportunities will be provided to allow for ongoing Board, community, and Executive Team oversight and support.		





The Information Transparency Initiative

March 2017

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Introduction

It is said there are "two kinds of knowledge – we know a subject ourselves, or we know where we can find information on it." ICANN has, over its 18-year history, accumulated a trove of information. This information represents our history, our institutional memory, our policymaking dialogues, and the knowledge we are obligated to share with our stakeholders. It is one of our most valuable assets, and it needs preservation, organization and protection.

Unfortunately, ICANN has not invested the time or the resources to safeguard this information. Our current, de facto document management system (DMS) is ICANN.org, and it has rendered our content undiscoverable to many stakeholders. At current content growth rates of between 25-35% per year, our findability problems will only deepen. As Göran Marby recently wrote, "It is a changing world for us after the Transition...We need to be sharper, more transparent, and the stakes are higher." At a time in our history when our accountability and transparency are under a brighter spotlight, our publically-facing DMS has put us at risk.

In an effort to mitigate that risk and guard our information, we propose the Information Transparency Initiative. Its primary goals are to develop a content governance with a robust taxonomy, establish better content organization, improve publishing speed and future proof our content. It is important to stress that the primary goal of the Information Transparency Initiative is not an ICANN.org revamp, rather we view ICANN.org as the route by which stakeholders access a new, publically-facing DMS.

We are well aware that there may be some reticence to devote time and resources to a project of this size and scope. Additionally, ICANN has not had a proven track record with these types of projects. However, what this white paper will illustrate is that building a content governance and strategy is the foundational work on which the entire DMS will be built. This is new for ICANN and is what makes this project different. The Information Transparency Initiative does not propose an overly complicated set of features or applications. We propose performing an eyes-on-audit of all our content to inform a verifiable taxonomy and information architecture. This work underpins the entire project.

This takes time and involves many stakeholders, but without completing this time-consuming, labor-intensive work, the project goals will not be met. Alfresco and dotCMS will serve as our respective DMS and content management system (CMS). These two platforms are the technological frameworks upon which the content governance is built.

The Information Transparency Initiative has identified five main objectives:

- 1. Focus on a content strategy and implementation of features that enable us to meet ICANN's accountability and transparency goals, and reflect its technical mission. Increase content findability through the creation of a taxonomy in the U.N. six languages, and an improved information architecture and user experience.
- Create and enforce staff content governance and increase publishing speed through distributed content management, and improve the writing in the U.N. six languages and develop audiencespecific, multimedia content offerings.
- 3. Develop a mobile first experience and ensure accessibility standards are met and provide a translated user experience.

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5. Create a scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

This white paper provides a summary of our current challenges and a blueprint to tackle them.

Why do we need to set up a DMS to help ICANN meet its post-Transition and global public interest commitments?

ICANN has post-Transition commitments to and requirements for accountability and transparency. Current and easy-to-find information in all six U.N. languages is a vital part of achieving those commitments. ICANN. org is where we demonstrate and meet those obligations. It is our only publically-facing system of record for policies, contracts and bylaws. Our reliance on and demands of ICANN.org to make that information available will only deepen in the coming years, and the level of scrutiny of our ability to meet and track those commitments through our content will also increase.

A DMS enables ICANN to establish and enforce content governance over our information, which in turn leads to improved accountability and transparency. That important information is then made accessible, organized and displayed for stakeholders through ICANN.org.

Content governance enforced through a new DMS will:

- 1. Set policies and standards for mandatory tagging and content creation.
- 2. Establish workflows for staff when creating and publishing content including: style rules, version control, approvals (departmental, legal, technical), translation and publication.
- 3. Enable easier content retrieval.
- 4. Enhance security for internal and external content permissions.
- 5. Allow for improved content collaboration.
- 6. Establish document lifecycle.
- 7. Provide the groundwork for building content governance for internal content (content that will not be published to ICANN.org).

What do we mean by content governance and content strategy?

It may be useful to briefly explain what we mean by content governance and content strategy. We just outlined the improvements that enforcing a content governance through a DMS will bring. But, the DMS is only the technological component. Think of the Information Transparency Initiative as two connected and interdependent pieces – content and technology, where technology is a means to implement the content governance and strategy.

Content governance is a key pillar of any content strategy. We cannot begin to fix our content problem or set up a DMS without outlining our governance. Content governance involves the processes and resources that govern how staff create, publish, store and preserve content. This governance includes documenting content ownership and roles, enforcing standard workflows, producing policies on content lifecycle and training staff on these governance rules.

The content strategy includes this governance but is about the overall vision for how we transform our content into a strategic asset. This means "getting the right content to the right user at the right time through strategic planning of content creation, delivery and governance." Without a content strategy, we cannot improve our content governance or ICANN.org. The content strategy includes the auditing, taxonomy, information architecture, UX, content matrix and content governance.

Why else is a DMS integrated with a new ICANN.org important?

ICANN.org is our most powerful and visible engagement tool - the 24/7 face of ICANN. Our site earns 250,000 users each month, with upwards of 70% of those users being new visitors. This is a greater reach than our public meetings, social media, webinars and newsletters combined. The site helps deepen our engagement with stakeholders and reinforce our reputation for competence and quality, accountability and transparency.

New and existing power users will judge the professionalism and credibility of our organization based on their experience with our website. Is content easy to find? Does it provide a seamless, enjoyable user experience? Does the website contain content that is approachable and in one of the six U.N. languages? Is content updated regularly? Is it mobile friendly?

How is our lack of a DMS and the current state of ICANN.org jeopardizing our ability to meet post-Transition commitments?

Without a DMS to institute content governance, we are making it increasingly difficult for stakeholders to find and track information. ICANN.org cannot easily surface thousands of pages of content either through its site search or its information architecture. There is little or no meta data attached to our content, there is no holistic taxonomy and no logical organization of information. Additionally, the site does not enable an environment for stakeholders to plan and track their engagements, policy work or content preferences. This means ICANN will struggle to meet its post-Transition commitments to increased accountability and transparency. Stakeholders can accuse ICANN of burying information and of not being accountable and transparent, when in actually, it is the lack of a DMS and ICANN.org's structure that is preventing greater and easier access to content.

How do we fix our content problem and why do we need to fix it now?

ICANN needs to establish content governance through a DMS, and integrate that DMS with a new CMS. But before we can set up a new DMS integrated with a CMS, we need to work on our content. We cannot meet our accountability and transparency goals by merely reskinning the current ICANN.org, as has historically been the approach. We have both a technology problem and a content problem. The key to resolving our content issues is dependent on creating a content strategy and governance, which is then implemented through a DMS and displayed on ICANN.org.

Band-aid solutions have only served to exacerbate problems. For example, there are eight different redirects at some levels of the site. Previous patchwork approaches have directly resulted in the issues we must now address. We have avoided the difficult and laborious work of auditing all our content for far too long. The time has come.

We propose, for the first time in ICANN's history, auditing and tagging all externally facing content, and creating a content strategy with a taxonomy, information architecture (IA) and user experience (UX) on which the entire ICANN ecosystem will be built upon.

The resources and effort required to establish control over our content is significant. Currently, there are over 100,000 pieces of untagged content. With each passing year, our content problem grows larger and larger, and it is a very public problem that is not going away. At this point in ICANN's history, the status quo is an option we can no longer afford, and the Cost of Ignoring (COI) means we are abdicating our responsibilities to the global community, undermining our ability to meet our commitments, while also increasing the costs we will have to bear down the road.

Nine Information Transparency Initiative Goals

The Information Transparency Initiative has identified nine goals to meet the five objectives outlined in the introduction of this white paper.

- 1. Focus on a content strategy and implementation of features that enable us to meet ICANN's accountability and transparency goals.
- 2. Increase content findability through the creation of a taxonomy and digital content strategy, and an improved information architecture and user experience.
- 3. Provide a translated user experience.
- 4. Improve the writing and develop audience-specific, multimedia content offerings.
- 5. Ensure that ICANN's technical mission is reflected throughout our content.
- 6. Create and enforce staff content governance and increase publishing speed through distributed content management.
- 7. Develop a mobile first experience and ensure accessibility standards are met.
- 8. Improve engagement with new and existing stakeholders, and enable power users to select content preferences, registrations and perform work through a universal profile environment and automated content delivery system.
- 9. Create a scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

What future impacts will the Information Transparency Initiative produce?

We have outlined a case which argues that our lack of attention to our content governance puts us at risk for meeting our post-Transition commitments to accountability and transparency. But, there are other Information Transparency Initiative benefits including:

- 1. A complete governance for writing, tagging and translating content will improve the quality and accessibility of our content to different stakeholders across the globe.
- 2. The stress on web administration decreases as content creation and publishing is moved from web administration directly to the content owners. This allows web administration to focus on digital projects that require more expert knowledge.
- 3. The tagging and taxonomy will ensure our content is future proof, as meta data will be added to all content, and will be transferable to any future platforms.
- 4. Universal profiles will ensure stakeholders can manage and track their engagements, content preferences and work. This data will enable us to accurately report KPIs, and this tracking will also help us meet our accountability and transparency goals.
- 5. The DMS and CMS setups are foundational work on which all SO/AC sites will be built, enabling ICANN ecosystem wide search and a common, shared governance.
- 6. A universal, shared ICANN glossary will bring consistency and order to our terminology and definitions of those terms.
- 7. Confidential Business Information
- 8. The DMS setup will create the foundational elements for phase two of the DMS implementation, which includes internally-facing documents.

What is and is not included in the Information Transparency Initiative?

In scope:

- ICANN.org
- meetings.icann.org. However, older meeting content will not be tagged, as there are tens of
 thousands of pieces of untagged meeting webpages, PowerPoint presentations and audio files
 in archive. This would involve an enormous effort in itself to include in the new taxonomy. These
 pieces of content will be migrated to the new DMS, but all future meeting content will be tagged
 and included in the taxonomy and information architecture. Older meetings content is rarely
 searched for, but we can explore whether an increase in scope to accommodate older meeting
 content into the taxonomy is desired.
- · myicann.
- ICANN glossary

Out of scope:

- · New gTLD site
- ICANN Learn. We will be adding, creating, revising and translating learning content on ICANN.org.
- SO/AC sites. However, the taxonomy, IA, universal profiles and glossary will serve as the foundation and templates for rebuilding SO/AC sites.
- WHOIS site
- New IANA (PTI) site
- Collaboration tools for SO/ACs, but universal profiles will serve as the foundation for this tool.

How will we provide community visibility into the Information Transparency Initiative, and what happens to the current site while the new DMS and ICANN.org are built?

We recognize the importance of providing the community with visibility into the Information Transparency Initiative, and encouraging the community to submit feedback. This is the multistakeholder model in action. To support that effort, we will launch an Alpha version of the site called evolution.icann.org. This site will show progress on how content governance will be displayed on ICANN.org and what content types will look like on the new ICANN.org. We'll solicit "limited window" feedback opportunities. We'll incorporate this feedback to improve user experience. The community is central to what ICANN staff do and evolution. icann.org reflects their importance in the decision-making process. While we build the DMS and new ICANN. org, the current ICANN.org will continue to serve as the official ICANN site.

What does it cost to create a content strategy, and set up a new DMS and CMS?

The ICANN organization is not a document management company, nor a website development company. We do not have the expertise or idle resources to tackle a project of this size on our own.

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It is also important to emphasize

that ICANN produces a lot of content – over 100,000 pieces of content exists on the site. We have never performed an audit of its content or developed a content strategy. These over 100,000 pieces of content include: webpages, PDFs, videos files, audio files, jpgs, PowerPoint presentations, Word documents and Excel spreadsheets. It requires a significant amount of human effort to ensure we create and execute the right taxonomy, and content and migration strategy.

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- 2. Use of an external vendor to perform and execute the development effort. Internal resources are not available to tackle a project of this size and sophistication. Additionally, internal resources need to maintain the existing site during the Information Transparency Initiative.
- 3. Need to introduce new technological platforms. We do not have a DMS and the current Rails/Drupal CMS setup on ICANN.org hinders our ability to make significant changes to the site. Our two new platforms require external skills and support to execute effectively.
- 4. Staff backfill and content auditors with ICANN knowledge are needed to assist with the content tagging and taxonomy.
- 5. A large percentage of content requires translation.

What are the costs of the status quo?

Findability worsens

There are currently over 100,000+ pieces of content on ICANN.org. As the amount of content rises, the problems also increase. For example, search quality continues to decline because of the unstructured nature of our content and cluttered organization. Also, the lack of content structure and document governance limits our ability to accommodate translated content and provide a consistent language experience to users.

Resource constraints become more acute

The resource limitations on web administration also widens, as staff requests for new or updated webpages grow.

Engagement becomes more difficult

Because content is untagged, unindexed, not translated and does not adhere to Search Engine Optimization (SEO) best practices to improve search on Google, we are missing engagement opportunities with new users. Additionally, there is very little content written for new users, which hinders our engagement efforts. It also undermines our ability to deepen engagement with existing users. We are not making it easy for our stakeholders to find content and stay informed.

Lack of governance over document management impedes transparency and accountability

ICANN has made accountability and transparency commitments. If we continue to neglect our document management on ICANN.org, we risk our reputation and our ability to meet those post-Transition commitments.

What risks exist with the current Information Transparency Initiative plan?

Unknown unknowns

Our primary challenge in the coming months is determining the content governance and strategy. This is predicated on performing the eyes-on-audit of all our content. As outlined earlier, the content governance and strategy are foundational and informs and provides clarity to the rest of the project. Confidential Negotiation Information

Likewise, any

proposed increase in scope would need the Committee's approval.

While the content strategy will provide greater clarity into the project, there are other factors that we cannot predict; for example:

- 1. Future technological advancements render dotCMS and Alfreso obsolete or ineffectual.
- 2. ICANN does not have the right internal resources to implement the project plan.
- 3. Other ICANN priorities divert resources and attention away from the Information Transparency Initiative.
- 4. The content strategy does not fit the changing needs/demands of the community and staff.
- 5. The wrong DMS and CMS were chosen to implement the content strategy.

ICANN staff resources

ICANN internal resources are limited. The Information Technology and Communications Departments will face significant challenges trying to maintain ICANN.org during the Information Transparency Initiative. Departments throughout ICANN will also be asked to assist during the content strategy and workflow processes, placing stress on those departments to deliver timely feedback, and assist with audits. This effort requires meaningful buy-in, change management and communication with the entire organization. The level of effort required by each department will be dependent on the amount of content each department currently owns on ICANN.org. This means that departments may need to provide backfill staff to replace staff who are working on the eyes-on audit.

What level of effort do we estimate is required from staff?

Exploratory Audit

From 17-21 October 2016, a small team from ICANN and Formative worked together to perform an exploratory eyes-on content audit of 4,500 pieces of ICANN.org content. The goals were to provide initial findings on the taxonomy and estimate the level of effort the Information Transparency Initiative would require from staff.

Additionally, Formative worked with ICANN's Web Administration Team to provide the ICANN Information Transparency Initiative team with a breakdown of all the content pieces on ICANN.org. Here, it was possible to group some of the content by content owner to help estimate the level of effort that would be required during an eyes-on audit.

As we discovered during our exploratory audit week, it can be a slow process, as the content owner and topic of a particular piece of content are not always obvious. Outsiders would have a very difficult time adding all the fields we need (owner, sub owner, topic, sub topic, meta description, etc.). Our own people have difficulty determining content owners and topics.

Audit Recommendation

However, going forward, we recommend performing eyes-on audits with the content owners. The audits would be better informed and take less time. This frontloads the level of effort for departments but decreases the overall effort. Content owners would weigh in on the taxonomy in real time, which eliminates a separate taxonomy review. Content owners would also flag content for revision/translation in real time, which eliminates a separate review during the content matrix and priorities phase. Lastly, content owners would have better insights into their requirements and content needs, which saves time during the requirements gathering and UX reviews.

The audit teams would include one-two content owners and members of the Information Transparency Initiative Team. An audit firm, Autonomy Works, would do an initial pass over the content to add titles and other obvious data.

How much content?

Before reviewing the level of effort, it's important to provide some background on the content currently on ICANN.org.

The totals below are estimates.

Total number of content pieces on ICANN.org = 104,000.

- 48,000 GDD (Monthly Registry Reports)
- 18,700 GDD (Registry Agreements)
- 3,200 (images)
- 12,000 (translated content)
- 22,000 all other content

Monthly registry reports and registry agreements belong to GDD, and there are other methods we can deploy to tag, post and organize this content, without requiring an eyes-on audit by staff.

The remaining content = 22,000 (subtract languages, registry reports and agreements and images) and this is the content we are currently concerned with.

Note#1 In addition to owning their own content, the Legal and Office of the CTO Departments will need to review content that belongs to other departments to ensure it is technically and legally accurate, and to ensure we are preserving the content appropriately. Therefore, the level of effort for these departments is based on the amount of content we estimate they own on the site and the amount of content they may need to review. We'll have a more accurate measurement of the time needed when we have begun the audit. All content owners can be broken down into sub-owners; for example, GDD can be broken down into Registry Services, IANA Functions, WHOIS, etc. For simplicity purposes, we have maintained the overall owner. Also, we have grouped MSSI and Transition materials together.

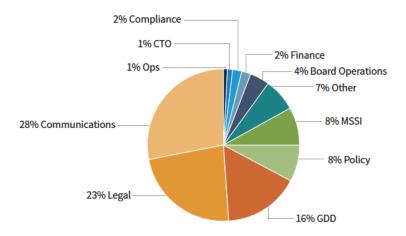
Note#2 We have not included translated content as it can be linked to the original English, and the tagging process can be automated.

How did we determine the current scope of the Information Transparency Initiative?

Our understanding of the problems and resources required to solve our content governance issues has increased. The initial research we performed with Formative uncovered problems which are greater than initially estimated, and basic solutions became unavailable to us. For example, current ICANN.org content contains little (if any) meta data. This means we were able to glean very little information from the automated content audit. Google Analytics was not set up properly which made historical site search data unavailable. We believe that the outlined scope and resources required are essential to meet the Information Transparency Initiative's goals and provide the foundational roadmap for the future ICANN document governance and ICANN ecosystem of SO/AC sites.

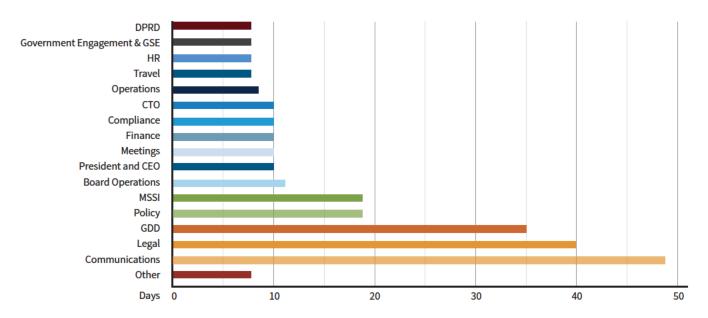
Percentage of ICANN.org content by owner

(does not include monthly registry reports or agreements)



Other content represents DPRD, GSE, Government Engagement, Meetings, Ombudsman and other miscellaneous content owners who own less than 100 pieces of content.

Level of Effort Required by Staff (in work days)



What has the Information Transparency Initiative team accomplished thus far?

As part of our due diligence into determining the goals, timelines, resources and costs, we have undertaken a limited scope of exploratory work. We have kept these costs low, as we are cognizant that the project needs Board approval first. We are now at the turning point in the project, where we need support and approval to move forward.

Below is a list of the tasks we have performed thus far, as part of the Information Transparency Initiative exploratory work:

- 1. Purchased dotCMS (CMS)
- 2. Purchased Alfresco (DMS)
- 3. Contracted content strategy firm, Formative
- 4. Identified technology partner for dotCMS, Architech
- 5. Delivered audience insights and metrics analysis report
- 6. Delivered current ICANN.org content and UX analysis research report
- 7. Interviewed staff at ICANN56 about their content
- 8. Delivered best in class website report
- 9. Performed automated content crawls
- 10. Delivered SEO recommendations report
- 11. Completed exploratory audit of 4.5k pieces of content
- 12. Delivered initial findings of exploratory audit
- 13. Estimated level of effort for staff
- 14. Delivered beginnings of taxonomy
- 15. Identified content tagging firm, Autonomy Works
- 16. Work begun on conflict terms, acronyms and glossary
- 17. Work begun on revised personas and user journeys report
- 18. Identified core and expanded Information Transparency Initiative teams
- 19. Completed RACI, Information Transparency Initiative governance and project plan

Implementation Strategy

The focus of the implementation strategy is first on public content, chosen because of ICANN's increased obligation to accountability and transparency. The proposed plan iteratively organizes content in the document management system through comprehensive tagging, which informs a new information architecture, search and navigation scheme on our content management system. The result of this effort will ultimately be surfaced on ICANN.org. This implementation strategy remains under review to identify opportunities for delivering value to the community sooner. However, as this is a fundamental and long overdue document engineering project, it will require dedicated time and resources to execute successfully.

Who are the Information Transparency Initiative's external vendors?

<u>Architech</u> is dotCMS's only Platinum (highest tier) partner in North America and has been serving clients for over 12 years. They are a company of over 120 engineers and consultants headquartered out of Toronto, Canada with a European office in Krakow, Poland. Architech has experience integrating and implementing highly complex CMS projects for clients that include RBC, Blue Cross Blue Shield, Roto Rooter and Equinix.

<u>Formative</u> is a strategic digital content firm that works with some of the world's leading organizations to plan, design, launch and manage platforms, programs and campaigns, and is comprised of content strategy, media, analytics, CRM, UX, creative, and development capabilities. A substantial part of Formative's work focuses on foundations, not-for-profit and advocacy organizations, whose primary purpose is to engage audiences, and build and serve member bases and communities. Their clients include: The Gates Foundation, Intel, Visual IQ and many others. Formative is based in Seattle, WA.

The Information Transparency Initiative's Plan – Nine Goals

To help explain our path forward, we have outlined each goal, its benefits, the necessary tactics needed to implement each goal and the owner from the Information Transparency Initiative team who is responsible for the goal.

Goal #1 Focus on a content strategy and implementation of features that enable us to meet ICANN's accountability and transparency goals.

BENEFITS

- All content work and features are focused on meeting one clear objective. If work and features do not contribute to our accountability and transparency goals, they are not priorities and should not be tackled in the scope of work.
- Our reputation post-Transition is dependent on meeting these two objectivities.

HOW?

- Content strategy and feature implementation.

WHAT?

- Content strategy, features and implementation are vetted through this lens.

WHO?

- Steering Committee

Goal #2 Increase content findability through the creation of a taxonomy and digital content strategy, and an improved information architecture and user experience.

BENEFITS

- New and existing users will be able to find new and older content through improved,
 multifaceted search; increasing and deepening our engagement.
- Stakeholders are up-to-date on the latest ICANN news.
- Content becomes future proof, as meta data is now added to all content.
- Increases our ability to meet transparency and accountability commitments.
- Reinforces our reputation for quality and competence to the community and new audiences.
- Foundational work for the ICANN digital ecosystem.
- Improved user experience.

HOW?

- Content strategy

WHAT?

- Revise personas and user journeys.
- Perform eyes-on-audit of all content.
- Create taxonomy, information architecture and new URL structure.
- Develop new user experience design.
- Tag all content using taxonomy for site search and apply SEO for external search.
- Implement robust multifaceted search experience with search in all U.N. six languages.
- Online searchable glossary.

WHO?

Contact Information Redacted

Goal #3 Provide a translated user experience

BENEFITS

- Increases our ability to engage with new and existing users in multiple languages.
- Expands the pool of new users.
- Meets our commitments to further globalize ICANN.

HOW?

- Translate first and second level content, expanding to other levels.
- Enable language support and user selectable language interface throughout the entire site.

WHAT?

- Working with the content prioritization contained in the content matrix, Language Services will translate content using the new DMS/dotCMS workflow.
- Enabled language support parallel to English content throughout the entire site.
- Export/import of English content suitable for LS Translation Workflow process.
- Full universal navigation/language bar consistently applied to each page throughout the entire site.

WHO?

Contact Information Redacted

Goal #4 Improve the writing and develop audience-specific, multimedia content offerings.

BENEFITS

- Increases our ability to deepen our engagement with various audience types with multiple content types.
- Improves our ability to translate content.
- Content is easier to understand and is more welcoming, increasing our ability to attract newcomers.

HOW?

Content strategy and matrix

WHAT?

- Content prioritization for creation and revision.
- Team of writers create and revise content.
- Designers create multimedia content to complement and enhance user experience.

WHO?

Contact Information Redacted **Goal #5** Ensure that ICANN's technical mission is reflected throughout our content.

Provides consistent messaging to new audiences and existing stakeholders. Focuses staff and community on our mission and goals. HOW? Content matrix informs prioritization of content creation, revision, tagging and migration. WHAT? Content revised to reflect and marble our technical mission throughout our content. WHO? David Conrad

Goal #6 Create and enforce staff content governance and increase publishing speed through distributed content management.

BENEFITS	
	 Decreases time it takes staff to post content to the site. Stakeholders have access to timely information more quickly. Content governance is established, meaning all content will be distributed to content owners. Simplified content authoring and publishing to dramatically reduce reliance upon IT. Workflows to support structured and simplified content approval and translation processes.
HOW?	
	- Content owners are responsible for creating and revising their content.
WHAT?	
	 Create and document governance on workflows, processes and content ownership. Staff training on new workflows and governance. Internal communication with staff on change management. Support from Executive Team and managers on new processes.
WHO?	
	Contact Information Redacted

Goal #7 Develop a mobile first experience and ensure accessibility standards are met.

BENEFITS

- Futureproofs the site to ensure we are delivering content to where audiences increasing are (on mobile).
- Ensures we are delivering to audiences with accessibility requirements.

HOW?

- Mobile first UX.
- Accessibility UX and features that meet W3C WCAG Level AA Guidelines.

WHAT?

- All pages developed with mobile first design, standard industry practice.
- All pages, features must pass accessibility checklist.

WHO?

Contact Information Redacted

Goal #8 Improve engagement with new and existing stakeholders, and enable power users to select content preferences, registrations and perform work through a universal profile environment and automated content delivery system.

BENEFITS

- Robust and reliable content subscriptions.
- Timely information delivery for stakeholders based on their content and language preferences.
- Actionable data on content preferences, meeting registrations, policy work.
- Foundation for policy work environment for stakeholders.

HOW?

 Community members and new users create profiles, subscribe to content preferences, registrations for events, policy work.

WHAT?

 Automated content delivery platform integrated with Salesforce which becomes the central repository for all data concerning user preferences, community group members, language preferences, all meeting registrations (not limited to public meetings) and community work.

WHO?

Contact Information Redacted

Goal #9 Create scalable platform to implement a future proof content strategy for the ICANN digital ecosystem.

BENEFITS

- Consolidates platforms for all ICANN web properties.
- Standardizes delivery mechanisms and processes.
- Enables content strategy, translations, technical content and governance goals.

HOW?

 Investment in key integrated platforms to ensure technologies are scalable for continued growth of ICANN.org and support future websites in the ecosystem.

WHAT?

- Document Management (Alfresco), system of record for all ICANN content.
- Content Management (dotCMS), presentation layer for all published content.
- Visualization platform (TBD), data rendering.
- Contact Management (Salesforce), community profile data repository.
- Marketing Automation (Marketo), content subscription automation.
- Enterprise Calendaring (TBA), meetings calendar management.
- Event Registration (TBA), public and all ICANN events.
- Glossary (TBD), searchable, centralized repository for ICANN terms, acronyms and definitions.
- Analytics (Google Analytics, TBD), web analytics tool set.
- Search (Google, Elastic Search, TBD), search based on taxonomy.
- Ticketing system integration (Samanage), language translation and content request tracking.
- Identity Management System (Okta), community single sign-on.
- Full language enablement required now and in future technology integrated.

WHO?

Contact Information Redacted

The Information Transparency Initiative: Estimated Future Spend Confidential Negotiation Information

Confidential Negotiation Information								

Board Accountability Mechanisms Committee Charter | As Approved by the Board of Directors on 23 September 2017

I. Purpose

The Board Accountability Mechanisms Committee is responsible for:

- A. Considering and responding to Reconsideration Requests submitted to the Board pursuant to ICANN's Bylaws;
- B. Considering any recommendations arising out of the Independent Review Process prior to the recommendation being submitted by the Board;
- C. Considering Ombudsman's "own motion" investigations; and
- D. Provide input on specific matters at the request of the Board.

II. Scope of Responsibilities

- A. Considering and responding to Reconsideration Requests submitted to the Board pursuant to ICANN's Bylaws.
 - 1. Article 4, Section 4.2 of ICANN's Bylaws sets forth procedures with respect to requests by the ICANN community for reconsideration of staff and Board action or inaction. The Committee is charged with reviewing and responding to such requests pursuant to the requirements of ICANN's Bylaws.
 - 2. The Committee shall annually report to the Board regarding its actions over that past year as set forth in Article 4, Section 4.2(u) of ICANN's Bylaws.
- B. Considering matters regarding the Independent Review Process prior to the matters being submitted to the Board for consideration;
 - 1. Article 4, Section 4.3 of ICANN's Bylaw sets forth procedures for a process for independent third party review of staff and Board action or inaction that allegedly violated the Articles of Incorporation or Bylaws.
 - 2. The Committee is charged with considering any recommendations arising out of the Independent Review Process prior to the recommendation being submitted by the Board, including recommendations regarding interim action or emergency relief if timing permits, and recommendations set forth in an Independent Review Process Panel's Final Declaration.

- C. Considering the Ombudsman's proposals for "own motion" investigations.
 - 1. Should the Ombudsman believe starting an investigation on his/her "own motion" would be appropriate, the Ombudsman will request authority to do so from the BAMC.
 - 2. The BAMC shall determine, based on the information provided by the Ombudsman and any information it obtains on its own, whether such an "own motion" investigation is sanctioned and thus whether or not the Ombudsman is authorized to proceed with that investigation.
- D. Provide input on specific matters at the request of the Board.
 - 1. The BAMC shall consider and provide input on matters referred by the Board.

III. Composition

The Committee shall be comprised of at least three but not more than seven voting Board members, as determined and appointed annually by the Board, each of whom shall comply with the Conflicts of Interest Policy (see http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm.) The voting Directors on the Committee shall be the voting members of the Committee, and the majority of the Committee members must be voting Directors. The members of the Committee shall serve at the discretion of the Board.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the members of the Committee by majority vote of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

IV. Meetings

A. Regularly Scheduled Meetings

The Board Accountability Mechanisms Committee shall meet at least quarterly, or more frequently as it deems necessary to carry out its responsibilities. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together, provided that regularly scheduled meetings generally shall be noticed at least one week in advance.

B. Special/Extraordinary Meetings

Special/extraordinary meetings may be called upon no less than 48 hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together. The purpose of the meeting must be included with the call for the meeting.

C.Action Without a Meeting

i. Making a Motion:

The Committee may take an action without a meeting for an individual item by using electronic means such as email. An action without a meeting shall only be taken if a motion is proposed by a member of the Committee, and seconded by another voting member of the Committee. All voting members of the Committee must vote electronically and in favor of the motion for it to be considered approved. The members proposing and seconding the motion will be assumed to have voted in the affirmative. The action without a meeting and its results will be noted in the next regularly scheduled Committee meeting and will be included in the minutes of that meeting.

ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven (7) days unless the Chair changes that time period. However, the period must be a minimum of two (2) days and a maximum of seven (7) days.

V. Voting and Quorum

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

A report of the activities of the Committee shall be prepared and published semiannually.

VI. Records of Proceedings

A preliminary report with respect to actions taken at each meeting (telephonic or inperson) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

VII. Succession Plan

The Board Accountability Mechanisms Committee shall maintain a succession plan for the Committee which includes identifying the experience, competencies and personal characteristics required to meet the leadership needs of the Committee. The Committee shall annually review the succession plan to ensure that it meets the needs of the Committee.

VIII. Review

The Board Accountability Mechanisms Committee shall conduct a self-evaluation of its performance on an annual basis and share a report on such self-evaluation with the full Board and shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Board Accountability Mechanisms Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

Proposed Amendments to Board Governance Committee Charter

I. Purpose

The Board Governance Committee is responsible for:

- A. Assisting the Board to enhance its performance;
- B. Leading the Board in periodic review of its performance, including its relationship with ICANN's Chief Executive Officer;
- C. Creating and recommending to the full Board for approval a slate of nominees for Board Chair, Board Vice Chair, and chairmanship and membership of each Board Committee, including filling any vacancies which may occur in these positions during the year;
- D. Oversight of compliance with ICANN's Board of Directors' Code of Conduct;
- E. Administration of ICANN's Conflicts of Interest Policy;
- F. Recommending to the Board corporate governance guidelines applicable to ICANN as a global, private sector corporation serving in the public interest; and
- G. Recommending to the Board a nominee for the Chair of the Nominating Committee and a nominee for the Chair-Elect of the Nominating Committee.

II. Scope of Responsibilities

- A. Assisting the Board to enhance its performance.
 - 1. The Committee will serve as a resource for Directors in developing their full and common understanding of their roles and responsibilities as Directors as well as the roles and responsibilities of ICANN. The Committee will provide guidance and assistance in orienting new Directors as the Board's membership evolves. It will help reinforce the Board's commitment to adhere to its Bylaws and Core Values.
 - 2. The Committee will encourage the development of effective tools, strategies, and styles for the Board's discussions.
 - 3. The Committee will work closely with the Chair and Vice-Chair of the Board and the Chief Executive Officer of ICANN.

- B. Leading the Board in its periodic review of its performance, including its relationship with the ICANN Chief Executive Officer.
 - The Committee will develop a thoughtful process for the Board's selfanalysis and evaluation of its own performance and undertake this process at least every two years.
 - 2. The Committee will develop a sound basis of common understanding of the appropriate relationship between the Board and the Chief Executive Officer under the Bylaws. From time to time it will review and advise on the effectiveness of that important relationship.
 - 3. The Committee will serve as a resource to Directors and the Chief Executive Officer by stimulating the examination and discussion of facts and analysis to complement anecdotal and other information acquired by individual directors from members of the community. In this way the Committee will assist the Board to distinguish among systemic problems, chronic problems, and isolated problems and will focus the Board's attention to both facts and perceptions.
- C. Creating and recommending to the full Board for approval a slate of nominees for Board Chair, Board Vice Chair, and chairmanship and membership of each Board Committee, including filling any vacancies which may occur in these positions during the year.
 - In accordance with the Board Governance Committee Procedures for Board Nominations posted on the Committee webpage, the Committee will: (a) in advance of the Annual General Meeting (AGM) create for Board approval a new slate of nominees to serve on each committee for the upcoming year; (b) fill any vacancies that arise during the year; and (c) recommended to the Board committee appointments for Board members beginning their terms on a date other than at AGM.
 - 2. The Committee shall periodically review the charters of the Board Committees, including its own charter and work with the members of the Board Committees to develop recommendations to the Board for any charter adjustments deemed advisable.
 - The Committee may serve as a resource for the Chief Executive
 Officer and Directors who are considering the establishment of new
 committees.
- D. Oversight of compliance with ICANN's Board of Directors' Code of Conduct.
 - 1. The Committee shall be responsible for oversight and enforcement with respect to the Board of Directors' Code of Conduct. In addition, at

- least annually, the Committee will review the Code of Conduct and make any recommendations for changes to the Code to the Board.
- 2. The Committee shall provide an annual report to the full Board with respect to compliance with the Code of Conduct, including any breaches and corrective action taken by the Committee.
- E. Administration of ICANN's Conflicts of Interest Policy.
 - The Committee shall review the annual conflicts of interest forms required from each Directors and Liaisons and shall consider any and all conflicts of interest that may arise under the Conflicts of Interest Policy.
 - 2. The Committee shall periodically review the Conflicts of Interest Policy and consider whether any modifications should be made to the policy to improve its effectiveness.
- F. Recommending to the Board corporate governance guidelines applicable to the ICANN as a global, private sector corporation serving in the public interest
 - The Committee shall review the existing corporate governance guidelines developed by ICANN staff, be attentive to developments in corporate governance in the global context, and bring ideas and recommendations for adjustments in these guidelines to the Board for its consideration.
- G. Recommending to the Board a nominee for the Chair of the Nominating Committee and a nominee for the Chair-Elect of the Nominating Committee.
 - Annually the Committee shall identify, through informal and formal means, and recommend that the Board approve a nominee to serve as Chair of the Nominating Committee and a nominee to serve as the Chair-Elect of the Nominating Committee.

III. Composition

The Committee shall be comprised of at least three but not more than seven Board members, as determined and appointed annually by the Board, each of whom shall comply with the Conflicts of Interest Policy (see http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm.) The voting Directors on the Committee shall be the voting members of the Committee, and the majority of the Committee members must be voting Directors. The members of the Committee shall serve at the discretion of the Board.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the voting members of the Committee by majority vote of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

IV. Meetings

A. Regularly Scheduled Meetings

The Board Governance Committee shall meet at least quarterly, or more frequently as it deems necessary to carry out its responsibilities. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together, provided that regularly scheduled meetings generally shall be noticed at least one week in advance.

B. Special/Extraordinary Meetings

Special/extraordinary meetings may be called upon no less than 48 hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together. The purpose of the meeting must be included with the call for the meeting.

C. Action Without a Meeting

i. Making a Motion:

The Committee may take an action without a meeting for an individual item by using electronic means such as email. An action without a meeting shall only be taken if a motion is proposed by a member of the Committee, and seconded by another voting member of the Committee. All voting members of the Committee must vote electronically and in favor of the motion for it to be considered approved. The members proposing and seconding the motion will be assumed to have voted in the affirmative. The action without a meeting and its results will be noted in the next regularly scheduled Committee meeting and will be included in the minutes of that meeting.

ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven (7) days unless the Chair changes that time period. However, the period must be a minimum of two (2) days and a maximum of seven (7) days.

V. Voting and Quorum

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

VI. Records of Proceedings

A preliminary report with respect to actions taken at each meeting (telephonic or in-person) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

A report of the activities of the Committee shall be prepared and published semiannually.

VII. Succession Plan

The Board Governance Committee shall maintain a succession plan for the Committee, which should include identifying the experience, competencies and personal characteristics required to meet the leadership needs of the Committee. The Committee shall annually review the succession plan to ensure that it meets the needs of the Committee.

VIII. Review

The Board Governance Committee shall conduct a self-evaluation of its performance on an annual basis and share a report on such self-evaluation with the full Board and shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Board Governance Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

Board Technical Committee Charter

As approved on 23 September 2017

I. Purpose

The Technical Committee of the ICANN Board is responsible for supporting the ICANN Board with oversight of technical work necessary to meet ICANN's mission of ensuring the stable and secure operation of the Internet's unique identifier systems.

II. Scope of Responsibilities

The following activities are set forth as a guide for fulfilling the Committee's responsibilities. The Committee is authorized to carry out these activities and other actions reasonably related to the Committee's Board-level strategic oversight of the following technical matters/purposes, or as assigned by the Board from time to time:

- A. Ensure that ICANN organization has an appropriate technical roadmap, consistent with ICANN's strategy;
- B. Explore and make recommendations on technical issues that require Board intervention;
- Recommend resolutions to the Board along with sufficient background information and analysis to further the technical work of the ICANN organization;
- D. Provide input on specific items at the request of the Board or ICANN organization;
- E. Identify or evaluate opportunities to work with other standards or information organizations to facilitate the interoperability of the Internet's unique identifier systems;
- F. Facilitate the Board's gaining a deeper understanding of general technical issues impacting the security, stability and resiliency of the Internet's unique identifier systems;
- G. Coordinate the Board's review and response relating to advice from the Security and Stability Advisory Committee and the Root Server System Advisory Committee;
- H. Provide analysis to the Board on technical issues related to maintenance or harmonization that are raised by Board members,

- Board committees, ICANN organization, the Technical Experts Group or other Advisory bodies;
- I. Ensure portfolio of technical programs and major projects as identified by the Board or ICANN organization (including community-driven initiatives) are in line with ICANN Strategy and the current updated technical roadmap by answering questions such as:
 - What major technical programs or initiatives should ICANN be doing or funding?
 - Does ICANN organization have the right number of technical programs/projects/teams (too many, too few)?
 - Are there major technical program/project/team initiatives that ICANN should be working on that it isn't?
 - Is the scope of each agreed major technical program and project initiative right?
 - Are there major technical programs/projects/products/teams that should be closed or discontinued?
- J. Lead and coordinate the Board's engagement with the Technical Experts Group; and
- K. Provide guidance on appropriate governance and standards development processes by answering questions such as:
 - What should be the process for approving a new major technical program or team?
 - What should be the process for (re-) prioritizing a major technical program/project/team?
- L. Periodically review IT tools made available to Board members for Board activities, and review recommendations for change based upon the evolution of both Board member needs and evolution of IT tools.

III. Composition

The Committee shall be comprised of at least three Board members as determined and appointed annually by the Board, each of whom shall comply with the Conflicts of Interest Policy (see http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm.). The Committee will have no independent authority to take action and will make recommendations to the Board to consider and take action on, by

resolution of the Board. Accordingly, while the Committee may only include Board Directors and/or Liaisons, the Committee may be made up primarily of Liaisons and may be chaired by a Liaison. The members of the Committee shall serve at the discretion of the Board.

Where possible, Committee membership shall be made up of Board Directors and Liaisons that have specific knowledge and expertise on the matters within the Committee's scope, including, but not limited to: operational experience with the Internet's technical identifiers; membership in the SSAC or RSSAC; and/or those who have direct experience in defining, developing and/or leading the implementation of large-scale engineering projects.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the members of the Committee by majority of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

IV. Meetings

A. Regularly Scheduled Meetings.

The Committee shall meet at least three times per year, or more frequently as it deems necessary to carry out its responsibilities. The schedule of these meetings will be established at the beginning of the calendar year. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Regularly scheduled meetings shall be noticed at least one week in advance, unless impracticable, in which case the notice shall be as soon as practicable.

B. Special/Extraordinary Meetings.

Special/Extraordinary meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together. The purpose of the meeting must be included with the call for the meeting.

C. Action Without a Meeting

i. Making a Motion:

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ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven days unless the Chair changes that time period. However, the period must be a minimum of two days and a maximum of seven days.

V. Voting and Quorum

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per voting member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

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VII. Succession Plan

The Committee shall maintain a succession plan for the Committee which includes identifying the experience, competencies and personal characteristics required to meet the leadership needs of the Committee. The Committee shall annually review the succession plan to ensure that it meets the needs of the Committee.

VIII. Review

The performance of the Committee shall be reviewed annually and informally by the Board Governance Committee. The Board Governance Committee shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

Board Technical Committee Charter

As approved on 23 September 2017

I. Purpose

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II. Scope of Responsibilities

The following activities are set forth as a guide for fulfilling the Committee's responsibilities. The Committee is authorized to carry out these activities and other actions reasonably related to the Committee's Board-level strategic oversight of the following technical matters purposes or as assigned by the Board from time to time:

- A. Ensure that ICANN organization has an appropriate technical roadmap, consistent with ICANN's strategy;
- B. Explore and make recommendations on technical issues that require Board intervention;
- Recommend resolutions to the Board along with sufficient background information and analysis to further the technical work of the ICANN organization;
- D. Provide input on specific items at the request of the Board or ICANN organization;
- E. Identify or evaluate opportunities to work with other standards or information organizations to facilitate the interoperability of the Internet's unique identifier systems;
- F. Facilitate the Board's gaining a deeper understanding of general technical issues impacting the security, stability and resiliency of the Internet's unique identifier systems;
- G. Coordinate the Board's review and response relating to advice from the Security and Stability Advisory Committee and the Root Server System Advisory Committee;
- H. Provide analysis to the Board on technical issues related to maintenance or harmonization that are raised by Board members,

- Board committees, ICANN organization, the Technical Experts Group or other Advisory bodies;
- I. Ensure portfolio of technical programs and major projects as identified by the Board or ICANN organization (including community-driven initiatives) are in line with ICANN Strategy and the current updated technical roadmap by answering questions such as:
 - What major technical programs or initiatives should ICANN be doing or funding?
 - Does ICANN organization have the right number of technical programs/projects/teams (too many, too few)?
 - Are there major technical program/project/team initiatives that ICANN should be working on that it isn't?
 - Is the scope of each agreed major technical program and project initiative right?
 - Are there major technical programs/projects/products/teams that should be closed or discontinued?
- J. Lead and coordinate the Board's engagement with the Technical Experts Group; and
- K. Provide guidance on appropriate governance and standards development processes by answering questions such as:
 - What should be the process for approving a new major technical program or team?
 - What should be the process for (re-) prioritizing a major technical program/project/team?
- L. Periodically review IT tools made available to Board members for Board activities, and review recommendations for change based upon the evolution of both Board member needs and evolution of IT tools.

III. Composition

The Committee shall be comprised of at least three, but not more than seven Board members, as determined and appointed annually by the Board, each of whom shall comply with the Conflicts of Interest Policy (see http://www.icann.org/en/committees/coi/coi-policy-04mar99.htm.). The Committee will have no independent authority to take action and will make recommendations to the Board to consider and take action

on, by resolution of the Board. Accordingly, while the Committee may only include Board Directors and/or Liaisons, the Committee may be made up primarily of Liaisons and may be chaired by a Liaison. The members of the Committee shall serve at the discretion of the Board.

Where possible, Committee membership shall be made up of Board Directors and Liaisons that have specific knowledge and expertise on the matters within the Committee's scope, including, but not limited to: operational experience with the Internet's technical identifiers; membership in the SSAC or RSSAC; and/or those who have direct experience in defining, developing and/or leading the implementation of large-scale engineering projects.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the members of the Committee by majority of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

IV. Meetings

A. Regularly Scheduled Meetings.

The Committee shall meet at least three times per year, or more frequently as it deems necessary to carry out its responsibilities. The schedule of these meetings will be established at the beginning of the calendar year. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Regularly scheduled meetings shall be noticed at least one week in advance, unless impracticable, in which case the notice shall be as soon as practicable.

B. Special/Extraordinary Meetings.

Special/Extraordinary meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together. The purpose of the meeting must be included with the call for the meeting.

C. Action Without a Meeting

i. Making a Motion:

The Committee may take an action without a meeting for an individual item by using electronic means such as email. An action without a meeting shall only be taken if a motion is proposed by a member of the Committee, and seconded by another voting member of the Committee. All voting members of the Committee must vote electronically and in favor of the motion for it to be considered approved. The members proposing and seconding the motion will be assumed to have voted in the affirmative. The action without a meeting and its results will be noted in the next regularly scheduled Committee meeting and will be included in the minutes of that meeting.

ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven days unless the Chair changes that time period. However, the period must be a minimum of two days and a maximum of seven days.

V. Voting and Quorum

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per voting member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

VI. Records of Proceedings

A preliminary report with respect to actions taken at each meeting (telephonic or in-person) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

A report of the activities of the Committee shall be prepared and published semiannually.

VII. Succession Plan

The Committee shall maintain a succession plan for the Committee which includes identifying the experience, competencies and personal characteristics required to meet the leadership needs of the Committee. The Committee shall annually review the succession plan to ensure that it meets the needs of the Committee.

VIII. Review

The performance of the Committee shall be reviewed annually and informally by the Board Governance Committee. The Board Governance Committee shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

REFERENCE MATERIALS – BOARD PAPER NO. 2017.09.23.1i

TITLE: Board Governance Committee Charter

Revisions and the Inaugural Charters of the Board Accountability Mechanisms Committee

and the Board Technical Committee

EXECUTIVE SUMMARY:

The Board is being asked to consider the BGC's recommendation to approve:

- (i) the inaugural charter of the Board Accountability Mechanisms Committee (BAMC);
- (ii) the revised Board Governance Committee (BGC) charter; and
- (iii) the inaugural charter of the Board Technical Committee.

DOCUMENTS/RELEVANT LINKS

The following attachments are relevant to the Board's consideration of aforementioned matters.

Attachment A is the proposed inaugural charter of the BAMC.

Attachment B is the proposed revised charter of the BGC.

Attachment C is the proposed inaugural charter of the BTC.

Submitted By: Amy A. Stathos, Deputy General Counsel

Date Noted: 29 August 2017

Email: amy.stathos@icann.org

DotMusic Reconsideration Request ("RR")

1. Requester Information

Requester is represented by:

Name: Dechert LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester:

Name: DotMusic Limited ("DotMusic")

Address: Contact Information Redacted

Email: Constantinos Roussos, Contact Information Redacted

Counsel: Arif Hyder Ali, Contact Information Redacted

2. Request for Reconsideration of:

 \underline{X} Board action/inaction

X Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

On September 17, 2016, the ICANN Board passed a Resolution requesting ICANN to conduct "an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE

reports issued by the CPE provider."¹ Further, on October 18, 2016, ICANN's Board Governance Committee ("BGC") requested it be provided "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."² In so doing, the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.³

On January 30, 2017, DotMusic requested "an immediate update about the status of: (1) DotMusic's Reconsideration Request 16-5 and the BGC's best estimate of the time it requires to make a final recommendation on DotMusic's Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider."⁴ DotMusic received no response. On April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that DotMusic had not received any communication from the independent evaluator. ICANN had not provided any details as to how the evaluator was selected, what its remit was, what information had been provided, whether the evaluator will seek to consult with the affected parties, etc.⁵

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN BGC Chair Chris Disspain ("BGC Letter") indicating that the Reconsideration Request 16-5 was "on hold" and *inter alia* that:

The BGC decided to request from the CPE provider the materials and research

¹ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a (emphasis supplied).

² Minutes of the Board Governance Committee, October 18, 2016, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

³ ICANN Bylaws Art. IV. § 2.13 "The Board Governance Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. *Any information collected by ICANN from third parties shall be provided to the Requestor.*"

⁴ Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, January 30, 2017, https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf

⁵ Annex B, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf

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. 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).

On May 5, 2017, Arif Ali, on behalf of DotMusic, submitted a DIDP Request 20170505-1 ("DIDP Request")⁷ requesting, *inter alia*:

- 1. The identity of the individual or firm undertaking the Review;
- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 3. The date of appointment of the evaluator;
- 4. The terms of instructions provided to the evaluator;
- 5. The materials provided to the evaluator by the EIU;
- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 7. The materials submitted by affected parties provided to the evaluator;
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
- 9. The most recent estimates provided by the evaluator for the completion of the

⁷ See Annex C, DIDP Request at https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf.

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⁶ See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf

investigation; and

10. All materials provided to ICANN by the evaluator concerning the Review.

DotMusic concluded in its DIDP Request that "there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review."

On May 15, 2017, in a letter to DotMusic, Jeffrey LeVee, on behalf of ICANN, reiterated the statements of BGC Chairman Chris Disspain and stated that certain questions concerning the CPE Review "will be addressed as part of ICANN's response to the DIDP in due course."

In response, on May 21, 2017, Arif Ali, on behalf of DotMusic, responded that DotMusic does "not consider ICANN's delays justified" and that "[r]egrettably, ICANN continues to breach its transparency obligations, ignoring DotMusic's information requests concerning the review process currently being conducted by an independent evaluator. Particularly, ICANN has ignored the basic safeguards that DotMusic has proposed, *inter alia*, that the identity of the evaluator be disclosed; that DotMusic be provided access to the materials being reviewed by the evaluator; and that DotMusic's right to be heard during the evaluation process and comment on the evaluation results be given full effect." Further, the letter stated that "[i]t is clear that the delays and secrecy are thus impairing ICANN's Board from discharging their oversight responsibilities. Withholding materials concerning DotMusic's CPE evaluation does not merely result in a denial of DotMusic's right to be heard; it also hampers the efficiency of the investigation, by disabling us from being

⁸ Annex F, https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf

able to identify the flaws in the EIU's results. We urge ICANN to reconsider whether continuing a pattern of secrecy and neglect to the right of applicants to fair treatment serves either ICANN's or the global music community's best interests."

On June 4, 2017, ICANN responded to the DIDP Request, ¹⁰ stating that:

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017 (sic), FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. 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. On 13 January 2017, FTI signed an engagement letter to perform the review... [T]he scope of the review consists of: (1) review of the process by which the ICANN organization 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.

Moreover, ICANN denied critical items requested. Specifically:

<u>Items 1- 4</u> ... With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

<u>Items 5-6</u> Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board (Item 6). As detailed in the Community Priority Evaluation Process Review Update, the review is being conducted in two parallel tracks. *The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early*

⁹ Annex G, https://www.icann.org/en/system/files/correspondence/ali-to-Levee-21may17-en.pdf

¹⁰ Annex D, ICANN DIDP Response, June 4, 2017, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf

March 2017. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

[...]

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

<u>Item 8</u>. Item 8 seeks the disclosure of "[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator." This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

<u>Item 10</u>. Item 10 requests the disclosure of "[a]ll materials provided to ICANN by the evaluator concerning the Review." As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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.
- 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.
- 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.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

On June 10, 2017, Arif Ali, on behalf of DotMusic and dotgay, sent a joint letter to ICANN stating, *inter alia*, that:¹¹

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

First, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

Second, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation 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," and that (ii) "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."

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration

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¹¹ Annex H, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (10 June 2017).

- requests, including all of the documents listed in Annexes A and B;
- 2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
- 3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
- 4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017, to date.

According to ICANN's DIDP "Defined Conditions of Nondisclosure:"12

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.

Information...may still be made public if ICANN determines, under the particular circumstances, that the <u>public interest</u> in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the <u>public interest</u> in disclosing the information.

ICANN's default policy is to release all information requested unless there is a *compelling* reason not to do so. ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of *public interest* in terms of the DIDP Request.

ICANN signed an engagement letter with FTI to perform an *independent* review of the CPE Process based on the acceptance by ICANN's Board of the systemic breaches of its Bylaws

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¹² See ICANN DIDP, https://www.icann.org/resources/pages/didp-2012-02-25-en

in the CPE Process identified by the *Despegar* and *Dot Registry* IRP Declarations.¹³ It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI's findings and conclusions. These materials critically include the items requested by DotMusic in its DIDP request that was denied by ICANN because ICANN "determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure." To prevent serious questions arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to DotMusic and the public to ensure full transparency, openness and fairness. This includes the items requested by DotMusic that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure and conflict check processes (Item 2), and the existence of the terms of appointment (Item 4) but also the underlying documents that substantiate ICANN's claims.

ICANN's assertion with regard to Item 5 that with the "exception of the correspondence between the ICANN organization and the CPE Provider regarding the evaluations, all materials provided to the evaluator are publicly available" is undercut by ICANN's admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP request. 15

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¹³ See Dot Registry Declaration, https://www.icann.org/en/system/files/irp-declaration-redacted-29jul16-en.pdf. See also Despegar Declaration, https://www.icann.org/en/system/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf.

¹⁴See ICANN DIDP, https://www.icann.org/resources/pages/didp-2012-02-25-en at p.4

¹⁵ See ICANN DIDP, https://www.icann.org/resources/pages/didp-2012-02-25-en at p.3 ("The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017.").

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel of the close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.¹⁶

In fact, this is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure." In addition, ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including DotMusic's Reconsideration Request 16-5. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency and credibility of the FTI investigation.

4. Date of action/inaction:

June 4, 2017

5. On what date did you become aware of action or that action would not be taken?

June 5, 2017

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¹⁶ *See* Dot Registry Declaration, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf at paras.93-101.

6. Describe how you believe you are materially affected by the action or inaction:

ICANN's actions and inactions materially affect the delineated and organized music community defined in DotMusic's application that is supported by organizations with members representing over 95% of global music consumed (the "Music Community") and DotMusic. Not disclosing these documents has negatively impacted the timely, predictable and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency and fairness of the CPE process. Without an effective policy to ensure openness, transparency and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency and openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

ICANN's action and inaction in denying the DIDP Request do not follow ICANN's Resolutions, its Bylaws or generally how ICANN claims to hold itself to high standards of accountability, transparency and openness. Such action and inaction raise additional questions as to the credibility, reliability and trustworthiness of the New gTLD Program's CPE process and its management by ICANN, especially in the case of the CPE Report and CPE process of DotMusic's application for the .MUSIC gTLD (Application ID: 1-1115-14110), which is subject to the CPE Reconsideration Request 16-5 ("CPE RR")¹⁷ and is highly relevant to this Request.

A closed and opaque ICANN damages the credibility, accountability and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating

¹⁷ CPE RR 16-5, https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en

community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the DotMusic CPE RR. In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the Music Community that has supported the DotMusic community-based application for the .MUSIC string to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

The Reconsideration Request and Independent Review Process accountability mechanisms are the <u>only</u> recourse for applicants (or impacted requesters) in lieu of litigation. As such, ICANN must provide documents and Items in DIDP requests in which there is an appearance of gross negligence, conflicts of interest, multiple violations of established process, or even simply questions from the affected parties as to how a certain process was followed.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

See Answer to Question 6 above.

8. <u>Detail of Staff/Board Action/Inaction – Required Information</u>

See Answer to Question 6 above.

9. What are you asking ICANN to do now?

The Requester requests ICANN to disclose all the Items requested in the Request based on ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability) to serve the global public interest.

Such disclosure will increase transparency and provide DotMusic and the BGC with additional information to assist in <u>evaluating</u> the CPE Report as well as the EIU's decision-making process in issuing the CPE Report. As outlined in Reconsideration Request 16-5 (and incorporated here by reference), ICANN engaged in <u>numerous</u> procedural and policy violations (including material omissions and oversights), which lead to inconsistencies and substantial flaws in its rationale methodology and scoring process.

The Requester requests that the BGC apply the Documentary Information Disclosure Policy to the DIDP Request in the manner it was intended to operate 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." The Requester requests the BGC:

- 1. Review the ICANN Staff decision to withhold all the information requested, to ensure that each and every requested Item, documents and information request was considered and evaluated individually, and that the public interest test was applied to each individual item properly. The Requester requests that the Items and documents requested are disclosed;
- 2. To recognize and instruct Staff that ICANN's default policy is to release all information requested unless there is a **compelling** reason not to do so and, where such a compelling

reason for nondisclosure exists to inform the Requesters of the reason for nondisclosure pertaining to each individual item requested; and

3. Insofar as Items remain withheld, to inform the Requesters as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm. Withholding information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws.

As indicated in the CPE Reconsideration Request 16-5, the promise of independence, nondiscrimination, transparency and accountability has been grossly violated in the .MUSIC CPE as the misguided and improper .MUSIC CPE Report shows. As such, the disclosure of the Items and documents requested will ensure that the BGC can perform due diligence and exercise independent judgement to make a well-informed decision pertaining to this DIDP RR (and subsequently the CPE Reconsideration Request 16-5).

10. Please state specifically 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.

DotMusic is a community applicant for .MUSIC, an application supported by organizations with members representing over 95% of music consumed. The justifications under which the Requester has standing and the right to assert this reconsideration request are:

- i. Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way. 18
- ii. Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;
- iii. Conflict of interest issues;
- iv. Failure to consider evidence filed; and
- v. Violation of ICANN Articles of Incorporation/Bylaws:
 - a. Introducing and <u>promoting</u> competition in the registration of domain names where practicable and <u>beneficial in the public interest</u>. ¹⁹
 - b. Preserving and <u>enhancing</u> the operational stability, <u>reliability</u>, security, and global interoperability of the Internet. ²⁰
 - c. Employing <u>open</u> and <u>transparent</u> policy development mechanisms that (i) promote <u>well-informed decisions</u> based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.²¹
 - d. <u>Making decisions by applying documented policies neutrally and objectively, with</u> integrity and fairness.²²
 - e. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, <u>obtaining informed input from those entities most</u> affected.²³
 - f. Remaining accountable to the Internet community through mechanisms that

¹⁸ Final Issue Report on New gTLD Subsequent Procedures, https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf, at pp.23-24

¹⁹ ICANN Bylaws, Art. I, § 2.6

²⁰ ICANN Bylaws, Art. I, § 2.1

²¹ ICANN Bylaws, Art. I, § 2.7

²² ICANN Bylaws, Art. I, § 2.8

²³ ICANN Bylaws, Art. I, § 2.9

enhance ICANN's effectiveness.²⁴

g. 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.²⁵

h. <u>Non-discriminatory treatment</u>: ICANN shall not apply its standards, policies, procedures, or practices <u>inequitably or single out any particular party for disparate</u> treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.²⁶

i. <u>Transparency</u>: ICANN and its constituent bodies shall operate to the <u>maximum</u> extent feasible in an <u>open and transparent manner and consistent with procedures</u> designed to ensure fairness.²⁷

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? No

11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.

12. Do you have any documents you want to provide to ICANN? Yes. See exhibits in Annexes.

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,

²⁴ ICANN Bylaws, Art. I, § 2.10

²⁵ ICANN Bylaws, Art. I, § 2.11

²⁶ ICANN Bylaws, Art. II, § 3

²⁷ ICANN Bylaws, Art. III, § 1

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.

A CO	I 10 2017
	June 18, 2017
Arif Hyder Ali	Date

ANNEX A



1900 K Street NW Washington DC 20006 1110 +1 202 261 3300 Main +1 202 261 3333 Fax www.dechert.com

ARIF HYDER ALI



January 30, 2017

VIA E-MAIL

ICANN Board Governance Committee	
c/o Chris Disspain, ICANN BGC Chair	
12025 Waterfront Drive, Suite 300	
Los Angeles, CA 90094	

Mr Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Dear President Marby and members of the BGC:

We are writing on behalf of our client, DotMusic Limited ("DotMusic"), to remind ICANN about the Board Governance Committee's (the "BGC") delay in making a final recommendation to the ICANN Board (the "Board") regarding DotMusic's Reconsideration Request 16-5 ("Reconsideration Request"). Over 11 months have passed since DotMusic submitted the Reconsideration Request to the BGC, however, the BGC has not made a final recommendation to the Board with respect to DotMusic's Reconsideration Request. This is inconsistent with the BGC's obligation under ICANN's Bylaws to review a reconsideration request on a timely basis. Specifically,

• Under Section 4.2(q) of ICANN's Bylaws (October 1, 2016): "The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within 30 days following its receipt of the Ombudsman's evaluation (or 30 days 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), unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final recommendation. In any event, the Board Governance Committee shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request." (emphasis added); see also Section 4.2(q) of ICANN's Bylaws (May 27, 2016) (same); and



• <u>Under Article IV(2)(16) of ICANN's Bylaws (February 11, 2016)</u>: "The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within *thirty days* following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final determination or recommendation." (emphasis added); *see also* Article IV(2)(16), ICANN's Bylaws (July 30, 2014) (same).

The BGC has been provided with substantial evidence for making a final recommendation on DotMusic's Reconsideration Request: (1) DotMusic has submitted extensive materials to assist the BGC in assessing DotMusic's Reconsideration Request, including multiple independent expert opinions prepared by renowned experts in the music industry, such as an independent joint expert opinion by Dr. Noah Askin and Dr. Joeri Mol and independent expert opinions by Honorary Professor Dr. Jorgen Blomqvist and Dr. Richard James Burgess; and (2) DotMusic made a lengthy telephonic presentation to the BGC on September 17, 2016, and gave the BGC ample opportunity to seek additional information or clarifications from DotMusic during the presentation.

Likewise, we understand that: (1) on September 17, 2016, the Board directed "the President and CEO, or his designee(s) to undertake an independent review of the process by which ICANN staff interacted with the CPE provider, both generally and specifically with respect to the CPE reports issued by the CPE provider" ("Independent Review"); and (2) on October 18, 2016, the BGC requested "from the CPE provider the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports" ("Request for Information from the CPE Provider"). DotMusic has not received *any* communication from ICANN regarding the status of the Independent Review or Request for Information from the CPE Provider. The BGC cannot (and should not) rely on these processes to delay DotMusic's application.

Accordingly, we request an immediate update about the status of: (1) DotMusic's Reconsideration Request 16-5 and the BGC's best estimate of the time it requires to make a final recommendation on DotMusic's Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider.

We look forward to receiving a response from you.



DotMusic reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

Arif Hyder Ali

ANNEX B



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www dechert com

ARIF HYDER ALI



28 April 2017

VIA E-MAIL

Mr. Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094 ICANN Board of Directors c/o Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: Dot Music Reconsideration Request concerning .MUSIC

Dear President Marby and Members of the Board:

We write on behalf of our client, DotMusic Limited ("DotMusic"), to inquire when the ICANN Board Governance Committee (the "BGC") will issue its final decision on DotMusic's Reconsideration Request 16-5 regarding the .MUSIC top-level domain (the "Reconsideration Request"). We further write to protest ICANN's lack of transparency in its treatment of DotMusic's application and ICANN's failure to provide any sort of response to DotMusic's various inquiries about the status of its application.

DotMusic submitted its Reconsideration Request *more than one year ago* and *nearly seven months* have passed since DotMusic delivered a presentation to the BGC. As we noted in our most recent correspondence of 30 January 2017, we find ICANN's protracted delays in reaching a decision on DotMusic's Reconsideration Request and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of our request a clear

Reconsideration Request 16-5 (24 February 2016), https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en





violation of ICANN's commitments to transparency enshrined in its governing documents.²

Further, it is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider" and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."

DotMusic wrote three months ago to ICANN seeking the disclosure of the identity of the individual or organization conducting the independent review ("evaluator") and informing ICANN that it had not received any communication from the independent evaluator.⁵ Both of these requests remain unaddressed.

ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Moreover ICANN Board Members have stated in public fora that the independent review "[] has been happening *for a little while. We don't have an actual date for completion yet.*" While ICANN Board members have indicated that ICANN would post an update as to the status of the review following ICANN 58 in March 2017, no such

See letter from Arif Ali, to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017), https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf

Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures (17 September 2016), https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a.

Minutes of the Board Governance Committee (18 October 2016), https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.

Letter from Arif Ali to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017)

ICANN Copenhagen Meeting 58,statement by Chris Dispain at p.91 http://schd.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf





update has been provided. Further, ICANN's refusal to disclose the identity of the individual(s) carrying out the review raises the risk of conflicts of interest. Such a conflict would undermine ICANN's stated purpose of restoring trust and confidence to the CPE process, and call into question the validity of any resultant report to ICANN's Board. ICANN should therefore disclose the identity of the independent evaluator and its method of selection without further delay.

ICANN's refusal to disclose the scope of the review violates its Bylaw commitment to procedural fairness and transparency. DotMusic has no assurance that the reviewer will take into account DotMusic's extensive submissions in any report prepared for ICANN's Board.

DotMusic's rights are thus being decided by a process about which it: (1) possesses minimal information; (2) carried out by an individual or organization whose identity ICANN is shielding; (3) whose mandate is secret; (4) whose methods are unknown; and (5) whose report may never be made public by ICANN's Board. The exclusion of directly affected parties from participation eerily reproduces the shortcomings of the EIU evaluations that are under scrutiny in the first place.

With this letter, we renew our request that ICANN extend DotMusic, and the global music community that has supported its community application, a response to its inquiries regarding the anticipated resolution of DotMusic's Reconsideration Request.

Further, we request disclosure of information about the nature of the independent review ICANN apparently has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

1. The identity of the individual or agency ("evaluator") undertaking the review.

ICANN Bylaw Art.I § 3 "Making decisions by applying documented policies neutrally and objectively, with integrity and fairness." ICANN Bylaw Art.III § 3 "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."



- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment.
- 3. The date of appointment of the evaluator.
- 4. The terms of instructions provided to the evaluator.
- 5. The materials provided to the evaluator by the EIU.
- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board.
- 7. The materials submitted by affected parties provided to the evaluator.
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.
- 9. The most recent estimates provided by the evaluator for the completion of the investigation.

ICANN must immediately ensure that the evaluator communicates with DotMusic as part of the evaluation process in order to afford DotMusic the fundamental due process right to be heard and treated fairly. We reserve the right to request further disclosure based on ICANN's prompt provision of the above information. We are unaware of any rule of law, administrative procedure or corporate governance that would justify ICANN's silence or withholding of information.

DotMusic reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

Arif Hyder Ali

Partner



Mr. Göran Marby ICANN Board of Directors 28 April 2017 Page 5

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

ANNEX C



1900 K Street NW Washington DC 20006 1110 +1 202 261 3300 Main +1 202 261 3333 Fax www.dechert.com

ARIF HYDER ALI

Contact Information Redacted

5 May 2017

VIA E-MAIL DIDP@ICANN.ORG

ICANN c/o Steve Crocker, Chairman Goran Marby, President and CEO 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: Request under ICANN's Documentary Information Disclosure Policy concerning Community Priority Evaluation for .MUSIC Application ID 1-1115-14110¹

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report² found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").³

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

DotMusic's .MUSIC community Application (ID 1-1115-14110), https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1392; Also *See* https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392

^{2 .}MUSIC CPE Report, https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf

³ See https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en



there is a <u>compelling</u> reason for confidentiality.⁴ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests.*⁵ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, <u>ICANN staff</u> determines whether the <u>public interest</u> in the disclosure of those documents <u>outweighs the harm</u> that may be caused by such disclosure.⁶ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

See ICANN DIDP, https://icann.org/resources/pages/didp-2012-02-25-en

Process for Responding to DIDP Requests, https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf

⁶ *Id.*





generally and specifically with respect to the CPE reports issued by the CPE provider"⁷ and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."⁸

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.⁹

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN's BGC Chair Chris Disspain ("BGC Letter") indicating that the RR is "on hold" and inter alia that: 10

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

Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a

Minutes of the Board Governance Committee, October18, 2016, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

Letter from Arif Ali to ICANN CEO Göran Marbyand the ICANN Board, April 28, 2017, https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf

Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf



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. 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).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by DotMusic in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway." ¹¹

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

- 1. The identity of the individual or firm ("the evaluator") undertaking the Review;
- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 3. The date of appointment of the evaluator;

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Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf



- 4. The terms of instructions provided to the evaluator;
- 5. The materials provided to the evaluator by the EIU;
- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 7. The materials submitted by affected parties provided to the evaluator;
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator:
- 9. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.



ICANN DIDP Request 5 May 2017 Page 6

Sincerely,

Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org) Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

ANNEX D

To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

Thank you for your request for documentary information dated 5 May 2017 (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:

- 1. The identity of the individual or firm undertaking the Review;
- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- The date of appointment of the evaluator;
- 4. The terms of instructions provided to the evaluator;
- 5. The materials provided to the evaluator by the EIU:
- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 7. The materials submitted by affected parties provided to the evaluator;
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator:
- 9. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 10. All materials provided to ICANN by the evaluator concerning the Review

Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; see also, CPE webpage at

http://newgtlds.icann.org/en/applicants/cpe.) As part of its process, the CPE provider 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 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board 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. (*See* Dot Registry IRP Final Declaration at https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* https://www.icann.org/resources/board-material/resolutions-2016-09-17-en.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his letter of 26 April 2017 to concerned parties, during its 18 October 2016 meeting, the 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, as part of the President and CEO's review, 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 to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. 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. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the <u>Community Priority Evaluation Process Review Update</u>, dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization 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.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See Community Priority Evaluation Process Review Update, dated 2 June 2017.)

Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), "[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment" (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the Community Priority Evaluation Process Review Update and above. With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

<u>Items 5-6</u>

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board (Item 6). As detailed in the Community Priority Evaluation Process Review Update, the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, https://newgtlds.icann.org/en/applicants/agb
- CPE reports, https://newgtlds.icann.org/en/applicants/cpe#invitations
- CPE Panel Process Document, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf

- EIU Contract and SOW Information, http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip
- CPE Guidelines, https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf
- Updated CPE FAQs, https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf
- CPE Processing Timeline, https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf
- CPE webpage and all materials referenced on the CPE webpage, https://newgtlds.icann.org/en/applicants/cpe
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at https://www.icann.org/resources/pages/accountability/reconsideration-en, and the applicable BGC and Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- Independent Review Process (IRP) related to CPEs and all related materials, available at https://www.icann.org/resources/pages/accountability/irp-en. Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- Board Resolution 2016.09.17.01, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en
- Minutes of 17 September 2016 Board meeting, https://www.icann.org/resources/board-material/minutes-2016-09-17-en
- Briefing materials related to Board Resolution 2016.09.17.01, https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf
- Minutes of 18 October 2016 BGC meeting, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en
- New gTLD Program Implementation Review regarding CPE, https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited. Rather than repeating those here, *see* Response to DIDP Request No. 20160429-1, https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-

<u>response-supporting-docs-15may16-en.pdf.</u> The second track of the review focuses on gathering information and materials from the CPE provider. As noted <u>Community Priority Evaluation Process Review Update</u> of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

Item 7

Item 7 seeks "[t]he materials submitted by affected parties provided to the evaluator." It is unclear what the term "affected parties" is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, https://newgtlds.icann.org/en/applicants/cpe#invitations
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at https://www.icann.org/resources/pages/accountability/reconsideration-en, and the applicable BGC and Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- Independent Review Process (IRP) related to CPEs and all related materials, available at https://www.icann.org/resources/pages/accountability/irp-en. Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- All public comments received on the applications that underwent evaluation, which are publicly available at https://gtldresult.icann.org/application-result/applicationstatus for each respective application

Items 8

Item 8 seeks the disclosure of "[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator." This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided <u>Community Priority Evaluation Process Review Update</u> of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Item 10

Item 10 requests the disclosure of "[a]II materials provided to ICANN by the evaluator concerning the Review." As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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.
- 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.
- 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.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances 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 makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN 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'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.

ANNEX E



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.



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: $\underline{14-30}$ (.LLC), $\underline{14-32}$ (.INC), $\underline{14-33}$ (.LLP), $\underline{16-3}$ (.GAY), $\underline{16-5}$ (.MUSIC), $\underline{16-8}$ (.CPA), $\underline{16-11}$ (.HOTEL), and $\underline{16-12}$ (.MERCK).

For more information about CPE criteria, please see ICANN's <u>Applicant Guidebook</u>, 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 <u>Bylaws</u>.

Sincerely,

Chris Disspain

Chair, ICANN Board Governance Committee

ANNEX F

JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071.2300

TELEPHONE: +1.213.489.3939 • FACSIMILE: +1.213.243.2539

DIRECT NUMBER: Contact n ormation Redacted Contact n ormation Redacted

May 15, 2017

VIA E-MAIL

Arif H. Ali, Esq. Dechert LLP 1900 K Street, NW Washington, DC 20006-1110

Re: <u>DotMusic Limited</u>

Dear Arif:

I write to provide you with a status update on Reconsideration Request 16-5 (Request 16-5) filed by DotMusic Limited (DotMusic) in response to the questions that you have raised to ICANN including in your correspondence to the ICANN Board, the Board Governance Committee (BGC), and/or the President and CEO of ICANN.¹

Request 16-5 was filed on 24 February 2016, seeking reconsideration of the community priority evaluation (CPE) of DotMusic's application for the .music string. On 1 April 2016, DotMusic submitted a request for documentary information through ICANN's Documentary Information Disclosure Policy (DIDP) and requested that the BGC's consideration of Request 16-5 be continued pending ICANN's response to the DIDP request. On 15 May 2016, ICANN responded to DotMusic's DIDP request. On 30 May 2016, DotMusic filed a separate reconsideration request (Request 16-7) regarding ICANN's response to DotMusic's DIDP Request. On 26 June 2016, the BGC denied Request 16-7. On 17 September 2016, DotMusic conducted a telephonic presentation to the BGC regarding Request 16-5. Between September

¹ See letter from A. Ali to ICANN Board and Göran Marby, 30 Jan. 2017, available at https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf and letter from A. Ali to BGC and Göran Marby, 28 Apr. 2017, available at https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf.

² See https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf.

³ See https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-request-redacted-30may16-en.pdf.

⁴ See https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun 16-en.pdf.

Arif H. Ali, Esq. May 15, 2017 Page 2

and December 2016, DotMusic submitted five supplemental materials in support of Request 16-5.5

The Board has recently 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 has directed the President and CEO to undertake a review of various aspects of the CPE process. The details of this review are discussed in the 26 April 2017 letter from Chris Disspain, Chair of the BGC, to DotMusic, among others. A copy of Mr. Disspain's letter has been published on the ICANN correspondence page and on the Reconsideration page under Request 16-5. As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-5 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its evaluation of Request 16-5, and will take into consideration all relevant materials.

Your letter of 30 January 2017 references the timing requirements for the Board's consideration of Reconsideration Requests prescribed by the Bylaws and posits that the Board's consideration of Request 16-5 has been delayed past the prescribed time. The Bylaws in effect at that time that Request 16-5 was filed provides that "[t]he Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website." The circumstances that have delayed the Board's consideration of Request 16-5, which are described above, have been identified and posted on ICANN's website and on the

⁵ See https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf, https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf, https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf, and https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf, and https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf, and https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf.

⁶ See https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a.

⁷ See letter from Chris Disspain to All Concerned, 26 Apr. 2017, available at https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

⁸ See id.

⁹ See https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en.

¹⁰ ICANN Bylaws, Art. IV, Section 2.17, effective 11 Feb. 2016, available at https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV.

Arif H. Ali, Esq. May 15, 2017 Page 3

Reconsideration page under Request 16-5.¹¹ As stated in Mr. Disspain's 26 April letter, the Board will resume its consideration as soon as feasible once the CPE review is complete.¹²

With respect to the questions that you pose on pages 3-4 of your 28 April 2017 letter regarding the CPE review, we note that the same questions were submitted to ICANN's DIDP by DotMusic on 5 May 2017 and will be addressed as part of ICANN's response to the DIDP in due course.

Very truly yours,

effrey A. LeVee

cc: John O. Jeffrey

General Counsel and Secretary

ICANN

NAI-1502709505v1

¹¹See letter from Chris Disspain to All Concerned, 26 Apr. 2017, available at https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf; and https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en.

¹² See letter from Chris Disspain to All Concerned, 26 Apr. 2017, available at https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en.

ANNEX G



1900 K Street NW Washington DC 20006 1110 +1 202 261 3300 Main +1 202 261 3333 Fax www.dechert.com

ARIF HYDER ALI

Contact Information Redacted

21 May 2017

VIA E-MAIL

Jeffrey A. LeVee, Esq. Jones Day 555 South Flower Street Los Angeles, CA 90071 2300

Re: ICANN 15 May 2017 Letter Concerning DotMusic

Dear Jeffrey A. LeVee:

I write on behalf of DotMusic Limited (DotMusic), in response to your 15 May 2017 letter. Your letter claims that the "circumstances that have delayed the Board's consideration of Request 16-5 . . . have been identified and posted on ICANN's website and on the Reconsideration page under Request 16-5." We do not consider ICANN's delays justified.

In addition, while we appreciate your assurance that ICANN will consider the entirety of DotMusic's submissions and reports, we note that your letter fails to provide any information that was not already public. Regrettably, ICANN continues to breach its transparency obligations, ignoring DotMusic's information requests concerning the review process currently being conducted by an independent evaluator. Particularly, ICANN has ignored the basic safeguards that DotMusic has proposed, *inter alia*, that the identity of the evaluator be disclosed; that DotMusic be provided access to the materials being reviewed by the evaluator; and that DotMusic's right to be heard during the evaluation process and comment on the evaluation results be given full effect.²

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¹ ICANN's Letter to DotMusic of 15 May 2017, https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf, p.2.

See DotMusic's Letter to ICANN of 28 April 2017, for a full list of DotMusic's proposed safeguards, https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf, pp.4-5



Mr. Roussos of DotMusic also raised these questions at the recent Madrid GDD summit and learned that ICANN's leadership was unaware of the identity of the external evaluator except that it was a law firm. Mr. Disspain also disclosed that the completion of the evaluation had been delayed beyond ICANN's estimates and ICANN does not have a scheduled date for completion. It is clear that the delays and secrecy are thus impairing ICANN's Board from discharging their oversight responsibilities. Withholding materials concerning DotMusic's CPE evaluation does not merely result in a denial of DotMusic's right to be heard; it also hampers the efficiency of the investigation, by disabling us from being able to identify the flaws in the EIU's results.

We urge ICANN to reconsider whether continuing a pattern of secrecy and neglect to the right of applicants to fair treatment serves either ICANN's or the global music community's best interests. ICANN should provide a full and prompt response to our letters of 30 January and 28 April 2017.

Sincerely,

Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

³ ICANN Madrid GDD Summit, May 9, 2017 at https://participate.icann.org/p4icilv7esy/? launcher=false&fcsContent=true&pbMode=normal, between 46:50 and 53:10.

ANNEX H



1900 K Street NW Washington DC 20006 1110 +1 202 261 3300 Main +1 202 261 3333 Fax www.dechert.com

ARIF HYDER ALI

Contact Information Redacted

10 June 2017

VIA E-MAIL

Chris Disspain Chair, ICANN Board Governance Committee 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094 Jeffrey A. LeVee, Esq. Jones Day 555 South Flower Street Los Angeles, CA 90071 2300

Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited ("DotMusic") and dotgay LLC ("dotgay"), regarding ICANN's 2 June 2017 Community Priority Evaluation Process Review Update ("CPE Process Review Update").

Our review of ICANN's CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws. As you are aware, after the ICANN Board announced in September 2016 that it is conducting "an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider," we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization's remit, the information it had been provided,

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See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 ("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"); Art. I, Section 2 (8) ("Make decisions by applying documented policies neutrally and objectively, with integrity and fairness").

² Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).



whether the evaluator will seek to consult with the affected parties, etc.³ In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.⁴ At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, inter alia, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—after DotMusic and dotgay filed their requests for documentary information⁵ and two weeks before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has already completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."

This is troubling for several reasons. *First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

See e.g., Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

⁴ ICANN Madrid GDD Summit, May 9, 2017.

See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

⁶ 2 June 2017 CPE Process Review Update.



Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. *Second*, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation 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," and that (ii) "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."

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

- 1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
- 2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
- 3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
- 4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. http://schd.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf, pp. 10 – 14.

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We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

Herb Waye, ICANN Ombudsman (ombudsman@icann.org)

Annex A DotMusic Limited

Key Documents

	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

Other Relevant Documents

	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	Description
5.	Reconsideration Request 14-8 (4 March 2014)
6.	Revised Reconsideration Request 14-8 (5 March 2014)
7.	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
8.	Reconsideration Request 14-28 (7 June 2014)
9.	Letter from Constantine Roussos to ICANN (13 June 2014)
10.	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
11.	Letter from Constantine Roussos to ICANN (1 July 2014)
12.	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
13.	Letter from Rich Bengloff to ICANN (7 March 2015)
14.	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
15.	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
16.	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
17.	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
18.	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	Description
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	Description
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	Description
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	Description
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	Description
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	Description
87.	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
88.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
89.	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
90.	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

Subject: Re: [reconsider] Reconsideration Request 17-2

Date: Monday, July 10, 2017 at 9:18:34 AM Pacific Daylight Time

From: Herb Waye (sent by reconsider-bounces@icann.org < reconsider-bounces@icann.org >)

To: Reconsideration **CC:** ombudsman

Reconsideration Request 17-2

Pursuant to Article 4, Section 4.2(I)(iii), I am recusing myself from consideration of Request 17.2.

Best regards,

Herb Waye ICANN Ombudsman

https://www.icann.org/ombudsman[icann.org]

https://www.facebook.com/ICANNOmbudsman[facebook.com]

Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf[icann.org]

Community Anti-Harassment Policy

 $\underline{\text{https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en[icann.org]}}$

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

From: Reconsideration < Reconsideration@icann.org >

Date: Sunday, July 9, 2017 at 4:03 AM **To:** Herb Waye <herb.waye@icann.org>

Cc: Reconsideration < Reconsideration@icann.org >

Subject: Reconsideration Request 17-2

Dear Herb,

ICANN recently received the attached reconsideration request (Request 17-2), which was submitted on 18 June 2017 by Dot Music Limited seeking reconsideration of ICANN's response to the Requestor's DIDP. The Requestor's DIDP sought the disclosure of documents relating to the Community Priority Evaluation Process Review. The Board Governance Committee (BGC) has determined that Request 17-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BGC to determine if the request is sufficiently stated. Specifically, Section 4.2 (l) [icann.org] states:

- (I) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in <u>Section 4.2(I)(iii)</u> and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.
 - (i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.
 - (ii) The Ombudsman shall submit to the Board Governance Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Governance Committee shall thereafter promptly proceed to review and consideration.
 - (iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Governance Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 17-2 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(I)(iii). If you are accepting Request 17-2 for evaluation, please note that your substantive evaluation must be provided to the BGC within 15 days of receipt of Request 17-2.

Best regards, ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

RECOMMENDATION OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECONSIDERATION REQUEST 17-2 23 AUGUST 2017

The Requestor, DotMusic Limited, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review). Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.

I. Brief Summary.

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. The Requestor was invited to, and did, participate in CPE, but did not prevail. On 24 February 2016, the Requester sought reconsideration of the CPE determination (Request 16-5).³

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation of

¹ Request 17-2, § 3, at Pg. 5 (incorrectly marked page 4).

² Request 17-2, § 10, at Pg. 16 (marked 15).

³ Request 16-5, https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf.

the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.⁴ The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-5, pending completion of the CPE Process Review.

On 5 May 2017, the Requestor submitted the DIDP Request. The Requestor sought ten categories of documents and information relating to the CPE Process Review, some of which the Requestor had already requested in a prior DIDP request. On 4 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-2 (Request 17-2), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws

⁴ Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/governance/bylaws-en/#article4.

concerning non-discriminatory treatment and transparency by: (1) providing information rather than documents in response to Items No. 2 and 4; (2) determining not to produce certain documents responsive to Items No. 5, 6, and 8, and (3) determining not to produce any documents responsive to Item No. 10.⁵

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration, and the Ombudsman recused himself.⁶

The BAMC has considered Request 17-2 and all relevant materials and recommends that the Board deny Request 17-2 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

II. Facts.

A. Background Facts.

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited to participate in CPE.⁷ The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.⁸

On 10 February 2016, the CPE panel issued a CPE Report, concluding that the Application earned 10 out of 16 possible points on the CPE criteria. Because a minimum of 14

⁵ Request 17-2, § 10, at Pg. 16 (marked 15).

⁶ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf.

⁷ 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.

⁸ See id

⁹ Id.; see also CPE Report at 1, https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf.

points are required to prevail in CPE, the CPE Report concluded that the Application did not qualify for community priority.¹⁰

On 24 February 2016, the Requestor filed Request 16-5, seeking reconsideration of the CPE determination and approval of the Requestor's community application.¹¹

On 29 April 2016, the Requestor submitted a DIDP request seeking documents relating to the CPE Report (2016 DIDP Request).¹² On 15 May 2016, ICANN organization responded to the 2016 DIDP Request.¹³ ICANN organization provided links to all the responsive, publicly available documents, furnished an email not previously publicly available,¹⁴ explained that it did not possess documents responsive to several of the requests, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.¹⁵ The Requestor thereafter filed Request 16-7 challenging ICANN organization's response to the 2016 DIDP Request. On 26 June 2016, the BGC denied Request 16-7.¹⁶

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by the Requestor on 17 September 2016 during its presentation to the BGC regarding Request 16-5, as well as issues that were identified in the Final Declaration from the Independent Review

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¹⁰ See CPE Report at 1.

¹¹ Request 16-5.

¹² See 2016 DIDP Request, https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf.

¹³ 2016 DIDP Response, https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf.

¹⁴ 2016 DIDP Response at 3, 12, Attachment.

¹⁵ *Id.*, Pgs. 1-7, 11-12.

¹⁶ BGC Determination on Request 16-7, https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf. The Requestor has now filed three reconsideration requests: Request 16-5 (challenging the CPE determination), Request 16-7 (challenging the response to the 2016 DIDP Request), and the instant request, Request 17-2 (challenging the response to the Requestor's 2017 DIDP Request).

Process (IRP) proceeding initiated by Dot Registry, LLC.¹⁷ As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to 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 their evaluations of the community applications. The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 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).

On 5 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:²⁰

- 1. The identity of the individual or firm undertaking the CPE Process Review;
- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 3. The date of appointment of the evaluator;
- 4. The terms of instructions provided to the evaluator;
- 5. The materials provided to the evaluator by the EIU;

¹⁷ Dot Registry IRP Final Declaration, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

¹⁸ 18 October 2016 Minutes of BGC Meeting, at Item 2, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

¹⁹ 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2,

https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf. DIDP Request at Pg. 4, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf.

- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board;
- 7. The materials submitted by affected parties provided to the evaluator;
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator:
- 9. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 10. All materials provided to ICANN by the evaluator concerning the CPE Process Review.²¹

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).²² The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.²³ The Status Update explained that the CPE Process Review is occurring on two parallel tracks – the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, and was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.²⁴

On 4 June 2017, ICANN organization responded to the DIDP Request.²⁵ As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.²⁶ The DIDP Response

²¹ *Id*. at Pg. 4-5.

²² Status Update, https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf.

²³ Ld

²⁴ I.A

²⁵ DIDP Response, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf.

²⁶ See generally id.

further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure.²⁷ Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.²⁸

On 18 June 2017, the Requestor filed Request 17-2, seeking reconsideration of ICANN organization's response to Items No. 2 and 4, and its determination not to produce certain documents responsive to Items No. 5, 6, 8, and 10 because they were subject to Nondisclosure Conditions. The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable[,] and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency[,] and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it is one of only two recourses "for applicants . . . in lieu of litigation," and the other recourse, IRP, is "expensive and time-consuming."

On 7 July 2017, the BGC concluded that Request 17-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.³⁰

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²⁷ *Id*. at Pg. 5-6.

²⁸ DIDP Response at Pg. 6.

²⁹ Request 17-2, § 6, at Pg. 12 (marked 11).

³⁰ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(I)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-2 was pending. The BGC was tasked with reviewing Request 17-2 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-2.

On 9 July 2017, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.³¹ Accordingly, the BAMC reviews Request 17-2 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

B. Relief Requested

The Requestor asks the BAMC to: (1) "[r]eview the ICANN Staff decision to withhold" information requested in the DIDP, "to ensure that each and every requested Item . . . was considered and evaluated individually, and that the public interest test was applied to each individual item properly"; (2) disclose the materials that ICANN staff withheld in response to the DIDP Request; (3) "instruct Staff that ICANN's default policy is to release all information requested unless there is a compelling reason not to"; and (4) for any items that the Board decides to withhold, "inform the Requestor[] as to the specific formula used to justify the nondisclosure."

III. Issue.

The issues are as follows:

- 1. Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
- 2. Whether ICANN organization was required by the DIDP or established policies to provide the Requestor with "the specific formula used to justify the nondisclosure."
- 3. Whether ICANN organization complied with its Core Values, Mission, and Commitments.³³

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³¹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf.

³² Request 17-2, § 9, at Pg. 13-14 (marked 12-13).

³³ Request 17-2, § 9, at Pg. 14 (marked 13).

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-2 seeks reconsideration of staff and Board action or inaction.³⁴ The only subsequent discussion of Board action is the Requestor's passing reference to its view that, in requesting materials from CPE panels for use in its evaluation of pending reconsideration requests, "the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so."³⁵ The Requestor makes no further arguments concerning the BGC's actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on the "ICANN staff" response to the Requestor's DIDP request.³⁶ Accordingly, the BAMC understands Request 17-2 to seek reconsideration of ICANN organization's response to the Requestor's DIDP Request, and *not* reconsideration of BGC action or inaction.³⁷

IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.

A. 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

³⁴ Request 17-2, § 2, at Pg. 1.

³⁵ Request 17-2, § 3, at Pg. 2 (marked 1).

³⁶ Request 17-2, §at Pg. 13 (marked 12).

³⁷ Further, we note that the BAMC has not completed its consideration of Request 16-5, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

(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.³⁸

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-2 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.³⁹ That substantive provision did not change when ICANN's Bylaws were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current 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.⁴⁰ 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.⁴¹

On 9 July 2017, the BGC determined that Request 17-2 is sufficiently stated and sent Request 17-2 to the Ombudsman for review and consideration.⁴² The Ombudsman thereafter recused himself from this matter.⁴³ Accordingly, the BAMC has reviewed Request 17-2 and issues this Recommendation.

B. Documentary Information Disclosure Policy

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and

³⁸ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

³⁹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1).

⁴⁰ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(1)(iii).

⁴¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁴² Response from Ombudsman Regarding Request 17-2, Pg. 1-2.

⁴³ Response from Ombudsman Regarding Request 17-2, Pg. 1.

that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.⁴⁴ In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information "concerning ICANN's operational activities, and within ICANN's possession, custody, or control," that is not already publicly available.⁴⁵ The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization's operational activities, and within ICANN organization's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.⁴⁶

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the "Process For Responding To ICANN's Documentary Information

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⁴⁴ See ICANN Documentary Information Disclosure Policy, https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁴⁵ *Id*.

⁴⁶ *Id*.

Disclosure Policy (DIDP) Requests" (DIDP Response Process).⁴⁷ 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]."⁴⁸

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- (i) Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decisionmaking 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;
- (ii) 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;
- (iii) Confidential business information and/or internal policies and procedures; and
- (iv) 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.⁴⁹

Notwithstanding the above, information that falls within any of the Nondisclosure

Conditions *may* still be made public if ICANN organization determines, under the particular

 ⁴⁷ See DIDP Response Process, https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.
 ⁴⁸ Id.; see also, "Nondisclosure Conditions," available at https://www.icann.org/resources/pages/didp-2012-02-25-

⁴⁹ DIDP.

circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁵⁰

V. Analysis and Rationale.

- A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.
 - 1. The DIDP Response Complies With Applicable Policies And Procedures.

The DIDP Response identified documentary information responsive to all 10 items. For Items No. 1 through 9, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website.⁵¹ Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available,⁵² ICANN organization identified and provided the hyperlinks to 21 publicly available categories of documents that contain information responsive to Items No. 1 through 9.⁵³

The DIDP Response also explained that some of the documents responsive to Items No. 6 and 8, as well as all documents responsive to Item 10, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.⁵⁴

⁵⁰ *Id*.

⁵¹ See generally DIDP Response.

⁵² DIDP https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁵³ DIDP Response at Pg. 3-4.

⁵⁴ DIDP Response at Pg. 6.

The Requestor claims that ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 violated established policies and procedures.⁵⁵ However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure.⁵⁶ As demonstrated below, ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 adhered to established policies and procedures.

The DIDP Response Process provides that "[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested ..., interviews ... the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request." Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions. If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure. disclosure.

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⁵⁵ The BAMC notes that the ten categories of documents and information relating to the CPE Review Process that the Requestor requested in its DIDP Request (i.e., Item Nos. 1-10) are identical to the requests set forth in a subsequent DIDP Request submitted by dotgay LLC (i.e., Item Nos. 4-13). While dotgay LLC, which is represented by the same counsel as the Requestor here here (who also filed the DIDP requests on behalf of the Requestor and dotgay LLC), has sought reconsideration of ICANN's response to its DIDP Request (Reconsideration Request 17-3), dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Items No. 5, 7, and 11, which are identical to Items No. 2, 4, and 8 here.

⁵⁶ Request 17-2, § 10, Pg. 15 (marked 14).

⁵⁷ DIDP Response Process, https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf. ⁵⁸ *Id*.

⁵⁹ *Id*.

a. ICANN organization's response to Item No. 2 adhered to established policies and procedures.

Item No. 2 requested information regarding "[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment." In its response, and consistent with the DIDP Response Process, ICANN organization identified and provided the hyperlink to the Status Update, which described the selection process for the company conducting the CPE Process Review. The response to Item No. 2 further explained that "[w]ith respect to the disclosures and conflict checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE."

The Requestor argues that ICANN organization was required to "disclose not only the existence of selection, disclosure, and conflict check processes . . . but also the underlying documents that substantiate ICANN's claims." The Requestor's claim is unsupported. The Requestor asked for information relating to "the selection process, disclosures, and conflicts checks undertaken in relation to the appointment of FTI." Notwithstanding that Item No. 2 requested information rather than documents, and as noted above, the DIDP Response identified and provided the hyperlink to the Status Update, which substantiated the narrative in the DIDP Response. Even if Item No. 2 were to be interpreted as a request for documents, the DIDP Response adhered to the DIDP Response Process, because ICANN organization published and provided hyperlinks to all documents in its possession that are appropriate for disclosure. The

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⁶⁰ DIDP Request at Pg. 4.

⁶¹ DIDP Response at Pg. 3.

⁶² DIDP Response at Pg. 3.

⁶³ Request 17-2 § 3, Pg. 9 (marked 8).

⁶⁴ See DIDP Request at Pg. 4.

⁶⁵ DIDP Response at Pg. 3.

⁶⁶ DIDP Response Process; DIDP Response at Pg. 3.

only other documents in ICANN's possession relating to the selection process and conflicts check are communications with ICANN organization's outside counsel. Those documents are not appropriate for disclosure because they comprise:

> 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.⁶⁷

The Requestor does not claim that ICANN organization's response to Item 2 is contrary to the DIDP Response Process, nor does the Requestor provide any evidence demonstrating how this response violates ICANN's Mission, Commitments, or Core Values.⁶⁸ Reconsideration is not warranted on these grounds.

> b. ICANN organization's response to Item No. 4 adhered to established policies and procedures.

Item No. 4 requested the "terms of instructions provided to the evaluator." Like Item No. 2, this was a request for information. Nevertheless, ICANN organization identified and provided the hyperlink to the Status Update, which contained information regarding the scope of the Review. The Status Update states:

> The scope of the review consists of: (1) review of the process by which the ICANN organization 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 provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

⁶⁷ DIDP.

⁶⁸ The Requestor claims that ICANN organization asserted certain Nondisclosure Conditions in response to Items No. 1-4. See Request 17-2, § 3, Pg. 5 (marked 4). The Requestor is mistaken. ICANN did not determine that Nondisclosure Conditions prevented the disclosure of documents responsive to Items No. 1-4. See DIDP Response, at Pg. 3. Therefore, reconsideration is not warranted on those grounds. As noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Item No. 5, which is identical to Item No. 2

⁶⁹ DIDP Request at Pg. 5.

The review is being conducted in two parallel tracks The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. . . . The second track focuses on gathering information and materials from the CPE provider. 70

The Requestor argues that the DIDP required ICANN organization to "disclose not only . . . the existence of the terms of appointment . . . but also the underlying documents that substantiate ICANN's claims."⁷¹

As with Item No. 2, and notwithstanding that the Requestor sought information rather than documents in this DIDP Request, the DIDP Response to Item No. 4 adhered to the DIDP Response Process, because it identified responsive documents and provided a hyperlink to the responsive document that was appropriate for disclosure.⁷² ICANN organization possesses only one other document potentially responsive to Item No. 4: the letter engaging FTI to undertake the CPE Process Review. That document is not appropriate for disclosure because it comprises:

• 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.⁷³

Accordingly, reconsideration is not warranted for the same reasons that reconsideration of the DIDP Response to Item No. 2 is not warranted.

c. ICANN organization's responses to Items No. 5, 6, and 8 adhered to established policies and procedures.

Items No. 5 and 6 sought the disclosure of the "materials provided to the evaluator by [the CPE provider]" (Item No. 5) and "materials provided to the evaluator by ICANN staff/legal,

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⁷⁰ Status Update.

⁷¹ Request 17-2 § 3, Pg. 9 (marked 8). Again, and as noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Item No. 7, which is identical to Item No. 4 here.

⁷² DIDP Response Process; DIDP Response at Pg. 3.

⁷³ DIDP.

outside counsel or ICANN's Board or any subcommittee of the Board" (Item No. 6). ⁷⁴ Item No. 8 sought the disclosure of "[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator," which overlaps with Items No. 5 and 6. ⁷⁵ With respect to Item No. 5, ICANN organization responded as follows:

The second track of the review focuses on gathering information and materials from the CPE provider. As noted Community Priority Evaluation Process Review Update of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.⁷⁶

As noted in the Status Update, and referenced in the DIDP Response, the CPE provider had not provided the requested materials at the time ICANN organization responded to the DIDP Request.⁷⁷ Accordingly, ICANN organization did not possess any documents responsive to Item No. 5 to provide to the Requestor, even if disclosure under the DIDP was appropriate, which is not yet clear.⁷⁸

In response to Item No. 6, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with the correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization's response to the 2016 DIDP

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⁷⁴ Request 17-2, § 3, at Pg. 9 (marked 8).

⁷⁵ DIDP Request at Pg. 5.

⁷⁶ DIDP Response at Pg. 4-5.

⁷⁷ Id

⁷⁸ See DIDP (DIDP applies to "documents . . . within ICANN's possession, custody, or control").

Request, which sought the same documentary information.⁷⁹ The BGC previously denied the Requestor's Request 16-7, which challenged ICANN organization's response to the 2016 DIDP Request.⁸⁰

The Requestor argues that ICANN organization's statement that it provided all materials responsive to Item No. 6⁸¹ except the correspondence between ICANN organization and the CPE provider "is undercut by ICANN organization's admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP [R]equest." This complaint is misplaced. Item No. 6 sought materials provided to FTI. The Requestor does not assert that interview notes—if any exist and are in ICANN organization's possession—were provided to FTI. Even if ICANN organization possessed copies of interview notes and provided those materials to FTI, the materials would fall under three Nondisclosure Conditions: (i) "[d]rafts of . . . documents . . . or any other forms of communication"; (ii) "[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, including internal documents[and] memoranda"; and (iii) "[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege [...]." The Requestor raises the same arguments for ICANN organization's response to Item

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⁷⁹ DIDP Response at Pg. 3-4.

⁸⁰ BGC Determination on Request 16-7, https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf.

⁸¹ The Requestor identified Item No. 5 in its argument on this issue, but it appears from the context that the Requestor intended to reference Item No. 6, materials provided to the evaluator by ICANN.

⁸² Request 17-2, § 3, at Pg. 9 (marked 8).

⁸³ DIDP Request at Pg. 5.

⁸⁴ See id.

⁸⁵ DIDP.

No. 8 as raised with respect to Item No. 6, and the BAMC rejects those arguments as outlined above.

d. ICANN organization's response to Item No. 10 adhered to established policies and procedures.

Item No. 10 requested "[a]ll materials provided to ICANN by the evaluator concerning the [CPE] Review." The DIDP Response stated:

[T]he review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure....

Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Item No. 10—"requests for documents and information to ICANN and the CPE provider"—then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.⁸⁷ Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.⁸⁸

2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information. ⁸⁹ Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the

⁸⁶ DIDP Request at Pg. 5.

⁸⁷ DIDP Response Process.

⁸⁸ DIDP Response at Pg. 6.

⁸⁹ DIDP.

public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply. In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Items No. 6 and 8, ICANN organization determined that the correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because they comprised:

- 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;
- 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;
- 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;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.⁹¹

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⁹⁰ *Id*.

⁹¹ DIDP Response at Pg. 4-5, citing 2016 DIDP Response at Pg. 5, https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf.

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Items No. 6 and 8. Those items request correspondence between ICANN organization and the CPE Provider. The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 16-7 without success. The BAMC recommends that Request 17-2 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Item No. 10 seeks materials that FTI provided to ICANN organization concerning the CPE Process Review. In response to Item No. 10, ICANN organization noted that it was in possession of the requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

- 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;
- 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;

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⁹² DIDP Request at Pg. 5.

⁹³ BGC Determination on Request 16-7, https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf.

- 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. 94

These materials certainly comprise information that may "compromise the integrity of" ICANN organization's and FTI's "deliberative and decision-making process" with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because "ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of public interest in terms of the DIDP Request." The Requestor's arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials. There is no policy or procedure requiring that ICANN organization provide *additional* justification for nondisclosure.

The Requestor asks the Board to "inform the Request[or] as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm." Neither the DIDP nor the DIDP Response Process require ICANN organization to use or provide a "formula" for determining whether materials that are subject to Nondisclosure Conditions may nonetheless be disclosed.⁹⁸

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⁹⁴ DIDP Response at Pg. 5-6; *see also* ICANN Defined Conditions for Nondisclosure. https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁹⁵ Request 17-2, § 3, at Pg. 8 (marked 7).

⁹⁶ DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

⁹⁷ Request 17-2, § 9, Pg. 14 (marked 13) (emphasis in original).

⁹⁸ See DIDP: DIDP Response Process.

The Requestor also asserts that nondisclosure "needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws." However, the DIDP provides the procedural fairness that the Requestor seeks. Here, ICANN organization applied the DIDP, determined that certain of the requested materials were subject to Nondisclosure Conditions, considered whether the materials should nonetheless be made public, determined that the public interest in disclosing the information did not outweigh the harm of disclosure, and explained that determination to the Requestor. Therefore, reconsideration is not warranted on this ground.

3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public's Interest In Disclosing The Information.

The DIDP states that documents subject to 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." In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.¹⁰²

The Requestor previously acknowledged that under the DIDP Response Process, it is "within ICANN's sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the

⁹⁹ Request 17-2, § 9, Pg. 14 (marked 13).

¹⁰⁰ See generally DIDP Response.

¹⁰¹ See id

¹⁰² DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

harm that may be caused by such disclosure."¹⁰³ Nevertheless, the Requestor claims reconsideration is warranted because the Dot Registry IRP Final Declaration gave rise to a "unique circumstance where the 'pubic interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."¹⁰⁴ However, the Dot Registry IRP Final Declaration is not an established ICANN policy or procedure, and the Board's acceptance of aspects of the Final Declaration does not make it so. Moreover, the Dot Registry IRP Final Declaration did not establish that the public interest in disclosure outweighs the potential harm for each and every document in ICANN organization's possession related to the CPE Process Review.¹⁰⁵ Accordingly, the argument does not support reconsideration.

B. The Reconsideration Process is Not A Mechanism for "Instructing" ICANN Staff on General Policies Where No Violation of ICANN Policies or Procedure Has Been Found.

The Requestor asks the Board to "recognize and instruct Staff that ICANN's default policy is to release all information requested unless there is a compelling reason not to do so." The Requestor is correct insofar as, under the DIDP Response Process, documents "concerning ICANN's operational activities, and within ICANN organization's possession, custody, or control, [are] made available to the public unless there is a compelling reason for confidentiality." However, the reconsideration request process is not an avenue for "instruct[ing]" ICANN staff concerning ICANN's policies in general, where no violation of ICANN policies or procedures has been found. Because the BAMC concludes that ICANN

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¹⁰³ Request 16-7, § 3, Pg. 4.

¹⁰⁴ Request 17-2 § 3, Pg. 10 (marked 9).

¹⁰⁵ See ICANN Board Resolution 2016.08.09.11, https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g.

¹⁰⁶ Request 17-2, § 9, Pg. 13-14 (marked 12-13).

¹⁰⁷ DIDP.

organization adhered to established ICANN policies in responding to the DIDP Request, the BAMC does not recommend that the Board "instruct" ICANN staff as the Requestor asks.

Further, to the extent the Requestor is challenging the DIDP Response Process or the DIDP itself, the time to do so has passed.¹⁰⁸

C. The Requestor's Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.

The Requestor cites a litany of ICANN's Commitments and Core Values, which the Requestor believes ICANN organization violated in the DIDP Response: 109

- Introducing and <u>promoting</u> competition in the registration of domain names where practical and <u>beneficial to the public interest</u>.¹¹⁰
- Preserving and <u>enhancing</u> the operational stability, <u>reliability</u>, security, and global interoperability of the Internet.¹¹¹
- 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.¹¹²
- Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. 113
- Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, <u>obtaining informed input from those entities most</u> affected.¹¹⁴

¹⁰⁸ ICANN Bylaws, 1 October 2016, Art. 4 Section 4.2(g)(i).

¹⁰⁹ Request 17-2, § 10, at Pg. 15-16 (marked 14-15). The Requestor cites the version of the Bylaws effective from 11 February 2016 until 30 September 2016. The version of the Bylaws effective on 18 June 2017, when the Requestor submitted Request 17-2, govern this Request. The substance of the Bylaws cited are not different from the current version of the Bylaws, except where otherwise noted.

¹¹⁰ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(iv) (emphasis in original).

¹¹¹ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(i) (emphasis in original).

¹¹² ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(iv) (emphasis in original).

¹¹³ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v) (emphasis in original).

¹¹⁴ICANN Bylaws, 11 February 2016, Art. I, Section 2.9 (emphasis in original). The current version of the Bylaws does not include the same language. The Bylaws now state: "Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community." ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v).

- Remaining <u>accountable</u> to the Internet community through mechanisms that enhance ICANN's effectiveness.¹¹⁵
- 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.¹¹⁶
- 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.¹¹⁷
- <u>Transparency</u>: ICANN and its constituent bodies shall operate to the <u>maximum</u> extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.¹¹⁸

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-2 or how ICANN organization has violated these Commitments and Core Values. Many of them, such as ICANN's Core Value of accounting for the public policy advice of governments and public authorities, have no clear relation to the DIDP Response. The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

The Requestor states in passing that it has "standing and the right to assert this reconsideration request" as a result of "[f]ailure to consider evidence filed," but does not identify any evidence that it believes ICANN organization failed to consider in responding to the DIDP Request. The Requester similarly references "[c]onflict of interest issues," "Breach of Fundamental Fairness," and the need for "[p]redictability in the introduction of gTLDs" without explaining how those principles provide grounds for reconsideration here.

¹¹⁵ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(vi) (emphasis in original).

¹¹⁶ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(vi) (emphasis in original).

¹¹⁷ ICANN Bylaws, 1 October 2016, Art. 2 Section 2.3 (emphasis in original).

¹¹⁸ ICANN Bylaws, 1 October 2016, Art. 3 Section 3.1 (emphasis in original).

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¹¹⁹ See generally Request 17-2, § 10, Pg. 13-14.

¹²⁰ Request 17-2, § 10, Pg. 13-14.

VI. Recommendation

The BAMC has considered the merits of Request 17-2, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-2.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-2 was submitted on 19 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 18 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-2 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-2.¹²¹

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¹²¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).



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Contact Information Redacted

5 May 2017

VIA E-MAIL DIDP@ICANN.ORG

ICANN c/o Steve Crocker, Chairman Goran Marby, President and CEO 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: Request under ICANN's Documentary Information Disclosure Policy concerning Community Priority Evaluation for .MUSIC Application ID 1-1115-14110¹

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by DotMusic Limited ("DotMusic") in relation to ICANN's .MUSIC Community Priority Evaluation ("CPE"). The .MUSIC CPE Report² found that DotMusic's community-based Application should not prevail. DotMusic is investigating the numerous CPE process violations and the contravention of established procedures as set forth in DotMusic Reconsideration Request 16-5 ("RR").³

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

DotMusic's .MUSIC community Application (ID 1-1115-14110), https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1392; Also *See* https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:download application/1392?t:ac=1392

^{2 .}MUSIC CPE Report, https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf

³ See https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en



there is a <u>compelling</u> reason for confidentiality.⁴ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests.*⁵ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, <u>ICANN staff</u> determines whether the <u>public interest</u> in the disclosure of those documents <u>outweighs the harm</u> that may be caused by such disclosure.⁶ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

DotMusic submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly seven months have passed since DotMusic delivered a presentation to the Board Governance Committee (the "BGC"). DotMusic has sent several correspondence to ICANN noting that ICANN's protracted delays in reaching a decision on DotMusic's RR and ICANN's continued lack of responsiveness to DotMusic's inquiries about the status of DotMusic's request represent a clear and blatant violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both

See ICANN DIDP, https://icann.org/resources/pages/didp-2012-02-25-en

Process for Responding to DIDP Requests, https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf

⁶ *Id.*





generally and specifically with respect to the CPE reports issued by the CPE provider"⁷ and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."⁸

However, ICANN has not provided any details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Thus, on April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.⁹

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN's BGC Chair Chris Disspain ("BGC Letter") indicating that the RR is "on hold" and inter alia that: 10

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

Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a

Minutes of the Board Governance Committee, October18, 2016, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

Letter from Arif Ali to ICANN CEO Göran Marbyand the ICANN Board, April 28, 2017, https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf

Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf



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. 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).

However, the BGC Letter does not transparently provide any meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by DotMusic in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway." ¹¹

Further, DotMusic requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

- 1. The identity of the individual or firm ("the evaluator") undertaking the Review;
- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 3. The date of appointment of the evaluator;

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Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf



- 4. The terms of instructions provided to the evaluator;
- 5. The materials provided to the evaluator by the EIU;
- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 7. The materials submitted by affected parties provided to the evaluator;
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator:
- 9. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 10. All materials provided to ICANN by the evaluator concerning the Review

DotMusic reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.



ICANN DIDP Request 5 May 2017 Page 6

Sincerely,

Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org) Herb Waye, ICANN Ombudsman (herb.waye@icann.org) To: Arif Ali on behalf of DotMusic Limited

Date: 4 June 2017

Re: Request No. 20170505-1

Thank you for your request for documentary information dated 5 May 2017 (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:

- 1. The identity of the individual or firm undertaking the Review;
- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 3. The date of appointment of the evaluator;
- 4. The terms of instructions provided to the evaluator;
- 5. The materials provided to the evaluator by the EIU:
- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 7. The materials submitted by affected parties provided to the evaluator;
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator:
- 9. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 10. All materials provided to ICANN by the evaluator concerning the Review

Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; see also, CPE webpage at

http://newgtlds.icann.org/en/applicants/cpe.) As part of its process, the CPE provider 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 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board 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. (*See* Dot Registry IRP Final Declaration at https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (*See* https://www.icann.org/resources/board-material/resolutions-2016-09-17-en.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his letter of 26 April 2017 to concerned parties, during its 18 October 2016 meeting, the 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, as part of the President and CEO's review, 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 to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE.

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017, FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. 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. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the <u>Community Priority Evaluation Process Review Update</u>, dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the

ICANN organization 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.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of the week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See Community Priority Evaluation Process Review Update, dated 2 June 2017.)

Items 1 – 4

Items 1 through 4 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 1), "[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment" (Item 2), the date of appointment (Item 3), and the terms of instructions provided to the evaluator (Item 4). The information responsive to these items were provided in the Community Priority Evaluation Process Review Update and above. With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

<u>Items 5-6</u>

Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board (Item 6). As detailed in the Community Priority Evaluation Process Review Update, the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, https://newgtlds.icann.org/en/applicants/agb
- CPE reports, https://newgtlds.icann.org/en/applicants/cpe#invitations
- CPE Panel Process Document, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf

- EIU Contract and SOW Information, http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip
- CPE Guidelines, https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf
- Updated CPE FAQs, https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf
- CPE Processing Timeline, https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf
- CPE webpage and all materials referenced on the CPE webpage, https://newgtlds.icann.org/en/applicants/cpe
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at https://www.icann.org/resources/pages/accountability/reconsideration-en, and the applicable BGC and Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- Independent Review Process (IRP) related to CPEs and all related materials, available at https://www.icann.org/resources/pages/accountability/irp-en. Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- Board Resolution 2016.09.17.01, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en
- Minutes of 17 September 2016 Board meeting, https://www.icann.org/resources/board-material/minutes-2016-09-17-en
- Briefing materials related to Board Resolution 2016.09.17.01, https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf
- Minutes of 18 October 2016 BGC meeting, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en
- New gTLD Program Implementation Review regarding CPE, https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited. Rather than repeating those here, *see* Response to DIDP Request No. 20160429-1, https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-

<u>response-supporting-docs-15may16-en.pdf.</u> The second track of the review focuses on gathering information and materials from the CPE provider. As noted <u>Community Priority Evaluation Process Review Update</u> of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.

Item 7

Item 7 seeks "[t]he materials submitted by affected parties provided to the evaluator." It is unclear what the term "affected parties" is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, https://newgtlds.icann.org/en/applicants/cpe#invitations
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at https://www.icann.org/resources/pages/accountability/reconsideration-en, and the applicable BGC and Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- Independent Review Process (IRP) related to CPEs and all related materials, available at https://www.icann.org/resources/pages/accountability/irp-en. Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- All public comments received on the applications that underwent evaluation, which are publicly available at https://gtldresult.icann.org/application-result/applicationstatus for each respective application

Items 8

Item 8 seeks the disclosure of "[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator." This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

Item 9

Item 9 asks for an estimate of completion of the review. The information responsive to this item has been provided <u>Community Priority Evaluation Process Review Update</u> of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Item 10

Item 10 requests the disclosure of "[a]II materials provided to ICANN by the evaluator concerning the Review." As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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.
- 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.
- 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.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances 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 makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN 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'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.

Rebuttal to the BAMC's Recommendation on Reconsideration Request 17-2

DotMusic¹ submits this Rebuttal to the Board Accountability Mechanisms Committee's ("BAMC") Recommendation on Reconsideration Request 17-2 (the "Recommendation").² The Recommendation concerns DotMusic's request that ICANN reconsider its refusal to disclose the documents requested in DotMusic's DIDP Request.³ The denied document requests all involve the disclosure of pre-existing documents and, despite the Recommendation's claims, are not "unfettered information requests" or requests "to create or compile summaries of any documented information." Specifically, DotMusic asked ICANN to disclose, inter alia, the following documents, which have not been disclosed:

- Request 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- Request 4. The terms of instructions provided to the evaluator;
- Request 5. The materials provided to the evaluator by the EIU;
- Request 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- Request 7. The materials submitted by affected parties provided to the evaluator;
- Request 8. Any further information, instructions, or suggestions provided by ICANN and/or its staff or counsel to the evaluator; and

This rebuttal adopts the same exhibits and terms as in DotMusic's Reconsideration Request 17-2. See Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), https://www.icann.org/en/system/files/ files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf.

See Annex C, DotMusic DIDP Request (May 5, 2017), https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request- 05may17-en.pdf.

See Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 11 https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf.

Request 10. All materials provided to ICANN by the evaluator concerning the Review.⁵

As explained in Request 17-2,⁶ ICANN refused to disclose these documents to DotMusic. This DIDP Response is clearly improper because (1) ICANN's assertion that the responsive documents fall under the Defined Conditions of Nondisclosure are conclusory and unsupported by any evidence, (2) the public interest outweighs any Nondisclosure Condition, and (3) ICANN's decision violates its Commitments and Core Values. The BAMC's Recommendation now attempts to further justify ICANN's improper decision.

Moreover, the Recommendation improperly implies that several Commitments and Core Values are not implicated in the DIDP Response, that DotMusic made unsupported references to these policies, and that these policies do not support reconsideration of the DIDP Response. These claims are unfounded. To provide further clarity for both the BAMC and the ICANN Board regarding the significance of both ICANN's Commitments and Core Values, DotMusic will now further clarify its position in this Rebuttal to the Recommendation.

1. The DIDP Response Must Adhere to ICANN's Commitments and Core Values

ICANN must comply with its Commitments and Core Values, even when issuing a DIDP response, or it will violate its own Bylaws. ICANN is required to "act in a manner consistent with [its] Bylaws" and "in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values" in performing its mission "to ensure the stable and secure

Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), p. 4, https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf.

⁶ See generally id.

Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), pp. 26-7 https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf.

⁸ ICANN Bylaws, Art. 1, § 1.2(a).

⁹ *Id.* at Art. 1, §1.2.

operation of the Internet's unique identifier systems."¹⁰ There is no exception carved out for the DIDP¹¹ and neither ICANN nor the BAMC has contested that the DIDP process is not governed by these Commitments and Core Values, simply that they do not relate to the DIDP Response for DotMusic's DIDP Request.¹² In fact, the BAMC even explained in the Recommendation that the DIDP is the direct result of ICANN's Commitment to transparency:

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publically available a comprehensive set of materials covering ICANN organization's operational activities.¹³

ICANN's refusal to disclose the requested documents is in direct contravention of this stated Commitment to transparency, as well as ICANN's other Commitments and Core Values.

2. ICANN Must Disclose the Requested Documents in Accordance with Its Commitments to Transparency and Openness

ICANN's DIDP is "[a] principal element of ICANN's approach to transparency and information disclosure." This principle of transparency "is one of the essential principles in ICANN's creation documents, and its name reverberate[s] through its Articles and Bylaws." ICANN's Articles of Incorporation commit it to "operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent

See id.; see also ICANN Articles of Incorporation.

ICANN DIDP, https://www.icann.org/resources/pages/didp-2012-02-25-en.

¹⁰ *Id.* at Art. 1, § 1.1(a).

Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), pp. 26-7 https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf.

¹³ *Id.* at pp. 10-11.

Dot Registry, LLC v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, https://www.icann.org/en/system/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

processes."¹⁶ ICANN's Bylaws reaffirm the same Commitment, explicitly stating that "ICANN must operate in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes."¹⁷ And, in addition to dedicating an entire Article on transparency, ¹⁸ the Bylaws further reaffirm that the processes for policy development, such as the use and evaluation of a CPE provider, must be "accountable and transparent."¹⁹

However, ICANN did not adhere to its Commitment to openness and transparency when it denied DotMusic's requests for further documents about the ongoing review of the CPE process. The CPE has affected several gTLD applicants through its inconsistent application of the CPE criteria, 20 drawing criticism from legal experts 21 and even the Council of Europe. 22 According to the BAMC, "the [ICANN] Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by" DotMusic and identified in the *Dot Registry v. ICANN* proceeding; this discussion resulted in ICANN's decision to initiate an independent review of the CPE process. 23

Yet, the actual content and scope of the review has been mired in secrecy, leaving applicants in the dark regarding ICANN's planned processes for addressing their concerns. This lack of transparency is evident through DotMusic's community application process for the

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¹⁶ ICANN Articles of Incorporation, § 2.III.

¹⁷ ICANN Bylaws, Art. 1, § 1.2(a).

See id. at Art. 3 ("TRANSPARENCY"). Article 3 concerns ICANN's Commitment to "operate to the maximum extent feasible in an open and transparent manner." *Id.* at Art. 3, § 3.1.

¹⁹ *Id.* at Art. 1, § 1.2(b)(ii).

See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017), https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

See Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board (Jan. 30, 2017), p. 2), https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf.

See Council of Europe Report, Application to ICANN for Community-Based New Generic Top Level Domains (gTLDs), Opportunities and challenges from a human rights perspective: https://rm.coe.int/16806b5a14.

Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 4 https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf.

.MUSIC gTLD. In February 2016, DotMusic discovered that it did not prevail as the community applicant for the .MUSIC gTLD. In response, and with the support of numerous community applications, DotMusic filed Reconsideration Request 16-5.²⁴ DotMusic subsequently waited for *over a year* for the BGC to respond to the Reconsideration Request with a Recommendation. And, when ICANN did finally provide DotMusic with a response to Reconsideration Request 16-5, it provided no closure; rather, in April 2017, DotMusic learned that its application was "on hold" as the BGC reviewed the CPE process.²⁵ Despite requests, no other substantive information about the independent review was disclosed to DotMusic for another *two months*, when ICANN released name of the independent evaluator conducting the review.²⁶

ICANN, despite its Commitments to transparency and openness, still has not disclosed relevant information held in documents in its possession about the independent review. For instance, DotMusic and the other applicants do not know (1) critical information regarding the independent review process that would be available through documents in ICANN's possession, such as the selection process for the independent evaluator; (2) the terms and scope of FTI's work for ICANN; and (3) the documents relied on by the EIU during the CPE that are currently under review by FTI. The DIDP remains the only mechanism for applicants to obtain this information from ICANN by obtaining the relevant documents. In rejecting the DIDP Request, ICANN has closed-off this possibility in clear contradiction of its own stated Commitments and Core Values.

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²⁴ CPE RR 16-5, https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf.

See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017), https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

Annex D, ICANN DIDP Response (June 4, 2017), p. 2, https://www.icann.org/en/system/files/files/didp-20170505-1- ali-response-04jun17-en.pdf

The BAMC Recommendation suggests that DotMusic has not sufficiently identified Board conduct implicated in the denial of its DIDP request.²⁷ In fact, ICANN's Board and the BGC remain in ultimate control of any review process initiated by ICANN staff and make the decisions as to the information and documents that are to be released in response to justified requests for documents from affected applicants such as DotMusic. Accordingly, contrary to the BAMC's understanding, DotMusic does in fact ask for the reconsideration of BGC's actions in denying its requests for information and its inaction in refusing to disclose or direct the disclosure of the requested categories of information.

3. ICANN Must Disclose the Requested Documents Because of its Commitment to Fairness, Which Shows that the Public Interest Outweighs Nondisclosure

The independent review is significant not only to DotMusic but also to other gTLD applicants. Its results may change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.²⁸ This evaluation process has clearly disproportionately treated community gTLD applicants by inconsistently and unfairly applying criteria between applicants. And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process in violation of the principle of transparency.

ICANN's refusal to disclose relevant documents through its DIDP also violates the principle of fairness. ICANN specifically stated that:

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent

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Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 9, https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf.

See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) (identifying seven other gTLD strings with pending reconsideration requests), https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).²⁹

It further committed itself to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment."³⁰

ICANN's DIDP Response is in clear violation of this Commitment. There is an undeniable problem with the consistency and fairness of the CPE process, evident by ICANN's own investigation of the CPE process and by the CPE Provider's lack of cooperation with the investigation. Clearly, the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff.³¹ This problem not only affects all of the community gTLD applicants but also the entire Internet community, which will benefit from certain community gTLDs, such as .MUSIC.

Despite the clear public interest in maintaining a fair CPE process, ICANN continues to unfairly exclude community applicants and the Internet community from the independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding

²⁹ ICANN Bylaws, Art. 3, § 3.1.

³⁰ *Id.* at Art. 1, § 1.2(a)(v).

See Exhibit K, Minutes of BGC Meeting (Aug. 1, 2017), https://www.icann.org/resources/board-material/minutes-bgc-2017-08-01-en. "This is in large part because, despite repeated requests from ICANN beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced." *Id.*

the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in blatantly unfair decisions that keep affected applicants uninformed and endangers the integrity of the independent review itself.

ICANN's failure to provide the requested documents raises questions as to its credibility, reliability, and trustworthiness. It implies that details about the independent review and CPE must be kept hidden because of improper behavior by the reviewer or the CPE panel. While trying to allay such concerns and defend its reluctance to disclose documents, ICANN has argued that the requested documents are covered by its Nondisclosure Conditions. However, while ICANN claims that they analyzed whether "each Item" was covered by a Nondisclosure Condition, neither ICANN nor the BAMC identify or apply the specific Nondisclosure Condition for each category of document included within DotMusic's request, much less to individual documents that have been requested.³² Instead, both have simply made conclusory statements that the requested categories of documents are covered by certain Nondisclosure Conditions based on this analysis, expecting DotMusic to understand how these conditions apply to unknown documents.³³

ICANN's actions are therefore in contravention of its commitments to transparency, openness, and its dedication to neutrality, objectiveness, integrity, and fairness. In all fairness, given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any nondisclosure policies.

Annex J, BAMC Recommendation on Reconsideration Request 17-2 (Aug. 23, 2017), p. 21 https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-bamc-recommendation-23aug17-en.pdf.

³³ *Id.* at pp. 16-20.

4. ICANN Must Disclose the Requested Documents to Remain Accountable to the Internet Community and Maintain its Effectiveness

ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community for a clearly flawed evaluation process in violation of its Commitments and Core Values. ICANN has committed itself to "[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness." ICANN is also committed to two Core Values: (1) "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;" and (2) "[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community."

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. ICANN has kept secret details regarding the review process, prohibiting informed participation in the independent review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In additions to violating its Bylaws, ICANN's attempts to avoid accountability will prevent it from operating in a fully effective manner as it prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

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³⁴ ICANN Bylaws, Art. 1, § 1.2(a)(vi).

³⁵ *Id.* at Art. 1, § 1.2(b)(ii).

³⁶ *Id.* at Art. 1, § 1.2(b)(v).

5. Conclusion

Therefore, it is clear that ICANN has failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC has only further perpetuated this violation by recommending that the Board deny Request 17-2. In addition to the reasons stated in the Request 17-2,³⁷ then, the Board should grant Request 17-2 and produce the requested documents regarding the CPE independent review.

AD_	September 12, 2017
Arif Hyder Ali	Date

Annex I, DotMusic Reconsideration Request 17-2 (June 18, 2017), https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf.

Annex I

DotMusic Reconsideration Request ("RR")

1. Requester Information

Requester is represented by:

Name: Dechert LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Requester:

Name: DotMusic Limited ("DotMusic")

Address: Contact Information Redacted

Email: Constantinos Roussos, Contact Information Redacted

Counsel: Arif Hyder Ali, Contact Information Redacted

2. Request for Reconsideration of:

 \underline{X} Board action/inaction

X Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

On September 17, 2016, the ICANN Board passed a Resolution requesting ICANN to conduct "an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE

reports issued by the CPE provider."¹ Further, on October 18, 2016, ICANN's Board Governance Committee ("BGC") requested it be provided "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."² In so doing, the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so.³

On January 30, 2017, DotMusic requested "an immediate update about the status of: (1) DotMusic's Reconsideration Request 16-5 and the BGC's best estimate of the time it requires to make a final recommendation on DotMusic's Reconsideration Request; (2) the Independent Review; and (3) Request for Information from the CPE Provider." DotMusic received no response. On April 28, 2017, DotMusic specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that DotMusic had not received any communication from the independent evaluator. ICANN had not provided any details as to how the evaluator was selected, what its remit was, what information had been provided, whether the evaluator will seek to consult with the affected parties, etc.⁵

Immediately following the Dechert letter submission to ICANN on April 28, 2017, DotMusic received a letter from ICANN BGC Chair Chris Disspain ("BGC Letter") indicating that the Reconsideration Request 16-5 was "on hold" and *inter alia* that:

The BGC decided to request from the CPE provider the materials and research

¹ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a (emphasis supplied).

² Minutes of the Board Governance Committee, October 18, 2016, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

³ ICANN Bylaws Art. IV. § 2.13 "The Board Governance Committee may also request information relevant to the Reconsideration Request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. *Any information collected by ICANN from third parties shall be provided to the Requestor.*"

⁴ Annex A, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, January 30, 2017, https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf

⁵ Annex B, Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf

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. 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).

On May 5, 2017, Arif Ali, on behalf of DotMusic, submitted a DIDP Request 20170505-1 ("DIDP Request")⁷ requesting, *inter alia*:

- 1. The identity of the individual or firm undertaking the Review;
- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 3. The date of appointment of the evaluator;
- 4. The terms of instructions provided to the evaluator;
- 5. The materials provided to the evaluator by the EIU;
- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 7. The materials submitted by affected parties provided to the evaluator;
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
- 9. The most recent estimates provided by the evaluator for the completion of the

⁷ See Annex C, DIDP Request at https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf.

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⁶ See Annex E, Letter to DotMusic from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf

investigation; and

10. All materials provided to ICANN by the evaluator concerning the Review.

DotMusic concluded in its DIDP Request that "there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review."

On May 15, 2017, in a letter to DotMusic, Jeffrey LeVee, on behalf of ICANN, reiterated the statements of BGC Chairman Chris Disspain and stated that certain questions concerning the CPE Review "will be addressed as part of ICANN's response to the DIDP in due course."

In response, on May 21, 2017, Arif Ali, on behalf of DotMusic, responded that DotMusic does "not consider ICANN's delays justified" and that "[r]egrettably, ICANN continues to breach its transparency obligations, ignoring DotMusic's information requests concerning the review process currently being conducted by an independent evaluator. Particularly, ICANN has ignored the basic safeguards that DotMusic has proposed, *inter alia*, that the identity of the evaluator be disclosed; that DotMusic be provided access to the materials being reviewed by the evaluator; and that DotMusic's right to be heard during the evaluation process and comment on the evaluation results be given full effect." Further, the letter stated that "[i]t is clear that the delays and secrecy are thus impairing ICANN's Board from discharging their oversight responsibilities. Withholding materials concerning DotMusic's CPE evaluation does not merely result in a denial of DotMusic's right to be heard; it also hampers the efficiency of the investigation, by disabling us from being

⁸ Annex F, https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf

able to identify the flaws in the EIU's results. We urge ICANN to reconsider whether continuing a pattern of secrecy and neglect to the right of applicants to fair treatment serves either ICANN's or the global music community's best interests."

On June 4, 2017, ICANN responded to the DIDP Request, ¹⁰ stating that:

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017 (sic), FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. 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. On 13 January 2017, FTI signed an engagement letter to perform the review... [T]he scope of the review consists of: (1) review of the process by which the ICANN organization 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.

Moreover, ICANN denied critical items requested. Specifically:

<u>Items 1- 4</u> ... With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

<u>Items 5-6</u> Items 5 and 6 seeks the disclosure of the materials provided to the evaluator by the CPE provider (Item 5) and materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board (Item 6). As detailed in the Community Priority Evaluation Process Review Update, the review is being conducted in two parallel tracks. *The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early*

⁹ Annex G, https://www.icann.org/en/system/files/correspondence/ali-to-Levee-21may17-en.pdf

¹⁰ Annex D, ICANN DIDP Response, June 4, 2017, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf

March 2017. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

[...]

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by DotMusic Limited.

<u>Item 8</u>. Item 8 seeks the disclosure of "[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator." This item overlaps with Items 4 and 5. The information responsive to the overlapping items has been provided in response to Items 4 and 5 above.

<u>Item 10</u>. Item 10 requests the disclosure of "[a]ll materials provided to ICANN by the evaluator concerning the Review." As noted, the review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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.
- 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.
- 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.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

On June 10, 2017, Arif Ali, on behalf of DotMusic and dotgay, sent a joint letter to ICANN stating, *inter alia*, that:¹¹

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

First, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

Second, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation 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," and that (ii) "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."

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration

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¹¹ Annex H, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (10 June 2017).

- requests, including all of the documents listed in Annexes A and B;
- 2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
- 3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
- 4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017, to date.

According to ICANN's DIDP "Defined Conditions of Nondisclosure:"12

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.

Information...may still be made public if ICANN determines, under the particular circumstances, that the <u>public interest</u> in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN reserves the right to deny disclosure of information under conditions not designated above if ICANN determines that the harm in disclosing the information outweighs the <u>public interest</u> in disclosing the information.

ICANN's default policy is to release all information requested unless there is a *compelling* reason not to do so. ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of *public interest* in terms of the DIDP Request.

ICANN signed an engagement letter with FTI to perform an *independent* review of the CPE Process based on the acceptance by ICANN's Board of the systemic breaches of its Bylaws

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¹² See ICANN DIDP, https://www.icann.org/resources/pages/didp-2012-02-25-en

in the CPE Process identified by the *Despegar* and *Dot Registry* IRP Declarations.¹³ It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI's findings and conclusions. These materials critically include the items requested by DotMusic in its DIDP request that was denied by ICANN because ICANN "determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure." To prevent serious questions arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to DotMusic and the public to ensure full transparency, openness and fairness. This includes the items requested by DotMusic that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure and conflict check processes (Item 2), and the existence of the terms of appointment (Item 4) but also the underlying documents that substantiate ICANN's claims.

ICANN's assertion with regard to Item 5 that with the "exception of the correspondence between the ICANN organization and the CPE Provider regarding the evaluations, all materials provided to the evaluator are publicly available" is undercut by ICANN's admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP request. 15

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¹³ See Dot Registry Declaration, https://www.icann.org/en/system/files/irp-declaration-redacted-29jul16-en.pdf. See also Despegar Declaration, https://www.icann.org/en/system/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf.

¹⁴See ICANN DIDP, https://www.icann.org/resources/pages/didp-2012-02-25-en at p.4

¹⁵ See ICANN DIDP, https://www.icann.org/resources/pages/didp-2012-02-25-en at p.3 ("The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017.").

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel of the close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.¹⁶

In fact, this is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure." In addition, ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including DotMusic's Reconsideration Request 16-5. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency and credibility of the FTI investigation.

4. Date of action/inaction:

June 4, 2017

5. On what date did you become aware of action or that action would not be taken?

June 5, 2017

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¹⁶ *See* Dot Registry Declaration, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf at paras.93-101.

6. Describe how you believe you are materially affected by the action or inaction:

ICANN's actions and inactions materially affect the delineated and organized music community defined in DotMusic's application that is supported by organizations with members representing over 95% of global music consumed (the "Music Community") and DotMusic. Not disclosing these documents has negatively impacted the timely, predictable and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency and fairness of the CPE process. Without an effective policy to ensure openness, transparency and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency and openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

ICANN's action and inaction in denying the DIDP Request do not follow ICANN's Resolutions, its Bylaws or generally how ICANN claims to hold itself to high standards of accountability, transparency and openness. Such action and inaction raise additional questions as to the credibility, reliability and trustworthiness of the New gTLD Program's CPE process and its management by ICANN, especially in the case of the CPE Report and CPE process of DotMusic's application for the .MUSIC gTLD (Application ID: 1-1115-14110), which is subject to the CPE Reconsideration Request 16-5 ("CPE RR")¹⁷ and is highly relevant to this Request.

A closed and opaque ICANN damages the credibility, accountability and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating

¹⁷ CPE RR 16-5, https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en

community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the DotMusic CPE RR. In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the Music Community that has supported the DotMusic community-based application for the .MUSIC string to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

The Reconsideration Request and Independent Review Process accountability mechanisms are the <u>only</u> recourse for applicants (or impacted requesters) in lieu of litigation. As such, ICANN must provide documents and Items in DIDP requests in which there is an appearance of gross negligence, conflicts of interest, multiple violations of established process, or even simply questions from the affected parties as to how a certain process was followed.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

See Answer to Question 6 above.

8. <u>Detail of Staff/Board Action/Inaction – Required Information</u>

See Answer to Question 6 above.

9. What are you asking ICANN to do now?

The Requester requests ICANN to disclose all the Items requested in the Request based on ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability) to serve the global public interest.

Such disclosure will increase transparency and provide DotMusic and the BGC with additional information to assist in <u>evaluating</u> the CPE Report as well as the EIU's decision-making process in issuing the CPE Report. As outlined in Reconsideration Request 16-5 (and incorporated here by reference), ICANN engaged in <u>numerous</u> procedural and policy violations (including material omissions and oversights), which lead to inconsistencies and substantial flaws in its rationale methodology and scoring process.

The Requester requests that the BGC apply the Documentary Information Disclosure Policy to the DIDP Request in the manner it was intended to operate 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." The Requester requests the BGC:

- 1. Review the ICANN Staff decision to withhold all the information requested, to ensure that each and every requested Item, documents and information request was considered and evaluated individually, and that the public interest test was applied to each individual item properly. The Requester requests that the Items and documents requested are disclosed;
- 2. To recognize and instruct Staff that ICANN's default policy is to release all information requested unless there is a **compelling** reason not to do so and, where such a compelling

reason for nondisclosure exists to inform the Requesters of the reason for nondisclosure pertaining to each individual item requested; and

3. Insofar as Items remain withheld, to inform the Requesters as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm. Withholding information under the principle of public interest needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws.

As indicated in the CPE Reconsideration Request 16-5, the promise of independence, nondiscrimination, transparency and accountability has been grossly violated in the .MUSIC CPE as the misguided and improper .MUSIC CPE Report shows. As such, the disclosure of the Items and documents requested will ensure that the BGC can perform due diligence and exercise independent judgement to make a well-informed decision pertaining to this DIDP RR (and subsequently the CPE Reconsideration Request 16-5).

10. Please state specifically 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.

DotMusic is a community applicant for .MUSIC, an application supported by organizations with members representing over 95% of music consumed. The justifications under which the Requester has standing and the right to assert this reconsideration request are:

- i. Predictability: [gTLDs] must be introduced in an orderly, timely and predictable way. 18
- ii. Breach of Fundamental Fairness: Basic principles of due process to proceeding were violated and lacked accountability by ICANN, including adequate quality control;
- iii. Conflict of interest issues;
- iv. Failure to consider evidence filed; and
- v. Violation of ICANN Articles of Incorporation/Bylaws:
 - a. Introducing and <u>promoting</u> competition in the registration of domain names where practicable and <u>beneficial in the public interest</u>. ¹⁹
 - b. Preserving and <u>enhancing</u> the operational stability, <u>reliability</u>, security, and global interoperability of the Internet. ²⁰
 - c. Employing <u>open</u> and <u>transparent</u> policy development mechanisms that (i) promote <u>well-informed decisions</u> based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.²¹
 - d. <u>Making decisions by applying documented policies neutrally and objectively, with</u> integrity and fairness.²²
 - e. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, <u>obtaining informed input from those entities most</u> affected.²³
 - f. Remaining accountable to the Internet community through mechanisms that

¹⁸ Final Issue Report on New gTLD Subsequent Procedures, https://gnso.icann.org/en/issues/new-gtlds/subsequent-procedures-final-issue-04dec15-en.pdf, at pp.23-24

¹⁹ ICANN Bylaws, Art. I, § 2.6

²⁰ ICANN Bylaws, Art. I, § 2.1

²¹ ICANN Bylaws, Art. I, § 2.7

²² ICANN Bylaws, Art. I, § 2.8

²³ ICANN Bylaws, Art. I, § 2.9

enhance ICANN's effectiveness.²⁴

g. 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.²⁵

h. <u>Non-discriminatory treatment</u>: ICANN shall not apply its standards, policies, procedures, or practices <u>inequitably or single out any particular party for disparate</u> treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.²⁶

i. <u>Transparency</u>: ICANN and its constituent bodies shall operate to the <u>maximum</u> extent feasible in an <u>open and transparent manner and consistent with procedures</u> designed to ensure fairness.²⁷

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? No

11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Yes.

12. Do you have any documents you want to provide to ICANN? Yes. See exhibits in Annexes.

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,

²⁴ ICANN Bylaws, Art. I, § 2.10

²⁵ ICANN Bylaws, Art. I, § 2.11

²⁶ ICANN Bylaws, Art. II, § 3

²⁷ ICANN Bylaws, Art. III, § 1

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.

A CO	I 10 2017
	June 18, 2017
Arif Hyder Ali	Date

Annex J

RECOMMENDATION OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECONSIDERATION REQUEST 17-2 23 AUGUST 2017

The Requestor, DotMusic Limited, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review). Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.

I. Brief Summary.

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. The Requestor was invited to, and did, participate in CPE, but did not prevail. On 24 February 2016, the Requester sought reconsideration of the CPE determination (Request 16-5).³

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation of

¹ Request 17-2, § 3, at Pg. 5 (incorrectly marked page 4).

² Request 17-2, § 10, at Pg. 16 (marked 15).

³ Request 16-5, https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf.

the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.⁴ The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-5, pending completion of the CPE Process Review.

On 5 May 2017, the Requestor submitted the DIDP Request. The Requestor sought ten categories of documents and information relating to the CPE Process Review, some of which the Requestor had already requested in a prior DIDP request. On 4 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-2 (Request 17-2), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws

⁴ Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/governance/bylaws-en/#article4.

concerning non-discriminatory treatment and transparency by: (1) providing information rather than documents in response to Items No. 2 and 4; (2) determining not to produce certain documents responsive to Items No. 5, 6, and 8, and (3) determining not to produce any documents responsive to Item No. 10.⁵

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration, and the Ombudsman recused himself.⁶

The BAMC has considered Request 17-2 and all relevant materials and recommends that the Board deny Request 17-2 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

II. Facts.

A. Background Facts.

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited to participate in CPE.⁷ The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.⁸

On 10 February 2016, the CPE panel issued a CPE Report, concluding that the Application earned 10 out of 16 possible points on the CPE criteria. Because a minimum of 14

⁵ Request 17-2, § 10, at Pg. 16 (marked 15).

⁶ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf.

⁷ 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.

⁸ See id

⁹ Id.; see also CPE Report at 1, https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf.

points are required to prevail in CPE, the CPE Report concluded that the Application did not qualify for community priority.¹⁰

On 24 February 2016, the Requestor filed Request 16-5, seeking reconsideration of the CPE determination and approval of the Requestor's community application.¹¹

On 29 April 2016, the Requestor submitted a DIDP request seeking documents relating to the CPE Report (2016 DIDP Request).¹² On 15 May 2016, ICANN organization responded to the 2016 DIDP Request.¹³ ICANN organization provided links to all the responsive, publicly available documents, furnished an email not previously publicly available,¹⁴ explained that it did not possess documents responsive to several of the requests, and explained that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.¹⁵ The Requestor thereafter filed Request 16-7 challenging ICANN organization's response to the 2016 DIDP Request. On 26 June 2016, the BGC denied Request 16-7.¹⁶

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by the Requestor on 17 September 2016 during its presentation to the BGC regarding Request 16-5, as well as issues that were identified in the Final Declaration from the Independent Review

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¹⁰ See CPE Report at 1.

¹¹ Request 16-5.

¹² See 2016 DIDP Request, https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-request-29apr16-en.pdf.

¹³ 2016 DIDP Response, https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf.

¹⁴ 2016 DIDP Response at 3, 12, Attachment.

¹⁵ *Id.*, Pgs. 1-7, 11-12.

¹⁶ BGC Determination on Request 16-7, https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf. The Requestor has now filed three reconsideration requests: Request 16-5 (challenging the CPE determination), Request 16-7 (challenging the response to the 2016 DIDP Request), and the instant request, Request 17-2 (challenging the response to the Requestor's 2017 DIDP Request).

Process (IRP) proceeding initiated by Dot Registry, LLC.¹⁷ As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to 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 their evaluations of the community applications. The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 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).

On 5 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:²⁰

- 1. The identity of the individual or firm undertaking the CPE Process Review;
- 2. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 3. The date of appointment of the evaluator;
- 4. The terms of instructions provided to the evaluator;
- 5. The materials provided to the evaluator by the EIU;

¹⁷ Dot Registry IRP Final Declaration, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

¹⁸ 18 October 2016 Minutes of BGC Meeting, at Item 2, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1, https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

¹⁹ 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2,

https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf. DIDP Request at Pg. 4, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf.

- 6. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board;
- 7. The materials submitted by affected parties provided to the evaluator;
- 8. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator:
- 9. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 10. All materials provided to ICANN by the evaluator concerning the CPE Process Review.²¹

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).²² The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.²³ The Status Update explained that the CPE Process Review is occurring on two parallel tracks – the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, and was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.²⁴

On 4 June 2017, ICANN organization responded to the DIDP Request.²⁵ As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to nine (Items No. 1-9) of the ten categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.²⁶ The DIDP Response

²¹ *Id*. at Pg. 4-5.

²² Status Update, https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf.

²³ Ld

²⁴ I.A

²⁵ DIDP Response, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf.

²⁶ See generally id.

further explained that all the documents responsive to Item No. 10 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure.²⁷ Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.²⁸

On 18 June 2017, the Requestor filed Request 17-2, seeking reconsideration of ICANN organization's response to Items No. 2 and 4, and its determination not to produce certain documents responsive to Items No. 5, 6, 8, and 10 because they were subject to Nondisclosure Conditions. The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable[,] and fair resolution of the .MUSIC string, while raising serious questions about the consistency, transparency[,] and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it is one of only two recourses "for applicants . . . in lieu of litigation," and the other recourse, IRP, is "expensive and time-consuming."

On 7 July 2017, the BGC concluded that Request 17-2 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.³⁰

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²⁷ *Id.* at Pg. 5-6.

²⁸ DIDP Response at Pg. 6.

²⁹ Request 17-2, § 6, at Pg. 12 (marked 11).

³⁰ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(I)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-2 was pending. The BGC was tasked with reviewing Request 17-2 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-2.

On 9 July 2017, ICANN organization transmitted Request 17-2 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.³¹ Accordingly, the BAMC reviews Request 17-2 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

B. Relief Requested

The Requestor asks the BAMC to: (1) "[r]eview the ICANN Staff decision to withhold" information requested in the DIDP, "to ensure that each and every requested Item . . . was considered and evaluated individually, and that the public interest test was applied to each individual item properly"; (2) disclose the materials that ICANN staff withheld in response to the DIDP Request; (3) "instruct Staff that ICANN's default policy is to release all information requested unless there is a compelling reason not to"; and (4) for any items that the Board decides to withhold, "inform the Requestor[] as to the specific formula used to justify the nondisclosure."

III. Issue.

The issues are as follows:

- 1. Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
- 2. Whether ICANN organization was required by the DIDP or established policies to provide the Requestor with "the specific formula used to justify the nondisclosure."
- 3. Whether ICANN organization complied with its Core Values, Mission, and Commitments.³³

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³¹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Request 17-2, Pg. 1, https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-ombudsman-action-10jul17-en.pdf.

³² Request 17-2, § 9, at Pg. 13-14 (marked 12-13).

³³ Request 17-2, § 9, at Pg. 14 (marked 13).

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-2 seeks reconsideration of staff and Board action or inaction.³⁴ The only subsequent discussion of Board action is the Requestor's passing reference to its view that, in requesting materials from CPE panels for use in its evaluation of pending reconsideration requests, "the BGC became obligated to disclose these materials under its Bylaws, but has failed to do so."³⁵ The Requestor makes no further arguments concerning the BGC's actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on the "ICANN staff" response to the Requestor's DIDP request.³⁶ Accordingly, the BAMC understands Request 17-2 to seek reconsideration of ICANN organization's response to the Requestor's DIDP Request, and *not* reconsideration of BGC action or inaction.³⁷

IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.

A. 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

³⁴ Request 17-2, § 2, at Pg. 1.

³⁵ Request 17-2, § 3, at Pg. 2 (marked 1).

³⁶ Request 17-2, §at Pg. 13 (marked 12).

³⁷ Further, we note that the BAMC has not completed its consideration of Request 16-5, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

(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.³⁸

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-2 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.³⁹ That substantive provision did not change when ICANN's Bylaws were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current 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.⁴⁰ 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.⁴¹

On 9 July 2017, the BGC determined that Request 17-2 is sufficiently stated and sent Request 17-2 to the Ombudsman for review and consideration.⁴² The Ombudsman thereafter recused himself from this matter.⁴³ Accordingly, the BAMC has reviewed Request 17-2 and issues this Recommendation.

B. Documentary Information Disclosure Policy

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and

³⁸ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

³⁹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1).

⁴⁰ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(1)(iii).

⁴¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁴² Response from Ombudsman Regarding Request 17-2, Pg. 1-2.

⁴³ Response from Ombudsman Regarding Request 17-2, Pg. 1.

that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course.⁴⁴ In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information "concerning ICANN's operational activities, and within ICANN's possession, custody, or control," that is not already publicly available.⁴⁵ The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization's operational activities, and within ICANN organization's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.⁴⁶

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the "Process For Responding To ICANN's Documentary Information

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⁴⁴ See ICANN Documentary Information Disclosure Policy, https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁴⁵ *Id*.

⁴⁶ *Id*.

Disclosure Policy (DIDP) Requests" (DIDP Response Process).⁴⁷ 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]."⁴⁸

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- (i) Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decisionmaking 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;
- (ii) 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;
- (iii) Confidential business information and/or internal policies and procedures; and
- (iv) 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.⁴⁹

Notwithstanding the above, information that falls within any of the Nondisclosure

Conditions *may* still be made public if ICANN organization determines, under the particular

 ⁴⁷ See DIDP Response Process, https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.
 ⁴⁸ Id.; see also, "Nondisclosure Conditions," available at https://www.icann.org/resources/pages/didp-2012-02-25-

⁴⁹ DIDP.

circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁵⁰

V. Analysis and Rationale.

- A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.
 - 1. The DIDP Response Complies With Applicable Policies And Procedures.

The DIDP Response identified documentary information responsive to all 10 items. For Items No. 1 through 9, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website.⁵¹ Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available,⁵² ICANN organization identified and provided the hyperlinks to 21 publicly available categories of documents that contain information responsive to Items No. 1 through 9.⁵³

The DIDP Response also explained that some of the documents responsive to Items No. 6 and 8, as well as all documents responsive to Item 10, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.⁵⁴

⁵⁰ *Id*.

⁵¹ See generally DIDP Response.

⁵² DIDP https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁵³ DIDP Response at Pg. 3-4.

⁵⁴ DIDP Response at Pg. 6.

The Requestor claims that ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 violated established policies and procedures.⁵⁵ However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure.⁵⁶ As demonstrated below, ICANN organization's responses to Items No. 2, 4, 5, 6, 8 and 10 adhered to established policies and procedures.

The DIDP Response Process provides that "[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested ..., interviews ... the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request." Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions. If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure. disclosure.

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⁵⁵ The BAMC notes that the ten categories of documents and information relating to the CPE Review Process that the Requestor requested in its DIDP Request (i.e., Item Nos. 1-10) are identical to the requests set forth in a subsequent DIDP Request submitted by dotgay LLC (i.e., Item Nos. 4-13). While dotgay LLC, which is represented by the same counsel as the Requestor here here (who also filed the DIDP requests on behalf of the Requestor and dotgay LLC), has sought reconsideration of ICANN's response to its DIDP Request (Reconsideration Request 17-3), dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Items No. 5, 7, and 11, which are identical to Items No. 2, 4, and 8 here.

⁵⁶ Request 17-2, § 10, Pg. 15 (marked 14).

⁵⁷ DIDP Response Process, https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf. ⁵⁸ *Id*.

⁵⁹ *Id*.

a. ICANN organization's response to Item No. 2 adhered to established policies and procedures.

Item No. 2 requested information regarding "[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment." In its response, and consistent with the DIDP Response Process, ICANN organization identified and provided the hyperlink to the Status Update, which described the selection process for the company conducting the CPE Process Review. The response to Item No. 2 further explained that "[w]ith respect to the disclosures and conflict checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE."

The Requestor argues that ICANN organization was required to "disclose not only the existence of selection, disclosure, and conflict check processes . . . but also the underlying documents that substantiate ICANN's claims." The Requestor's claim is unsupported. The Requestor asked for information relating to "the selection process, disclosures, and conflicts checks undertaken in relation to the appointment of FTI." Notwithstanding that Item No. 2 requested information rather than documents, and as noted above, the DIDP Response identified and provided the hyperlink to the Status Update, which substantiated the narrative in the DIDP Response. Even if Item No. 2 were to be interpreted as a request for documents, the DIDP Response adhered to the DIDP Response Process, because ICANN organization published and provided hyperlinks to all documents in its possession that are appropriate for disclosure. The

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⁶⁰ DIDP Request at Pg. 4.

⁶¹ DIDP Response at Pg. 3.

⁶² DIDP Response at Pg. 3.

⁶³ Request 17-2 § 3, Pg. 9 (marked 8).

⁶⁴ See DIDP Request at Pg. 4.

⁶⁵ DIDP Response at Pg. 3.

⁶⁶ DIDP Response Process; DIDP Response at Pg. 3.

only other documents in ICANN's possession relating to the selection process and conflicts check are communications with ICANN organization's outside counsel. Those documents are not appropriate for disclosure because they comprise:

> 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.⁶⁷

The Requestor does not claim that ICANN organization's response to Item 2 is contrary to the DIDP Response Process, nor does the Requestor provide any evidence demonstrating how this response violates ICANN's Mission, Commitments, or Core Values.⁶⁸ Reconsideration is not warranted on these grounds.

> b. ICANN organization's response to Item No. 4 adhered to established policies and procedures.

Item No. 4 requested the "terms of instructions provided to the evaluator." Like Item No. 2, this was a request for information. Nevertheless, ICANN organization identified and provided the hyperlink to the Status Update, which contained information regarding the scope of the Review. The Status Update states:

> The scope of the review consists of: (1) review of the process by which the ICANN organization 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 provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

⁶⁷ DIDP.

⁶⁸ The Requestor claims that ICANN organization asserted certain Nondisclosure Conditions in response to Items No. 1-4. See Request 17-2, § 3, Pg. 5 (marked 4). The Requestor is mistaken. ICANN did not determine that Nondisclosure Conditions prevented the disclosure of documents responsive to Items No. 1-4. See DIDP Response, at Pg. 3. Therefore, reconsideration is not warranted on those grounds. As noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Item No. 5, which is identical to Item No. 2

⁶⁹ DIDP Request at Pg. 5.

The review is being conducted in two parallel tracks The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. . . . The second track focuses on gathering information and materials from the CPE provider. 70

The Requestor argues that the DIDP required ICANN organization to "disclose not only . . . the existence of the terms of appointment . . . but also the underlying documents that substantiate ICANN's claims."⁷¹

As with Item No. 2, and notwithstanding that the Requestor sought information rather than documents in this DIDP Request, the DIDP Response to Item No. 4 adhered to the DIDP Response Process, because it identified responsive documents and provided a hyperlink to the responsive document that was appropriate for disclosure.⁷² ICANN organization possesses only one other document potentially responsive to Item No. 4: the letter engaging FTI to undertake the CPE Process Review. That document is not appropriate for disclosure because it comprises:

• 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.⁷³

Accordingly, reconsideration is not warranted for the same reasons that reconsideration of the DIDP Response to Item No. 2 is not warranted.

c. ICANN organization's responses to Items No. 5, 6, and 8 adhered to established policies and procedures.

Items No. 5 and 6 sought the disclosure of the "materials provided to the evaluator by [the CPE provider]" (Item No. 5) and "materials provided to the evaluator by ICANN staff/legal,

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⁷⁰ Status Update.

⁷¹ Request 17-2 § 3, Pg. 9 (marked 8). Again, and as noted in footnote 55 above, dotgay LLC has not sought reconsideration of ICANN's response to dotgay LLC's Item No. 7, which is identical to Item No. 4 here.

⁷² DIDP Response Process; DIDP Response at Pg. 3.

⁷³ DIDP.

outside counsel or ICANN's Board or any subcommittee of the Board" (Item No. 6). ⁷⁴ Item No. 8 sought the disclosure of "[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator," which overlaps with Items No. 5 and 6. ⁷⁵ With respect to Item No. 5, ICANN organization responded as follows:

The second track of the review focuses on gathering information and materials from the CPE provider. As noted Community Priority Evaluation Process Review Update of 2 June 2017, this work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents.⁷⁶

As noted in the Status Update, and referenced in the DIDP Response, the CPE provider had not provided the requested materials at the time ICANN organization responded to the DIDP Request.⁷⁷ Accordingly, ICANN organization did not possess any documents responsive to Item No. 5 to provide to the Requestor, even if disclosure under the DIDP was appropriate, which is not yet clear.⁷⁸

In response to Item No. 6, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with the correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization's response to the 2016 DIDP

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⁷⁴ Request 17-2, § 3, at Pg. 9 (marked 8).

⁷⁵ DIDP Request at Pg. 5.

⁷⁶ DIDP Response at Pg. 4-5.

⁷⁷ Id

⁷⁸ See DIDP (DIDP applies to "documents . . . within ICANN's possession, custody, or control").

Request, which sought the same documentary information.⁷⁹ The BGC previously denied the Requestor's Request 16-7, which challenged ICANN organization's response to the 2016 DIDP Request.⁸⁰

The Requestor argues that ICANN organization's statement that it provided all materials responsive to Item No. 6⁸¹ except the correspondence between ICANN organization and the CPE provider "is undercut by ICANN organization's admission of the existence of interviews conducted by FTI of ICANN staff, whose notes have not been disclosed in response to the DIDP [R]equest." This complaint is misplaced. Item No. 6 sought materials provided to FTI. The Requestor does not assert that interview notes—if any exist and are in ICANN organization's possession—were provided to FTI. Even if ICANN organization possessed copies of interview notes and provided those materials to FTI, the materials would fall under three Nondisclosure Conditions: (i) "[d]rafts of . . . documents . . . or any other forms of communication"; (ii) "[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, including internal documents[and] memoranda"; and (iii) "[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege [...]." The Requestor raises the same arguments for ICANN organization's response to Item

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⁷⁹ DIDP Response at Pg. 3-4.

⁸⁰ BGC Determination on Request 16-7, https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf.

⁸¹ The Requestor identified Item No. 5 in its argument on this issue, but it appears from the context that the Requestor intended to reference Item No. 6, materials provided to the evaluator by ICANN.

⁸² Request 17-2, § 3, at Pg. 9 (marked 8).

⁸³ DIDP Request at Pg. 5.

⁸⁴ See id.

⁸⁵ DIDP.

No. 8 as raised with respect to Item No. 6, and the BAMC rejects those arguments as outlined above.

d. ICANN organization's response to Item No. 10 adhered to established policies and procedures.

Item No. 10 requested "[a]ll materials provided to ICANN by the evaluator concerning the [CPE] Review." The DIDP Response stated:

[T]he review is still in process. To date, FTI has provided ICANN with requests for documents and information to ICANN and the CPE provider. These documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure....

Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Item No. 10—"requests for documents and information to ICANN and the CPE provider"—then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.⁸⁷ Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.⁸⁸

2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information. ⁸⁹ Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the

⁸⁶ DIDP Request at Pg. 5.

⁸⁷ DIDP Response Process.

⁸⁸ DIDP Response at Pg. 6.

⁸⁹ DIDP.

public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply. In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Items No. 6 and 8, ICANN organization determined that the correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because they comprised:

- 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;
- 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;
- 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;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.⁹¹

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⁹⁰ *Id*.

⁹¹ DIDP Response at Pg. 4-5, citing 2016 DIDP Response at Pg. 5, https://www.icann.org/en/system/files/files/didp-20160429-1-dotmusic-response-supporting-docs-15may16-en.pdf.

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Items No. 6 and 8. Those items request correspondence between ICANN organization and the CPE Provider. The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 16-7 without success. The BAMC recommends that Request 17-2 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Item No. 10 seeks materials that FTI provided to ICANN organization concerning the CPE Process Review. In response to Item No. 10, ICANN organization noted that it was in possession of the requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

- 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;
- 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;

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⁹² DIDP Request at Pg. 5.

⁹³ BGC Determination on Request 16-7, https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-bgc-determination-26jun16-en.pdf.

- 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. 94

These materials certainly comprise information that may "compromise the integrity of" ICANN organization's and FTI's "deliberative and decision-making process" with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because "ICANN did not state compelling reasons for nondisclosure as it pertains to each individual item requested nor provide the definition of public interest in terms of the DIDP Request." The Requestor's arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials. There is no policy or procedure requiring that ICANN organization provide *additional* justification for nondisclosure.

The Requestor asks the Board to "inform the Request[or] as to the specific formula used to justify the nondisclosure position that the *public interest* does not outweigh the harm." Neither the DIDP nor the DIDP Response Process require ICANN organization to use or provide a "formula" for determining whether materials that are subject to Nondisclosure Conditions may nonetheless be disclosed.⁹⁸

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⁹⁴ DIDP Response at Pg. 5-6; *see also* ICANN Defined Conditions for Nondisclosure. https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁹⁵ Request 17-2, § 3, at Pg. 8 (marked 7).

⁹⁶ DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

⁹⁷ Request 17-2, § 9, Pg. 14 (marked 13) (emphasis in original).

⁹⁸ See DIDP: DIDP Response Process.

The Requestor also asserts that nondisclosure "needs to be avoided in order to ensure the procedural fairness guaranteed by Article 3, Section 1 of ICANN's Bylaws." However, the DIDP provides the procedural fairness that the Requestor seeks. Here, ICANN organization applied the DIDP, determined that certain of the requested materials were subject to Nondisclosure Conditions, considered whether the materials should nonetheless be made public, determined that the public interest in disclosing the information did not outweigh the harm of disclosure, and explained that determination to the Requestor. Therefore, reconsideration is not warranted on this ground.

3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public's Interest In Disclosing The Information.

The DIDP states that documents subject to 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." In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.¹⁰²

The Requestor previously acknowledged that under the DIDP Response Process, it is "within ICANN's sole discretion to determine whether or not the public interest in the disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the

⁹⁹ Request 17-2, § 9, Pg. 14 (marked 13).

¹⁰⁰ See generally DIDP Response.

¹⁰¹ See id

¹⁰² DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

harm that may be caused by such disclosure."¹⁰³ Nevertheless, the Requestor claims reconsideration is warranted because the Dot Registry IRP Final Declaration gave rise to a "unique circumstance where the 'pubic interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."¹⁰⁴ However, the Dot Registry IRP Final Declaration is not an established ICANN policy or procedure, and the Board's acceptance of aspects of the Final Declaration does not make it so. Moreover, the Dot Registry IRP Final Declaration did not establish that the public interest in disclosure outweighs the potential harm for each and every document in ICANN organization's possession related to the CPE Process Review.¹⁰⁵ Accordingly, the argument does not support reconsideration.

B. The Reconsideration Process is Not A Mechanism for "Instructing" ICANN Staff on General Policies Where No Violation of ICANN Policies or Procedure Has Been Found.

The Requestor asks the Board to "recognize and instruct Staff that ICANN's default policy is to release all information requested unless there is a compelling reason not to do so." The Requestor is correct insofar as, under the DIDP Response Process, documents "concerning ICANN's operational activities, and within ICANN organization's possession, custody, or control, [are] made available to the public unless there is a compelling reason for confidentiality." However, the reconsideration request process is not an avenue for "instruct[ing]" ICANN staff concerning ICANN's policies in general, where no violation of ICANN policies or procedures has been found. Because the BAMC concludes that ICANN

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¹⁰³ Request 16-7, § 3, Pg. 4.

¹⁰⁴ Request 17-2 § 3, Pg. 10 (marked 9).

¹⁰⁵ See ICANN Board Resolution 2016.08.09.11, https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.g.

¹⁰⁶ Request 17-2, § 9, Pg. 13-14 (marked 12-13).

¹⁰⁷ DIDP.

organization adhered to established ICANN policies in responding to the DIDP Request, the BAMC does not recommend that the Board "instruct" ICANN staff as the Requestor asks.

Further, to the extent the Requestor is challenging the DIDP Response Process or the DIDP itself, the time to do so has passed.¹⁰⁸

C. The Requestor's Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.

The Requestor cites a litany of ICANN's Commitments and Core Values, which the Requestor believes ICANN organization violated in the DIDP Response: 109

- Introducing and <u>promoting</u> competition in the registration of domain names where practical and <u>beneficial to the public interest</u>.¹¹⁰
- Preserving and <u>enhancing</u> the operational stability, <u>reliability</u>, security, and global interoperability of the Internet.¹¹¹
- Employing <u>open</u> and <u>transparent</u> policy development mechanisms that (i) promote <u>well-informed decisions</u> based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.¹¹²
- Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. 113
- Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, <u>obtaining informed input from those entities most</u> affected.¹¹⁴

¹⁰⁸ ICANN Bylaws, 1 October 2016, Art. 4 Section 4.2(g)(i).

¹⁰⁹ Request 17-2, § 10, at Pg. 15-16 (marked 14-15). The Requestor cites the version of the Bylaws effective from 11 February 2016 until 30 September 2016. The version of the Bylaws effective on 18 June 2017, when the Requestor submitted Request 17-2, govern this Request. The substance of the Bylaws cited are not different from the current version of the Bylaws, except where otherwise noted.

¹¹⁰ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(iv) (emphasis in original).

¹¹¹ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(i) (emphasis in original).

¹¹² ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(iv) (emphasis in original).

¹¹³ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v) (emphasis in original).

¹¹⁴ICANN Bylaws, 11 February 2016, Art. I, Section 2.9 (emphasis in original). The current version of the Bylaws does not include the same language. The Bylaws now state: "Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community." ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(v).

- Remaining <u>accountable</u> to the Internet community through mechanisms that enhance ICANN's effectiveness.¹¹⁵
- 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.¹¹⁶
- 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.¹¹⁷
- <u>Transparency</u>: ICANN and its constituent bodies shall operate to the <u>maximum</u> extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.¹¹⁸

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-2 or how ICANN organization has violated these Commitments and Core Values. Many of them, such as ICANN's Core Value of accounting for the public policy advice of governments and public authorities, have no clear relation to the DIDP Response. The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

The Requestor states in passing that it has "standing and the right to assert this reconsideration request" as a result of "[f]ailure to consider evidence filed," but does not identify any evidence that it believes ICANN organization failed to consider in responding to the DIDP Request. The Requester similarly references "[c]onflict of interest issues," "Breach of Fundamental Fairness," and the need for "[p]redictability in the introduction of gTLDs" without explaining how those principles provide grounds for reconsideration here.

¹¹⁵ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(a)(vi) (emphasis in original).

¹¹⁶ ICANN Bylaws, 1 October 2016, Art. 1 Section 1.2(b)(vi) (emphasis in original).

¹¹⁷ ICANN Bylaws, 1 October 2016, Art. 2 Section 2.3 (emphasis in original).

¹¹⁸ ICANN Bylaws, 1 October 2016, Art. 3 Section 3.1 (emphasis in original).

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¹¹⁹ See generally Request 17-2, § 10, Pg. 13-14.

¹²⁰ Request 17-2, § 10, Pg. 13-14.

VI. Recommendation

The BAMC has considered the merits of Request 17-2, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-2.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-2 was submitted on 19 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 18 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-2 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-2.¹²¹

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¹²¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

Annex K

Minutes | Board Governance Committee (BGC) Meeting

01 Aug 2017

BGC Attendees: Cherine Chalaby, Chris Disspain (Chair), Markus Kummer, Ram Mohan, and Mike Silber

BGC Member Apologies: Rinalia Abdul Rahim and Asha Hemrajani

Other Board Member Attendees: Becky Burr, Steve Crocker, and Ron da Silva

ICANN (Internet Corporation for Assigned Names and Numbers) Organization Attendees: Michelle Bright (Board Content Senior Manager), John Jeffrey (General Counsel and Secretary), Vinciane Koenigsfeld (Board Training & Content Senior Manager), Elizabeth Le (Associate General Counsel), Wendy Profit (Manager, Board Operations), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

Update on Community Priority Evaluation
 Process Review (Review) - The BGC received a briefing on the status of the CPE process review. The second track of the Review, which focuses on gathering information and materials from the CPE provider, is still ongoing. This is in large part because, despite repeated requests from ICANN (Internet Corporation for Assigned Names and Numbers) beginning in March 2017, the CPE provider failed to produce a single document until just very recently –

four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced. FTI is in the process of reviewing the documents that have been produced. The BGC discussed the importance of bring the work on the second track to a closure within a definitive time period so that the FTI can conclude their work.

Action:

- ICANN (Internet Corporation for Assigned Names and Numbers) organization to follow up with FTI on what documents are outstanding from the CPE provider in response to FTI's document request.
- ICANN (Internet Corporation for Assigned Names and Numbers) organization to continue providing the BGC with updates on the status of the review, and publish update(s) as appropriate.
- Board Committee and Leadership Selection
 Procedures The BGC reviewed and discussed proposed revisions to the Board Committee and Leadership Selection Procedures (Procedures). The BGC agreed that Committee members should review revisions and provide further edits, if any, by the next BGC meeting, whereupon the Committee will revisit the issue.
 - Action:
 - BGC members to provide comments and further edits to the Procedures via email by the next BGC meeting.
- <u>Discussion of Board Committees and Working</u>
 <u>Groups Slate</u> The BGC discussed the Board
 Committees and Working Group slates based upon the preferences indicated by the Board members. The BGC also discussed standardizing the Committee

charters to specify a minimum and maximum number of Committee members but allow flexibility for the composition of Committee within that range.

• Action:

 ICANN (Internet Corporation for Assigned Names and Numbers) organization to revise the Committee charters in accordance with the discussion regarding composition of the Committees for consideration by the BGC at its next meeting.

Any Other Business

 Nominating Committee (NomCom) 2018 Chair and Chair-Elect Leadership— The BGC noted that it is anticipated that the interview process for the NomCom 2018 Chair and Chair-Elect Leadership will be completed by the next BGC meeting and that the BGC will discuss its recommendations at the meeting.

Published on 24 August 2017.

REFERENCE MATERIALS – BOARD PAPER NO. 2017.09.23.2a

TITLE: Consideration of Reconsideration Request 17-2

Document/Background Links

The following attachments are relevant to the Board's consideration of Reconsideration Request 17-2.

Attachment A is Reconsideration Request 17-2, submitted on 18 June 2017.

Attachment B are <u>Annexes A to H</u> in support of Reconsideration Request 17-2, submitted on 18 June 2017.

Attachment C is the Ombudsman Action on Request 17-2, dated 10 July 2017.

Attachment D is the **BAMC Recommendation on Request 17-2**, issued 23 August 2017.

Attachment E is the <u>request</u> submitted by DotMusic Limited pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), dated 5 May 2017.

Attachment F is the <u>response</u> to DotMusic Limited's DIDP request, dated 4 June 2017.

Attachment G is the <u>Rebuttal</u> and accompanying <u>Annexes I to K</u> in support of Request 17-2, submitted on 12 September 2017.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 13 September 2017

Email: amy.stathos@icann.org

dotgay LLC Reconsideration Request ("RR")

1. Requester Information

Requester:

Name: dotgay LLC ("dotgay")

Address: Contact Information Redacted

Email: Jamie Baxter, Contact Information Redacted

Requester is represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

X Board action/inaction

X Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

dotgay LLC (the "Requester") seeks reconsideration of ICANN's response to its DIDP Request, which denied the disclosure of certain categories of documents requested pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP").

On May 18, 2017, the Requester submitted a DIDP request seeking disclosure of documentary information relating to ICANN's Board Governance Committee's (the "BGC")

review of the Community Priority Evaluation ("CPE") process (the "DIDP Request"). Specifically, the Requester submitted 13 document requests as follows:

<u>Request No. 1</u>: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,"15 and (b) all communications between the EIU and ICANN regarding the request;

<u>Request No. 3</u>: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

<u>Request No. 4</u>: The identity of the individual or firm ("the evaluator") undertaking the Review:

<u>Request No. 5</u>: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

<u>Request No. 7</u>: The terms of instructions provided to the evaluator;

<u>Request No. 8</u>: The materials provided to the evaluator by the EIU;

<u>Request No. 9</u>: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;

<u>Request No. 10</u>: The materials submitted by affected parties provided to the evaluator;

<u>Request No. 11</u>: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

<u>Request No. 12</u>: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the

Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

Review.²

Subsequently, on June 18, 2017, ICANN responded to the Requester's DIDP Request by denying the Requester's (1) five document requests (Request Nos. 1-3, 8 and 13) in whole, and (2) one document request (Request No. 9) in part. ICANN reasoned that (1) the documents under Request Nos. 1-3, 8 and 13 are not appropriate for disclosure "based on . . . [the] DIDP Defined Conditions of Non-Disclosure;" and (2) the documents under Request No. 9 concerning "the correspondence between the ICANN organization and the CPE provider regarding the evaluations" are not appropriate for disclosure for "the same reasons identified in ICANN's response to the DIDP previous[1y] submitted by dotgay."³

4. Date of action/inaction:

ICANN acted on June 18, 2017 by issuing its response to the DIDP Request.

5. On what date did you become aware of action or that action would not be taken?

The Requester became aware of the action on June 18, 2017, when it received ICANN's response to the DIDP Request.

6. Describe how you believe you are materially affected by the action or inaction:

The Requester is materially affected by ICANN's refusal to disclose certain categories of documents concerning the BGC's review of the CPE process at issue in the DIDP Request.

Exhibit 2, dotgay DIDP Request (May 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf.

Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf; see Exhibit 3, Request No. 20151022-1, ICANN DIDP Response (Oct. 21, 2015), https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf.

By way of background, the Requester filed a community-based generic Top-Level Domain ("gTLD") application for the string ".GAY." However, the CPE report, authored by the Economist Intelligence Unit (the "EIU"), recommended that ICANN reject the Requester's application for the .GAY gTLD. As evident from the Requester's submissions, including an independent expert report by Prof. William Eskridge of Yale Law School, the CPE report is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN's Applicant Guidebook and ignoring ICANN's mission and core values; (2) errors of inconsistency derived from the EIU's failure to follow its own guidelines; (3) errors of discrimination, namely the EIU's discriminatory treatment of dotgay's application compared with other applications; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.⁴

In January 2017, ICANN retained an independent reviewer, FTI Consulting, Inc. ("FTI"), to review the CPE process and "the consistency in which the CPE criteria were applied" by the CPE provider. As part of the review, FTI is collecting information and materials from ICANN and the CPE provider. FTI will submit its findings to ICANN based on this underlying information.

FTI's findings relating to "the consistency in which the CPE criteria were applied" will directly affect the outcome of the Requester's Reconsideration Request 16-3 ("Request 16-3"), which is currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain's April 26, 2017 letter to the Requester, which stated that FTI's review "will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration

Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf Requests related to CPE." Thus, the Requester filed the DIDP Request seeking various categories of documents concerning the BGC's review of the CPE process. In submitting this DIDP Request, the Requester expected ICANN to "operate in a manner consistent with [its] Bylaws" and "through open and transparent processes." ICANN failed to do so.

Specifically, according to Article 4 of ICANN's Bylaws, "[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor." The Bylaws require that ICANN (1) "operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;" (2) "employ[] open and transparent policy development mechanisms;" (3) "apply[] documented policies neutrally and objectively, with integrity and fairness;" and (4) "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness. ¹¹ ICANN's failure to provide complete responses to the Requester's DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program's CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester's .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3. ¹²

⁵ ICANN Bylaws, Art. 1, § 1.2(a).

⁶ *Id.*, Art. 4, § 4.2(o).

⁷ *Id.*, Art. 1, § 1.2(a).

⁸ *Id.*, Art. 3, § 3.1.

⁹ *Id.*, Art. 1, § 1.2(v).

¹⁰ *Id.*, Art. 1, § 1.2(vi).

¹¹ See id., Arts. 1, 3-4.

Exhibit 4, CPE Reconsideration Request 16-3 (Feb. 17, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf.

Moreover, the public interest clearly outweighs any "compelling reasons" for ICANN's refusal to disclose certain categories of documents in the DIDP Request. Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.¹³ It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI's findings and conclusions.

To prevent serious questions from arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to the Requester and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by the Requester that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure, and conflict check processes (Request No. 2) but also the underlying documents that substantiate ICANN's claims.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

ICANN's action materially affects the global gay community represented by the Requester. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and

ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial."), https://www.icann.org/resources/pages/didp-2012-02-25-en.

openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed and opaque ICANN damages the credibility, accountability, and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the Requester's BGC presentation and accompanying materials. In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requester's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports. This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure." ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that

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See Exhibit 18, dotgay's Presentation to the Board Governance Committee (May 15, 2016), pp.2-3 https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf.

See Exhibit 6, Dot Registry v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶¶ 93-101, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

¹⁶ ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("Information that falls within any of the conditions set forth above 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."), https://www.icann.org/resources/pages/didp-2012-02-25-en.

were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

8. Detail of Staff/Board Action/Inaction – Required Information

8.1 Background

The Requester elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant later that year – having only received 10 points.¹⁷ In response, the Requester, supported by multiple community organizations, filed a Reconsideration Request with the BGC. The BGC granted the request, determining that the EIU did not follow procedure during the CPE process. As a result, the Requester's application was sent to be reevaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.¹⁸

When this issue was brought before the BGC via another Reconsideration Request, though, the BGC excused the discriminatory conduct and the EIU's policy and process violations. It refused to reconsider the CPE a second time. The Requester therefore filed a third Reconsideration Request, Request 16-3, on February 17, 2016 in response to the BGC's non-response on many of

Exhibit 7, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf.

See Exhibit 8, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf_

the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.¹⁹

Almost a year later, and after numerous letters to ICANN,²⁰ on April 26, 2017, ICANN finally updated the Requester on the status of Request 16-3. The Requester received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was "on hold" and that:

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. 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).²¹

8.2 The DIDP Request

In response to this new information regarding the delay, on May 18, 2017, Arif Ali, on behalf of the Requester, filed the DIDP Request, in relation to the .GAY CPE.²² The reason for

See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf.

See Exhibit 10, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf; Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf; Exhibit 5, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf; Exhibit 13, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf.

See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

Exhibit 15, dotgay DIDP Request (May 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf.

this request is twofold. *First*, the Requester sought to "ensure that information contained in documents concerning ICANN's operational activities, within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."²³ *Second*, the Requester, like other gTLD applications, sought *any* information regarding "how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc."²⁴ The Requester sought this information because "both the BGC Letter and Mr. LeVee's letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold."²⁵

As a result of this dearth of information from ICANN, the Requester made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, which are identified in **Question 3** above. The Requester concluded in its DIDP Request that "there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review."²⁶

Prior to issuing its response to the DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to the DIDP Request.²⁷ ICANN explained that:

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Id.

²⁴ *Id*.

²⁵ *Id*.

²⁶ Id.

Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf.

The scope of the review consists of: (1) review of the process by which the ICANN organization 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 provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.²⁸

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.²⁹

In response to ICANN's update on the CPE Review Process, and the lack of any additional information, the Requester sent ICANN a joint letter with DotMusic on June 10, 2017. The letter stated, *inter alia*, that:³⁰

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

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²⁸ Id

Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

Exhibit 17, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf.

First, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

Second, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation 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," and that (ii) "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."

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

- 1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
- 2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
- 3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
- 4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017.

8.3 ICANN's Response to the Request

However, on June 18, 2017, ICANN responded to the DIDP Request. ICANN issued a

response that provided the same information that had already been given to the Requester regarding the BGC's decision to review the CPE Process and to hire FTI in order to conduct an independent review.³¹ ICANN further denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN's responses to these requests are as follows:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

As stated in ICANN's Response to DIDP Request 20170505-1 that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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.
- 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.
- 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.

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Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

• Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.³²

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,"15 and (b) all communications between the EIU and ICANN regarding the request;

ICANN provided the same response as for Item 1.33

<u>Request No. 3</u>: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

ICANN provided the same response as for Item 1.34

<u>Request No. 8</u>: The materials provided to the evaluator by the EIU; *ICANN provided the same response as for Item 1.*³⁵

<u>Request No. 9</u>: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;

While ICANN provided a list of materials that it provided FTI, but also determined that the internal "documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by dotgay."³⁶

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.³⁷

ICANN provided the same response as for Item 1.38

³² *Id*.

³³ *Id*.

³⁴ *Id*.

³⁵ *Id*.

³⁶ Id

Exhibit 2, dotgay DIDP Request (May 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf.

Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy as described in **Question 6** above.

9. What are you asking ICANN to do now?

The Requester asks ICANN to disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.

10. Please state specifically 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.

As stated above, the Requester is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its Request for documents, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents – the gay community – is materially affected by ICANN's failure to disclose the requested documents.

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

This is not applicable.

12. Do you have any documents you want to provide to ICANN?

Yes, these documents are attached as Exhibits.

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.

June 30, 2017

Arif Hyder Ali Date

Exhibit 1

To: Arif Ali on behalf of dotgay LLC

Date: 18 June 2017

Re: Request No. 20170518-1

Thank you for your request for documentary information dated 18 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). 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 Review):

- 1. All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
- 2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request;
- 3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
- 4. The identity of the individual or firm ("the evaluator") undertaking the Review;
- 5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 6. The date of appointment of the evaluator;
- 7. The terms of instructions provided to the evaluator;
- 8. The materials provided to the evaluator by the EIU:
- 9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 10. The materials submitted by affected parties provided to the evaluator:
- 11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator:
- 12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (*See* Applicant Guidebook, § 4.2; *see also*, CPE webpage at

http://newgtlds.icann.org/en/applicants/cpe.) As part of its process, the CPE provider 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 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (See id.)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board 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. (See Dot Registry IRP Final Declaration at https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (See https://www.icann.org/resources/board-material/resolutions-2016-09-17-en.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his letter of 26 April 2017 to concerned parties, during its 18 October 2016 meeting, the 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, as part of the President and CEO's review, 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 to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. (See Letter from Chris Disspain to Concerned Parties, 26 April 2017.

https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf; see also, Minutes of BGC 18 October 2016 Meeting, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.)

As described in the Community Priority Evaluation Process Review Update, dated 2 June 2017, in November 2017, ICANN undertook the process to find the most qualified evaluator for the review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. 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. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the <u>Community Priority Evaluation Process Review Update</u>, dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the ICANN organization 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.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (*See Community Priority Evaluation Process Review Update*, dated 2 June 2017.)

Items 1, 2, 3, 8, and 13

Items 1, 2, 3, 8, 9, and 13 seek the disclosure of overlapping categories of documents relating to the Review. Specifically, these items request the following:

- Documents relating to "ICANN's request to the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports" (Item 1);
- "[D]ocuments from the EIU provider to ICANN including but not limited to: (a) ICANN's request for 'the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,' and

- (b) all communications between the EIU and ICANN regarding the request" (Item 2);
- "[D]ocuments relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation" (Item 3);
- Materials provided to the evaluator by the EIU (Item 8); and
- Materials provided to ICANN by the evaluator concerning the Review (Item 13).

As stated in ICANN's <u>Response to DIDP Request 20170505-1</u> that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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.
- 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.
- 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 4, 5, 6, 7

Items 4 through 7 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 4), "[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment" (Item 5), the date of appointment (Item 6), and the terms of instructions provided to the evaluator (Item 7). The information responsive to these items were provided in the Community Priority Evaluation Process Review Update and above. With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive

conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

Item 9

Item 9 seeks the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board." As detailed in the <u>Community Priority Evaluation Process Review Update</u>, the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, https://newgtlds.icann.org/en/applicants/agb
- CPE reports, https://newgtlds.icann.org/en/applicants/cpe#invitations
- CPE Panel Process Document, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf
- EIU Contract and SOW Information, http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip
- CPE Guidelines, https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf
- Updated CPE FAQs, https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf
- CPE Processing Timeline, https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf
- CPE webpage and all materials referenced on the CPE webpage, https://newgtlds.icann.org/en/applicants/cpe
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at https://www.icann.org/resources/pages/accountability/reconsideration-en, and the applicable BGC and Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- Independent Review Process (IRP) related to CPEs and all related materials, available at https://www.icann.org/resources/pages/accountability/irp-en. Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings

- Board Resolution 2016.09.17.01, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en
- Minutes of 17 September 2016 Board meeting, https://www.icann.org/resources/board-material/minutes-2016-09-17-en
- Briefing materials related to Board Resolution 2016.09.17.01, https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf
- Minutes of 18 October 2016 BGC meeting, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en
- New gTLD Program Implementation Review regarding CPE, https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by dotgay. Rather than repeating those here, *see* Response to DIDP Request No. 20151022-1, https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf. The second track of the review focuses on gathering information and materials from the CPE provider. As noted https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf. The second track of the review focuses on gathering information and materials from the CPE provider. As noted https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf. The second track of the review focuses on gathering information and materials from the CPE provider. As noted https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf. The second track of the review focuses on gathering information and materials from the CPE provider. As noted https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-respo

Item 10

Item 10 seeks "[t]he materials submitted by affected parties provided to the evaluator." It is unclear what the term "affected parties" is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, https://newgtlds.icann.org/en/applicants/cpe#invitations
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at https://www.icann.org/resources/pages/accountability/reconsideration-en, and the applicable BGC and Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings

- Independent Review Process (IRP) related to CPEs and all related materials, available at https://www.icann.org/resources/pages/accountability/irp-en. Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at https://www.icann.org/resources/pages/2017-board-meetings
- All public comments received on the applications that underwent evaluation, which are publicly available at https://gtldresult.icann.org/application-result/applicationstatus for each respective application.

Items 11

Item 11 seeks the disclosure of "[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator." This item overlaps with Items 7 and 9. The information responsive to the overlapping items has been provided in response to Items 7 and 9 above.

Item 12

Item 12 asks for an estimate of completion of the review. The information responsive to this item has been provided <u>Community Priority Evaluation Process Review Update</u> of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances 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 makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN 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'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 2



1900 K Street NW Washington DC 20006 1110 +1 202 261 3300 Main +1 202 261 3333 Fax www.dechert.com

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

VIA E-MAIL DIDP@ICANN.ORG

ICANN c/o Steve Crocker, Chairman Goran Marby, President and CEO 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: Request under ICANN's Documentary Information Disclosure Policy concerning Community Priority Evaluation for .GAY Application ID 1-1713-23699

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report¹ found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.²

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 <u>compelling</u> reason for confidentiality.³ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

GAY CPE Report, https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf

² See https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en

³ See ICANN DIDP, https://icann.org/resources/pages/didp-2012-02-25-en





Documentary Information Disclosure Policy (DIDP) Requests.⁴ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, <u>ICANN staff</u> determines whether the <u>public interest</u> in the disclosure of those documents <u>outweighs the harm</u> that may be caused by such disclosure.⁵ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the "BGC"). Dotgay has sent several letters to ICANN noting that ICANN's protracted delays in reaching a decision and ICANN's continued lack of responsiveness to dotgay's inquiries about the status of dotgay's request represent a violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"⁷ and that the BGC may have requested from the CPE provider "the materials and research

14.

Process for Responding to DIDP Requests, https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf

⁵ *Id*.

https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf; See also *dotgay* 's powerpoint presentation:

Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a



relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."8

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator. ⁹ Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation. ¹⁰

Dotgay has received a letter from ICANN's BGC Chair Chris Disspain ("BGC Letter") indicating that the RR is "on hold" and inter alia that:¹¹

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

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Minutes of the Board Governance Committee, October18, 2016, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf

Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf

Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf



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. 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).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3..." According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway." Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf



- 1. All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;" 14
- 2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," ¹⁵ and (b) all communications between the EIU and ICANN regarding the request;
- 3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation:
- 4. The identity of the individual or firm ("the evaluator") undertaking the Review;
- 5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 6. The date of appointment of the evaluator;
- 7. The terms of instructions provided to the evaluator;
- 8. The materials provided to the evaluator by the EIU;
- 9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 10. The materials submitted by affected parties provided to the evaluator;
- 11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

ICANN DIDP Request 18 May 2017 Page 6



- 12. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

Exhibit 3

Response to Documentary Information Disclosure Policy Request

To: Bart Lieben on behalf of dotgay LLC

Date: 21 October 2015

Re: Request No. 20151022-1

Thank you for your Request for Information dated 22 October 2015 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN's) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (Requester). For reference, a copy of your Request is attached to the email forwarding this Response.

Items Requested

Your Request seeks documentary information relating to the second Community Priority Evaluation (CPE) of dotgay LLC's application for the .GAY gTLD (Application ID: 1-1713-23699), which was completed and for which a CPE Report was issued on 8 October 2015. Specifically, you request the disclosure of:

- 1) policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered "policy" under ICANN by-laws;
- 2) internal reports, notes, (weekly) meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application;
- 3) detailed information on the evaluation panels that have reviewed Requester's Application during the first CPE that was conducted in 2014, as well as the evaluation panels that have conducted the second CPE in 2015, including the names and respective positions of the members of the evaluation panels;
- 4) detailed information in relation to (i) the information reviewed, (ii) criteria and standards used, (iii) arguments exchanged, (iv) information disregarded or considered irrelevant, and (v) scores given by each individual Community Priority Evaluation panel member in view of each of the criteria set out in the Applicant Guidebook, and more in particular:

I. In relation to the criterion "Nexus"

5) which information, apart from the information contained in the Application, has been used by the CPE Panel in order to determine that the word "gay" "does not identify or match the name of the community as defined in the Application,

nor is it a well-known short-form or abbreviation of the community", notwithstanding the fact that public references to this "catch-all" or "umbrella" term made by reputable organizations prove otherwise;

- 6) whether, in considering that individuals who qualify as transgenders, intersex or "allies" are not deemed to be members of the community as defined by the Application, whereas various national, international and supranational organizations such as Parents, Families, and Friends of Lesbians and Gays (PFLAG) and Children of Lesbians and Gays Everywhere (COLAGE), both of which are also endorsing the Requester's Application for the .GAY gTLD,3 are clearly being recognized as supporting the same causes and endorsing the same values as expressed by the "inner circle" of members of this community, especially since they are closely linked to the thematic remit the community has;
- 7) based on the CPE Report, it seems that the EIU assumed that an "ally" necessarily would be an individual, notwithstanding various statements Requester has made to the contrary, for instance in the context of its initial Reconsideration Request. Therefore, Requester would like to obtain insights into the definition or concept used by the EIU in order to determine what an "ally" is;
- 8) in relation to the above: which information, statistics, etc. and criteria to evaluate and weigh the importance of such information have been used in determining that transgenders, intersex, or "allies" would be "substantially" overreaching the term "gay";
- 9) why, considering the fact that the CPE Panel did not provide passing scores in relation to Requester's answers in relation to the "Nexus between Proposed String and Community" and "Community Endorsement" aspects of the Application, the CPE Panel or ICANN has not reached out to the Requester in the form of Clarifying Questions.

II. In relation to the criterion "Community Endorsement":

- 10) which letters of endorsement and/or support have been considered and verified by the CPE Panel in making its Determination, bearing in mind the fact that the BGC has determined that the EIU has made a process error in the context of the first CPE that was performed in 2014. The information provided in the second CPE Report does not allow Requester to distinguish the letters that have been provided by Requester in the context of the Application from the letters that have been published on ICANN's correspondence page or through other means since the publication of the first CPE Report;
- 11) which criteria and/or standards have been used by the CPE Panel in order to determine which group is "of relevance" in relation to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application;

- 12) why, although the CPE Panel has recognized that Requester "possesses documented support from many groups with relevance", only the support of "one group of relevance" has been taken into consideration by the CPE Panel; 13) what were the criteria and standards that have been used by the Panel in making such distinction and coming to such determination;
- 14) bearing in mind the previous question, why the CPE Panel has come to a different assessment in relation to the standing of ILGA expressed by the Expert Determination provided by the ICDR, which has been acknowledged and endorsed by ICANN in dismissing an official complaint lodged before the ICDR by Metroplex Republicans of Dallas, in which the Requester prevailed;
- 15) which scores or evaluations have been given to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application against such criteria and/or standards for each of the organizations, companies and groups referred to in the Application and the CPE Report;
- 16) if no particular additional criteria and/or standards have been utilized by the CPE Panel, apart from the ones published in the Applicant Guidebook and the Guidelines published by the CPE Panel, a detailed overview of the arguments that have been brought forward and have been adopted or acknowledged by the CPE Panel for not considering the letters of support and/or endorsement from other groups, organizations, companies and individuals;
- 17) which independent research has been performed by the CPE Panel and how the results of such research have been taken into account by the CPE Panel in the scoring they have applied. Considering the wide endorsement obtained from various umbrella organizations, national and supranational groups, the Determination makes it clear that only one letter of endorsement from one group considered "relevant" by the CPE Panel has been taken into account.

III. In relation to the criterion "Opposition":

- 18) the name, address, and standing of the anonymous organization considered by the CPE Panel;
- 19) an overview of the staff members, including their names, roles and responsibilities of such organization;
- 20) the events and activities organized by such organization;
- 21) which standards and criteria have been used by the CPE Panel in order to determine that such activities had a "substantial" following;

- 22) the metrics used by ICANN and the Community Priority Evaluation Panels in performing the evaluation; and
- 23) whether any of the information provided by the Requester to ICANN in relation to potential spurious or unsubstantiated claims made by certain organizations have been taken into account, and in such event the reasons for not taking into account such information;
- 24) in particular, Requester would like to know whether the Community Priority Panel has considered the letter of the Q Center of April 1st, 2015 in which the latter requested the opposition letter of the Q Center to be voided

Response

The standards governing CPE are set forth in Module 4.2 of the New gTLD Applicant Guidebook (Guidebook), and are available at http://newgtlds.icann.org/en/applicants/agb. CPE will occur only if a community-based applicant in contention selects CPE, and after all applications in the contention set have completed all previous stages of the gTLD evaluation process. (See Guidebook, § 4.2.) CPEs are performed by independent CPE panels that are coordinated by the Economist Intelligence Unit (EIU), an independent, third-party provider, which contracts with ICANN to perform that coordination role. (See id.; see also, CPE webpage at http://newgtlds.icann.org/en/applicants/cpe.) The CPE panel's role is to determine whether a community-based application meets the community priority criteria. (See id.) The Guidebook, the CPE Panel Process Document, and the CPE Guidelines (all of which can be accessed at http://newgtlds.icann.org/en/applicants/cpe) set forth the guidelines, procedures, standards and criteria applied to CPEs, and make clear that the EIU and its designated panelists are the only persons or entities involved in the performance of CPEs.

As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against the following four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement. An application must score at least 14 out of a possible 16 points to prevail in CPE; a high bar because awarding priority eliminates all non-community applications in the contention set as well as any other non-prevailing community applications. (*See* Guidebook at § 4.2; *see also*, CPE webpage at http://newgtlds.icann.org/en/applicants/cpe.)

To provide transparency of the CPE process, ICANN has established 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 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).
- EIU 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).

Preliminary Statement regarding Request No. 20151022-1

As a preliminary matter, many of the items in the Request do not specify whether the request relates to the first CPE of the Application that was performed in 2014 or the reevaluation that was performed in 2015. Because you have previously filed a similar DIDP Request on 22 October 2014 seeking documents related to the first CPE, for purposes of this Response, we will interpret the Request to relate to the second CPE, unless otherwise specified in the request.

Item No. 1

Item No. 1 seeks "policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process." This request was previously made and responded to in Request No. 20141022-2. (See Response to Request No. 20141022-2, Item No. 3, available at

https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf.) As noted therein, ICANN has published documentary information responsive to this item on the CPE webpage, including, the CPE Panel Process Document

(http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf), the CPE Guidelines (http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf), Module 4.2 of the Guidebook (http://newgtlds.icann.org/en/applicants/agb/string-

contention-procedures-04jun12-en.pdf), and CPE Processing Timeline (http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf). Additionally, since ICANN responded to Request No. 20141022-2, it has published the EIU Contract and SOW (http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip). Additionally, in response to this DIDP Request, ICANN will provide the email notifications to the EIU with instructions to begin the CPE of dotgay LLC's application for the .GAY TLD that was provided to the EIU in 2014 relating to dotgay's application and the email notification to begin re-evaluation in 2015 that was initiated pursuant to the Board Governance Committee's Determination on Reconsideration Request 14-44.

Item Nos. 2, 3, 4

Item Nos. 2, 3 and 4 seek extensive, detailed information regarding CPE Panels, the materials reviewed, the analysis conducted by the CPE Panel during the first CPE conducted in 2014 as well as the re-evaluation in 2015, as well any internal reports, notes, or meeting minutes by ICANN, the CPE Panels and "other individuals or organizations involved in the CPE in relation to the Application." (Request at pg. 2.) To help assure independence of the process, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained above and in the CPE Panel Process Document, is entirely within the work of the EIU's team. As stated in the CPE Process Document, "[t]he Panel Firm's Project Manager is notified by ICANN that an application is ready for CPE, and the application ID and public comment delivered to the EIU. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website." (See CPE Panel Process Document, Pg. 2, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf.) Thus, except for the notices of commencement of CPE and the public comments submitted on the Application Comments page relating to the, ICANN is not responsible for gathering the materials to be considered by the CPE Panel. As such, ICANN does not have, nor does it collect or maintain, the work papers of the individual CPE panels that may contain the information sought through these items. The end result of the CPE Panel's analysis is the CPE Report, which explains the CPE Panel's determination and scoring, and is available at https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf and

With respect to your request in Item No. 2 for "internal reports, notes, (weekly) meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application", this request is vague. It is unclear whether you are seeking internal reports, notes, and weekly meeting minutes relating to the CPEs of the Application or all reports, notes, meeting minutes about the Application in general. To the extent that you are requesting that later, the request is subject to the following DIDP Defined Condition of Nondisclosure:

https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf.

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; and (iii) complying with which is not feasible.
- 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.
- 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.
- Information subject to the attorney client privilege, 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.

To the extent that you are requesting these document as it relates to the CPEs, ICANN does not maintain internal notes and meeting minutes in the regular course of business and therefore, ICANN has no documents responsive to this request. As for your request for internal ICANN reports, notes, or meeting minutes relating to the CPEs of the Application, such documents are subject to the following DIDP Defined Condition of Nondisclosure:

- 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.
- Information subject to the attorney client privilege, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

With respect to Item No. 3, seeking detailed information on the CPE Panels, to help assure independence of the process and evaluation of CPEs, ICANN does not maintain any information on the identity of the CPE Panelists. ICANN (either Board or staff) is not involved with the selection of a CPE panel's individual evaluators who perform the

scoring in each CPE process, nor is ICANN provided with information about who the evaluators on any individual panel may be. ICANN therefore does not have any documentation responsive to this item. The coordination of a CPE panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team. (*See* CPE Process Documents, Pgs. 2 and 4, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf.) The CPE Panel Process Document provides a detailed description of the EIU's experience level, qualifications, EIU evaluators and core team. Specifically, the CPE Panel Process Document states:

The Economist Intelligence Unit (EIU) was selected as a Panel Firm for the gTLD evaluation process. The EIU is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 500 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 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. In this regard, the Economist Intelligence Unit has more than six decades of experience building evaluative frameworks and benchmarking models for its clients, including governments, corporations, academic institutions and NGOs. Applying scoring systems to complex questions is a core competence.

EIU evaluators and core team

The Community Priority Evaluation panel comprises a core team, in addition to several independent 1 evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to- day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit's Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.
- All EIU evaluators undergo 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 has been
 followed by regular training sessions to ensure that all
 evaluators have the same understanding of the evaluation
 process and procedures.
- EIU evaluators are highly qualified, they speak several languages and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.
- Language skills and knowledge of specific regions are also considered in the selection of evaluators and the assignment of specific applications.

(CPE Panel Process Document, Pgs. 1-2, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf.)

Item Nos. 5 through 24

Item Nos. 5 through 24 seek the disclosure of information related to the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. Specifically, Item Nos. 5 through 9 request information related to the Panel's consideration of the "nexus" criterion. Item Nos. 10 through 17 request information related to the Panel's consideration of the "community endorsement" criterion. Item Nos. 17 through 24 request information related to the Panel's consideration of the "opposition" criterion.

As a preliminary matter, the majority of the requests seek information relating to the CPE Panel's evaluation. It is not clear from these items what documents are being requested, if any. 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 are compelling grounds for maintaining confidentiality. As these items do not appear to request documents, as written they are not appropriate under the DIDP. Should the Requester wish to amend these items to clarify what documents they are seeking, ICANN will endeavor to respond to such requests.

Notwithstanding the foregoing, to the extent that the Requester is seeking documentary information related to the Panel's evaluation of the CPE criteria, scoring decisions, or underlying analyses, as noted above, to help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website, as well as its

analysis of said materials (*See* CPE Panel Process Document, Pg. 2, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf.) The end result of the CPE Panel's analysis is the CPE Report, which explains the CPE Panel's determination and scoring, and is available at https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf. Thus, with the exception of the CPE Report, which has been published, ICANN does not have documents that contain the requested information.

The CPE criteria are set forth in Module 4.2.3 of the Guidebook, including the scoring process. (*See* http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf.) The CPE Guidelines provide further clarity around the CPE process and scoring principles outlined in the Guidebook. (*See* http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf.) Thus, for those items seeking information regarding the evaluation criteria and scoring applied by the Panel (Item Nos. 8, 11, 12, 13, 15, 16, 17, 21, and 22), the responsive information can be found in the Module 4.2.3 of the Guidebook (http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf), the CPE Guidelines (http://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf), and the CPE Report (https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf), and the CPE Report (https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf).

With respect to those items seeking information about which letters of endorsement and/or opposition were considered by the CPE Panel (Item Nos. 10, 18, 19, 20, 22, 23, and 24), letters in support of or in opposition to an application are publicly posted on the application webpage and ICANN's Correspondence webpages. In this instance, letters regarding dotgay LLC's application for .GAY are available at https://gtldresult.icann.org/applicationdetails/444,

https://www.icann.org/resources/pages/correspondence-2012-09-24-enand

http://newgtlds.icann.org/en/program-status/correspondence. With respect to the EIU's actions taken to verify, or the EIU's reliance upon, such letters, in accordance with the CPE Panel Process Document the CPE Panel may review documents and communications, including letters of support or opposition, that are publicly available through a number of resources, including, but not limited to: (a) dotgay's application for .GAY available at https://gtldresult.icann.org/application-

<u>result/applicationstatus/applicationdetails/444</u>; (b) the Correspondence webpages available at https://www.icann.org/resources/pages/correspondence-2012-09-24-en and https://newgtlds.icann.org/en/program-status/correspondence; (c) the Applicant Comment Forum available at https://gtldcomment.icann.org/comments-

feedback/applicationcomment/viewcomments; (d) the Objection Determinations webpage available at http://newgtlds.icann.org/en/program-status/odr/determination; (e) information related to dot gay's Reconsideration Request 14-44 available at https://www.icann.org/resources/pages/14-44-2014-10-22-en. (See CPE Panel Process Document at Pg. 2, http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf.) As further noted in the CPE Panel Process Document, the EIU reviews ICANN's public correspondence page on a regular basis for recently received

correspondence to assess whether it is relevant to an ongoing evaluation. If it is relevant, the EIU provides the public correspondence to the evaluators assigned to the evaluation of a particular application. (*See id.* at Pg. 5.) ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses, as such ICANN does. Thus, with the exception of the CPE Report, which has been published, ICANN does not have documents that contain the requested information.

Item No. 14 asks "why CPE Panel has come to a different assessment in relation to the standing of the ILGA expressed by the expert Determination provided by the ICDR." As noted above this request seeks information, rather than documents, and is not appropriate for the DIDP. Moreover, the Expert Determination provided by the ICDR to which the Requester references relates to a Community Objection filed by Metroplex Republicans of Dallas against dotgay LLC. (See

http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1713-23699-en.pdf.) The criteria for Community Objections are set forth in Module 3.5.4, and are not the same standards as CPE.

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 makes every effort to be as responsive as possible to the entirety of the Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at MyICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest because, as we continue to enhance our reporting mechanisms, reports will be posted for public access.

We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Subject: Application: 1-1713-23699 ready to begin CPE

Date: Monday, May 12, 2014 at 10:51:29 AM Pacific Daylight Time

From: Christopher Bare

To: EIU Designated Confidential Info

CC: Russ Weinstein

Hi EIU Designated Confidential Information

Just wanted to inform you that another application is ready to begin CPE.

Application ID: 1-1713-23699

String: GAY

Applicant: dotgay llc

CPE invite date: 23 April 2014

I have pulled the application comments for this application and placed them in the shared drive under the EIU folder (//dfs1-lax.ds.icann.org/External-New-gTLD-Prgm/EIU/CPE Application Comment/1-1713-23699_Application_Comment_12MAY14.csv).

Note: there are several comments in Arabic, I have forwarded these to our translations team and will get them to you as soon as possible.

There were also several updated letters of support posted to the ICANN correspondence page last week (http://newgtlds.icann.org/en/program-status/correspondence). The application detail page also has the original letters submitted with the application (https://gtldresult.icann.org/applicationstatus/applicationdetails/444).

Please let me know if any of these need translated.

The New gTLD microsite will be updated to show the application as CPE in progress today or tomorrow.

Thanks

Chris

Chris Bare?

GDD Operations Manager

Email: <u>Christopher.Bare@ICANN.org</u>
Confidential Contact Information

ICANN? 12025 Waterfront Drive, Suite 300? Playa Vista, CA 90094-2536



Subject: RE: .GAY Reconsideration

Tuesday, February 10, 2015 at 3:41:34 PM Pacific Standard Time

From:

EIU Designated Confidential Information To:

Russ Weinstein, Christopher Bare, EIU Designated Confidential CC:

Information

EIU Designated Confidential Information

That is correct. There have been no new comments since 7/7/14, so any additional letters will have to come through correspondence. For sake of the process, I have included a spreadsheet of the comments in the external share drive, dated as of today.

I am still working on getting a response to your other question, but I just want to make sure it's clear that the Panel is free to begin its re-evaluation at this point, now that the comment window has closed. The CPE micro-site (http://newgtlds.icann.org/en/applicants/cpe) will be updated by tomorrow morning to show that re-evaluation is in progress.

Thank you and will get back to you with more soon,

Jared

EIU Designated Confidential Information

Sent: February 10, 2015 15:22

To: Jared Erwin

Subject: Re: .GAY Reconsideration

Cc: Russ Weinstein; Christopher Bare; EIU Designated Confidential Information

Thanks, Jared. Unless we get any more from you, then, I'll assume there are no new comments to consider. Same will of course be the case for attachments which have not changed since the initial application. In that case, the only channel for additional potentially relevant letters of support or opposition will be the correspondence.

Thanks,

EIU Designated Confidential Information

On Tue, Feb 10, 2015 at 10:49 AM, Jared Erwin < <u>jared.erwin@icann.org</u>> wrote:

EIU Designated Confidential Information

To your second question: yesterday was the last day for comments/correspondence. Today I was planning on sending you the latest comments. I don't think there are any new ones, though.

As to your first question, I'll try and get an answer/clarification for you as soon as possible.

Thank you!

Jared

EIU Designated Confidential Information From:

Sent: February 10, 2015 10:37 To: Jared Erwin; Russ Weinstein; Christopher Bare; Information

Subject: .GAY Reconsideration

Hi All,

I remembered as soon as we ended our call that I had a couple questions about this. First off, as per our discussion last week, we are considering dotGay LLC's reconsideration request as well as ICANN's response and any related materials (annexes, etc.) to be now "a part" of the application itself. Can you clarify exactly what that means? In other words, in several areas of dotGay's reconsideration request, they take issue with specific arguments that the CPE Panel made about certain issues - most of them in fact. As you know, ICANN did not rule favorably on any of their responses to the Panel's decisions (with the exception of the one about verification of letters), but nevertheless these arguments are now to be considered part of their application. The problem is that their arguments against the Panel's conclusions definitely verges on re-writing their initial application document. For example, information about Authenticating Partners, a key part of the Delineation section, is presented in a new light and in terms not used in the application document itself. How are our evaluators to consider such information that appears to be revised or differ to some extent from the application document?

Second, Jared, I believe today was the close of the 14-day comment window, is that correct? I just want to make sure we know when we have the last piece of incoming support/opposition materials to deal with.

Thanks. **EIU Designated Confidential Information**

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Subject: RE: .GAY Reconsideration

Date: Wednesday, February 25, 2015 at 5:13:45 PM Pacific Standard Time

From: Jared Erwin

To: EIU Designated Confidential Information I, Russ Weinstein, Christopher Bare, EIU Designated Confidential Information

EIU Designated Confidential Information

I have some feedback for you on this question. Sorry again for the long delay in responding.

- Our intention was to impress upon the panel and evaluators that the reconsideration request materials should be used to *inform* the evaluation, but it should not be *part* of the application. The materials should merely be considered relevant, much in the same way that an objection determination may also be considered relevant and inform the panel's understanding of the community. Here the materials may also inform the panel on the "landscape" of the proposed TLD, community, and the applicant.
- 2) Regarding the fact that this then may create conflicting information, ICANN is of the opinion that this might require a CQ.

Hopefully this is helpful. Let me know if you have any other questions.

Best, Jared

From: EIU Designated Confidential Information

Sent: February 10, 2015 10:37

EIU Designated Confidential

To: Jared Erwin; Russ Weinstein; Christopher Bare; Information

Subject: .GAY Reconsideration

Hi All,

I remembered as soon as we ended our call that I had a couple questions about this. First off, as per our discussion last week, we are considering dotGay LLC's reconsideration request as well as ICANN's response and any related materials (annexes, etc.) to be now "a part" of the application itself. Can you clarify exactly what that means? In other words, in several areas of dotGay's reconsideration request, they take issue with specific arguments that the CPE Panel made about certain issues - most of them in fact. As you know, ICANN did not rule favorably on any of their responses to the Panel's decisions (with the exception of the one about verification of letters), but nevertheless these arguments are now to be considered part of their application. The problem is that their arguments against the Panel's conclusions definitely verges on re-writing their initial application document. For example, information about Authenticating Partners, a key part of the Delineation section, is presented in a new light and in terms not used in the application document itself. How are our evaluators to consider such information that appears to be revised or differ to some extent from the application document?

Second, Jared, I believe today was the close of the 14-day comment window, is that correct? I just want to make sure we know when we have the last piece of incoming support/opposition materials to deal with.

Thanks
EIU Designated Confidential
Information

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Exhibit 4

Reconsideration Request

1. Requester Information

Name: dotgay LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: Bart Lieben — Contact Information Redacted

- 2. Request for Reconsideration of (check one only):
- Board action/inaction
- _x_ Staff action/inaction
- 3. Description of specific action you are seeking to have reconsidered.

On February 1st, 2016, ICANN published the Determination of the Board Governance Committee (BGC) in relation to Requester's Reconsideration Request 15-21 (hereinafter: the "Second BGC Determination").

On the basis of the arguments set out in the Second BGC Determination, "the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21."

4. Date of action/inaction:

February 1st, 2016.

5. On what date did you became aware of the action or that action would not be taken?

February 2nd, 2016.

6. Describe how you believe you are materially affected by the action or inaction:

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see

https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444) (hereinafter referred to as the "Application").

Requester has elected to participate in the Community Priority Evaluation ("CPE") in accordance with the provisions set out in the Applicant Guidebook.

On October 7, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester's application for the .GAY gTLD "did not prevail in Community Priority Evaluation".

Despite having invoked ICANN's Accountability Mechanisms on various occasions, "the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21."

Therefore, the Requester is now facing contention resolution with three other applicants for the same string "through the other methods as described in Module 4 of the Applicant Guidebook", requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in a "last resort" auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the EIU Determinations had been developed in accordance with ICANN's standards, in particular those set out in the Applicant Guidebook.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and does not necessarily have the public interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group in many countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the safety and security of this community and its members.

The fact that not only Requester but the gay community in its entirety is affected by the CPE Report and the Determinations is substantiated by the various letters of support for the Reconsideration Requests that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce. Requester also refers in this respect to the numerous letters of support received when developing its Application for the .GAY qTLD.

8. Detail of Board or Staff Action – Required Information

8.1. Introduction

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.

In the First Determination, the BGC specified that "new CPE evaluators (and potentially new core team members) [were] to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel's Report."

Now, the evidence provided by Requester shows that the EIU has appointed at least one evaluator who developed the First EIU Determination in order to develop the Second EIU Determination, which is contrary to the instructions by the BGC.

8.2. The Second BGC Determination

Section C of the Second BGC Determination reads as follows:

"The Requester contends that reconsideration is warranted because "it appears that both during the first and second CPE, the EIU appointed the same evaluator for performing the new CPE,"in contravention of the BGC's Determination on Request 14-44. However, this argument is inaccurate. The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU. Moreover, the identities of CPE evaluators are confidential. ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and replaced one core team member for the administration of the Second CPE." (emphasis added)

8.3. The "CPE Panel Process Document"

On August 6, 2014, ICANN published the Economist Intelligence Unit's Process documentation for Community Priority Evaluation in view of providing

"transparency of the panel's evaluation process". 1 2

According to this CPE Panel Process Document:

"The Community Priority Evaluation panel comprises a core team, in addition to several independent evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit's Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people." (emphasis added)

The CPE Panel Process Document describes the CPE Evaluation Process as follows:

"The EIU evaluates applications for gTLDs once they become eligible for review under CPE. The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:

[...]

As part of this process, <u>one of the two evaluators</u> assigned to assess the same string is asked to verify the letters of support and opposition. (Please see "Verification of letter(s) of support and opposition" section for further details.)" ⁴ (emphasis added)

Furthermore, on page 5 of the CPE Panel Process Document, the EIU has described the process for "Verification of letter(s) of support and opposition", which reads as follows:

"As part of this CPE evaluation process, one of the two evaluators assigned to assess the same string verifies the letters of support and opposition. This process is outlined below:"

[...]

"For every letter of support/opposition received, the designated evaluator assesses both the relevance of the organization and the validity of the documentation. Only one of the two evaluators is responsible for the letter

¹ See https://newgtlds.icann.org/en/applicants/cpe, § CPE Resources.

² See https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf for the actual CPE Panel Process Document.

³ CPE Panel Process Document, Page 2.

⁴ CPE Panel Process Document, Page 2, §CPE Evaluation Process, third bullet.

verification process."

And:

"To provide every opportunity for a response, the evaluator regularly contacts the organization for a response by email and phone for a period of at least a month."

8.4. The EIU made a process error in allowing a third person, not even a core team member, and certainly not an "independent evaluator" to perform the verification of the letters of support and opposition

Bearing in mind the confirmation by the BGC that the "CPE Panel Process Document strictly adheres to the Guidebook's criteria and requirements", and that "the CPE Materials are entirely consistent with the Guidebook", the BGC confirmed – apparently on the basis of information ICANN does not want to see independently verified – that:

"The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.

Now, considering the fact that the CPE Process Document – which is considered by the BGC to be "consistent with" and "strictly adheres to the Guidebook's criteria and requirements", it is clear that the verification of the letters should have been performed by an independent evaluator (as emphasized in §8.2 above), and not by someone "responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU".

It is therefore clear that, according to the CPE Panel Process Document, the point of contact for organizations had to be <u>an evaluator</u>. Also, the verification of the letters had to be performed by <u>an evaluator</u>.

Based on the statement contained in the last BGC Determination, it is clear that the BGC confirmed that the contact person for organizations was <u>not an evaluator</u>, and the letters of have <u>not been verified by an evaluator</u>.

In any case, it is obvious that – when reviewing the Second BGC Determination in light of the Applicant Guidebook and the CPE Panel Process Document –

previously defined processes and policies have not been followed, regardless of whether one sees the Applicant Guidebook and the CPE Panel Process Document as defining the same process, or that the one complements the other.

The BGC rejected Requester's arguments that the CPE Materials 8.5. imposed additional requirements than the ones contained in the New qTLD **Applicant Guidebook**

In the context of its First and Second Reconsideration Requests, Requester claimed that the EIU was not entitled to develop the CPE Materials in so far and to the extent they imposed more stringent requirements than the ones set forth by the Applicant Guidebook. Furthermore, Requester contended that the EIU's use of these CPE Materials violated the policy recommendations, principles and guidelines issued by the GNSO relating to the introduction of new gTLDs.5

Nonetheless, the BGC confirmed in the Second BGC Determination that:

- "none of the CPE Materials comprise an addition or change to the terms of the Guidebook: 67
- "The CPE Panel Process Document strictly adheres to the Guidebook's criteria and requirements";8
- "the CPE Materials are entirely consistent with the Guidebook".9

One of the key arguments put forward by the BGC was that Requester should have challenged the development and implementation of the CPE Materials earlier, in particular "within 15 days of the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action".

The BGC concluded that:

- "[...] nothing about the development of the CPE Materials violates the GNSO policy recommendations or guidelines relating to the introduction of new gTLDs as the Requester has suggested."; and
- "no reconsideration is warranted based on the development or use of the CPE Materials, because any such arguments are both time-barred and without merit." 10

Requester notes that the Applicant Guidebook does not include the concept of a

⁹ Second BGC Determination, footnote 34.

⁵ Second BGC Determination, page 11.

⁶ The Second BGC Determination defines the term "CPE Materials" as "(1) the EIU's CPE Panel Process Document; (2) the CPE Guidelines; (3) ICANN's CPE Frequently Asked Questions page, dated 10 September 2014 (FAQ Page); and (4) an ICANN document summarizing a typical CPE timeline (CPE Timeline).

⁷ Second BGC Determination, page 12. ⁸ *Ibid*.

¹⁰ Second BGC Determination, page 14.

"core team" that is appointed in the context of CPE. In fact, the Applicant Guidebook only refers to a "Community Priority Panel" that is appointed by ICANN in order to perform CPE.¹¹

Therefore, the CPE Panel Process Document introduces a concept that has not been included in the Applicant Guidebook, which only refers to "evaluators".

Indeed, according to the CPE Panel Process Document, each application is evaluated by <u>seven individuals</u>, being <u>two independent evaluators</u> and <u>five core</u> team members.

The fact that the BGC confirmed that, in addition to the seven individuals, an eight person has contributed to developing the CPE Determinations, being a "person [...] responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU", can only lead to the following conclusions:

 the CPE Panel Process Document provides for a process and composition of a team that is different from what the Applicant Guidebook states (being only a "Community Priority Panel" that performs CPE);

OR

 the team that has been composed by the EIU in order to perform CPE for Requester's Application does not have the composition that has been defined in the Applicant Guidebook nor in the CPE Panel Process Document.

8.6. Conclusion

For the reasons set out above, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies:

- contained in the Applicant Guidebook;
- contained in the CPE Materials;
- relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester's Application in a discriminatory manner.

Indeed, when developing the Second BGC Determination, the BGC should, on the basis of the arguments and facts set out above, have confirmed:

 that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator, as

-

¹¹ See Applicant Guidebook, 4-8.

prescribed by this CPE Panel Process Document, but by someone else (a "core team member" or someone "responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU"; or

- that the CPE Panel Process Document does define and describe a process that is more stringent than the one set out in the Applicant Guidebook, which does not require the independent evaluator perform such verification of letters of support and objection.

In the first case, the process followed by the EIU would be in direct contradiction with the processes it has designed itself and, moreover, would be contrary to the First BGC Determination, which required the EIU to appoint a new evaluation panel for performing CPE.

In the second case, the BGC has erred in confirming that "none of the CPE Materials comprise an addition or change to the terms of the Guidebook".

Setting aside any possible arguments regarding possibly unfounded time-barred allegations, it is obvious that the outcome of a process is often, if not always, determined by the fact whether the correct process has been followed. In any event, the above facts clearly show that the EIU and – by extension ICANN – have not.

8.7. Request for a Hearing

Bearing in mind the elements set out above, Requester respectfully submits the request to organize a hearing with the BGC in order to further explain its arguments and exchange additional information in this respect.

8.8. Reservation of Rights

Notwithstanding the fact that Requester only relates to the fact that the EIU and ICANN have not followed due process in developing the Second CPE Determination, Requester is submitting this Reconsideration Request with full reserve of its rights, claims and defenses in this matter, whether or not stated herein.

9. What are you asking ICANN to do now?

Considering the information and arguments included in this Reconsideration Request, Requesters request ICANN to:

(i) acknowledge receipt of this Reconsideration Request;

- (ii) determine that the Second BGC Determination is to be set aside;
- (iii) invite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;
- (iv) determine that, given the circumstances, any and all of its requests set out in §9 of Requester's Second Reconsideration Request be awarded, which are incorporated herein by reference.
- 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.

Requester has standing in accordance with:

- (1) ICANN's By-Laws, considering the fact that Requester has been adversely affected by the Second BGC Determination; and
- (2) ICANN's Top-Level Domain Application Terms and Conditions.
- 11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

x 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.

N/A

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.

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.

Respectfully Submitted,

February 17, 2016

Bart Lieben

Date

Attorney-at-Law

Exhibit 5



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ARIF HYDER ALI

Contact Information Redacted
Contact Information Redacted
Direct
Fax

November 15, 2016

VIA E-MAIL

ICANN Board of Directors c/o Mr. Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: Council of Europe Report DGI (2016)17 - .GAY TLD

Dear Chairman Crocker and Board of Directors,

dotgay LLC ("**dotgay**") writes to request that the ICANN Board ("**Board**") add to the materials it is reviewing in connection with dotgay's application the Council of Europe's 4 November 2016 Report on "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" ("**CoE Report**"). The CoE is Europe's leading human rights organization, with 47 member states (28 of which are also members of the European Union), all of which are members of the European Convention on Human Rights. The CoE has observer status within ICANN's Governmental Advisory Committee (GAC).

The CoE Report, standing alone, and certainly when taken together with the following materials, makes it abundantly clear that the EIU erred in its evaluation of dotgay's application and that the Board is obligated to grant community priority status to dotgay's application for the .GAY TLD:

¹ See Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 Nov. 2016), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 806b5a14.

² See http://www.coe.int/en/.



- (i) the former ICANN Ombudsman Chris LaHatte's Report;³
- (ii) the ICC Expert's Determination regarding .LGBT;⁴
- (iii) the Expert Opinion of Professor William N. Eskridge of Yale Law School;⁵
- (iv) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts;⁶ and
- (v) the Dot Registry IRP Decision.⁷

The CoE Report identifies a long list of human rights principles, which the Board cannot avoid giving effect in evaluating dotgay's application. The Report amply supports the conclusions reached by the ICANN Ombudsman and the two independent expert reports submitted to ICANN on 13 September and 17 October 2016.

³ Chris LaHatte, Dot Gay Report (27 July 2016), http://www.lahatte.co.nz/2016/07/dot-gay-report.html (determining that "[t]he board should grant the community application status to the applicant . . . [and] comply[] with its own policies and well established human rights principles").

⁴ The International Lesbian Gay Bisexual Trans and Intersex Association v. Afilias Limited, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf (finding that the .GAY application "is designed to serve the gay community").

⁵ Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf (explaining how Prof. Eskridge shows that "the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement").

⁶ Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf (explaining how Prof. Badgett demonstrates that "withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community").

Dot Registry LLC v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf (holding that the Board Governance Committee ("BGC") "must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination").



The CoE Report Applies Human Rights Principles to .GAY

The CoE Report affirms that human rights principles apply to ICANN.⁸ The Report's discussion of human rights and community applications shows that the Board should independently approve dotgay's .GAY application. To assist the Board with its analysis of the CoE Report, we attach particularly relevant excerpts of it, the import of which should be self-evident:

ICANN Must Protect Public Interest Values through Community TLDs

- Community TLDs should protect "vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination."
- Community TLDs should protect "[p]luralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN's mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content."¹⁰

⁸ Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 Nov. 2016), p. 17, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 806b5a14.

⁹ *Id.*, p. 34.

¹⁰ *Id.* (emphasis added).



ICANN's Commitment to Human Rights Requires that It Support Community gTLDs

- The Right to Freedom of Expression: "For Internet users at large, domain names represent an important way to find and access information on the Internet. . . . A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members. Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas."11
- The Right to Freedom of Assembly and Association: "Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests. As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities." ¹²

ICANN's gTLD Program Improperly Fails to Conform with Human Rights Principles

• The Right to Procedural Due Process: "ICANN's gTLD program, including community-based applications, needs to be based on procedural due process. . . . Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus

¹¹ *Id.*, p. 19 (emphasis added).

¹² *Id.*, p. 22.



access to justice, which is generally considered a human right or at least a right at the constitutional level." ¹³

• The Right to Non-Discrimination: "The general principle of equality and non-discrimination is a fundamental element of international human rights law. . . . ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority." ¹⁴

Through its discussion of these human rights, the CoE Report confirms the ICANN Ombudsman's determination that ICANN has a commitment to human rights and that dotgay represents a community that "is real, does need protection and should be supported" by awarding dotgay community priority status. ¹⁵ It further supports the Expert Opinion of Prof. M.V. Lee Badgett, which states that ICANN should provide a safe space on the Internet for the gay community to engage in economic activity and social change. ¹⁶

The BGC and the EIU failed to uphold these basic human rights when it considered dotgay's application for the .GAY TLD. In light of the CoE Report's recent findings, the ICANN Ombudsman's determination, the expert opinions submitted to ICANN, and the clearly incorrect determination by the EIU, the Board should correct this error by individually considering the .GAY application in accordance with Article 5.1 of the AGB and awarding the .GAY TLD to dotgay.

The CoE Report Further Recognizes Problems with the EIU and the CPE Process

In addition to human rights considerations, the CoE Report confirms the significant problems with the EIU's CPE of the .GAY gTLD, corroborating the Expert Opinion of

¹⁴ *Id.*, p. 26.

¹³ *Id.*, p. 25.

¹⁵ Ombudsman Report, http://www.lahatte.co nz/2016/07/dot-gay-report html.

¹⁶ See Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf.



Prof. Eskridge of Yale Law School. ¹⁷ The EIU clearly made fundamental errors of inconsistency and discrimination in following and applying its guidelines. The CoE Report criticizes the EIU for these inconsistencies, specifically highlighting the following issues with the EIU's consideration of .GAY:

The EIU's Inconsistent Acts during the CPE Process Raises Issues of Human Rights Violations, Unfairness, and Discrimination¹⁸

- "First, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to avoid any 'double-counting'. . . . However, the EIU appears to double count 'awareness and recognition of the community amongst its member' twice." ¹⁹
- "Second, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others. The EIU appears to have been inconsistent in its interpretation of 'Nexus' Under Criterion 2 of the CPE process. The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO. There is no evidence provided of the relative small and 'more than small' segments of the identified communities

¹⁷ See Letter to ICANN Board from A. Ali enclosing the Eskridge Report (13 Sept. 2016), https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf.

¹⁸ Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 Nov. 2016), pp. 9, 45, 49, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016 806b5a14.

¹⁹ *Id.*, p. 49 (emphasis added).



which justified giving a score of 0 to one applicant and 2 to another."²⁰

- "The EIU has demonstrated inconsistency in the way it interprets 'Support' under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a majority of the community. . . . By contrast, both .GAY and .MUSIC only scored I point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one."
- "Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime."
- "Third, the EIU changed its own process as it went along." 23
- "Fourth, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. An example

²⁰ *Id.*, pp. 49-50 (emphasis added).

²¹ *Id.*, p. 51 (emphasis added).

²² *Id.* (emphasis added).

²³ *Id.* (emphasis added).



that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community."²⁴

• *Fifth*, "[t]here are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. . . . It would seem that the EIU prefers to award full points on 4A[, the Support prong of 'Community Endorsement,'] for applicants who are acting on behalf of member organisations. The AGB says: 'Recognized' means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.' If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as 'recognised' organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not 'recognised'. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community."²⁵

ICANN Improperly Accepts EIU Determinations without Question and without Possibility of Appeal

• "The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) 'failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its

²⁴ *Id.*, pp. 51-52 (emphasis added).

²⁵ *Id.*, p. 57.



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 publicly available the ICANN staff work on which the BGC relied).' The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws."²⁶

• "ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN. This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a 'decision' which it will not question. Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU's processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers."²⁷

The CPE Process does not Conform with ICANN's Core Principles, including Human Rights Principles

• "In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC. Here, he took to task the fact that the BGC has 'a very narrow view of its own jurisdiction in considering reconsideration requests.' He points out that 'it has always been open to ICANN to reject an EIU

²⁶ *Id.*, p. 60 (quoting *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016)).

²⁷ *Id.*, p. 64.



recommendation, especially when public interest considerations are involved.' As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it 'has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency'. We endorse his view and hope that our report will strengthen the argument behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet."²⁸

• "As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate. However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN's mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in."²⁹

As evidenced by these inconsistencies, the EIU clearly failed to "respect[] the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB." The BGC's own failure to exercise its independent judgment when evaluating the EIU's CPE in light of these principles, which it must do according to the Dot Registry Declaration, "must be corrected." The principles of fairness are set out in the ICANN Articles, Bylaws and AGB." The BGC's own failure to exercise its independent judgment when evaluating the EIU's CPE in light of these principles, which it must do according to the Dot Registry Declaration, "must be corrected."

²⁸ *Id.*, pp. 69-70 (quoting Chris LaHatte, Dot Gay Report (27 July 2016), http://www.lahatte.co nz/2016/07/dot-gay-report.html) (emphasis added).

²⁹ *Id.*, p. 31.

³⁰ Dot Registry LLC v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34.

³¹ Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 Nov. 2016), p. 60.



ICANN Must Proceed to Contracting with dotgay for .GAY

In light of the above considerations, we believe that there are more than sufficient grounds for the Board to act under Article 5.1 of the AGB and award the .GAY TLD to dotgay. The Board should grant dotgay's community priority application without any further delay and proceed to enter into a registry agreement with dotgay, which remains dedicated and enthusiastic about operating the .GAY registry.

Sincerely,

Arif Hyder Ali

Partner

Exhibit 6

INDPENDENT 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 COPRORATION 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 0f 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 ". $^{\text{\tiny EVContact information Restacted}}$ Declaration"), $\P\P$ 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."

- 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:
 - 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. <u>History of Independent Review Process</u>

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:
 - 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.
 - 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.
 - 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:

- May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- 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, II. 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

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;"
 - 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 .//c, and .//p 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);
 - 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)."
- 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 Reducted also served as Project Director for EIU's work on behalf of ICANN.

91. In his declaration, EIU Contact Information Reducted 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. <u>ICANN views its staff as being obligated to</u> 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.

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.

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."

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, inequitability, 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 workproduct 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

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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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

Mark Kantor

Mak Kantan

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, 2016

For the Panel Majority

Mark Kantor

M. Scott Donahey, Chair

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

- 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. <u>First</u>, 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," 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

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. <u>Second</u>, 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 <u>not</u> assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB." The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws. Despite the Declaration's statement to the contrary, ¹⁰ I cannot

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 i₁ 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. <u>Third</u>, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws," 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." 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 [BGC] 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. <u>Fourth</u>, 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. 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."
 - 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 hearing ¹⁹ 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." 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. 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. 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." 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. 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. 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:

<u>Research</u> 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 <u>research</u>, 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." 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." My colleagues are troubled by what they view as ICANN's Board making "short shrift" of Dot Registry's position concerning the "research." 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." 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 ElU'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

35 ICANN's Response to Claimant Dot Registry LLC's Additional Submission dated 10 Aug. 2015, ¶ 10.

³⁴ Declaration ¶ 122.

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," 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." It finds that "the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment." 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. The Declaration chastises ICANN for submitting "no witness statements or testimony" or documents to prove that its Board acted independently. 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." 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.

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

Note that the Declaration also repeatedly refers to the "Declaration" submitted by **Ucontact information Reducted* on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. **BUContact information Reducted* 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" 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. 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." 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.icamp.org/resources/board-material minutes-bge-2014-07-24-en,

minutes as "boilerplate" and "pro forma," 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.

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 BCG 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. Braner

Charles N. Brower

Exhibit 7



New gTLD Program Community Priority Evaluation Report

Report Date: 6 October 2014

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay llc

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result

Did Not Prevail

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 has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)

The Community Priority Evaluation panel has determined that the community as defined 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 defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.

Delineation

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.

The community defined in the application (".GAY1") is drawn from:

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes 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 cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA². The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however "Gay".

The application further elaborates the requirements of the above individuals to demonstrate membership in the community:

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). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

This community definition shows a clear and straightforward membership and is therefore well defined. Membership is "determined through formal membership with any of dotgay LLC's [the applicant's] Authentication Partners (AP) from the community", a transparent and verifiable membership structure that adequately meets the evaluation criteria of the AGB.

In addition, the community as defined in the application has awareness and recognition among its members. The application states:

As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as "hubs" and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community. In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:

- 1. Have an active and reputable presence in the Gay Community
- 2. Have a mission statement that incorporates a focus specific to the Gay Community
- 3. Have an established policy that affirms community status for member enrolment
- 4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

¹ In this report the community as defined by the application is referred to as the ".GAY community" instead of the "gay community" or the "LGBTQIA community". The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD. "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community. This use is consistent with the references to these groups in the application.

² The Applicant notes with regard to its use of the term LGBTQIA that "LGBTQIA – Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community." This report uses the term similarly.

Based on the Panel's research and materials provided in the application, there is sufficient evidence that the members as defined in the application would cohere as required for a clearly delineated community. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the 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.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic scope and the community as defined is a global one. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both 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. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization representative of the community defined by the applicant, as referred to above, has records of activity beginning before 2007. LGBTQIA individuals have been active outside of organizations as well, but the community as defined is comprised of members of [AP] organizations.

The Community Priority Evaluation panel has 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 that the community meets the requirements for size and demonstrates longevity. 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 it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. While the application does cite global estimates of the self-identified gay/LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, and ally) population (1.2% of world population), it does not rely on such figures to determine the size of its community. This is because the applicant requires that any such LGBTQIA individual also be a member of an AP organization in order to qualify for membership of the proposed community. According to the application:

Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members.

The size of the delineated community is therefore still considerable, despite the applicant's requirement that the proposed community members must be members of an AP.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community3", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of 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 .GAY community⁴ are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of LGBTQIA individuals has accelerated since then, especially in recent decades and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater rates of visibility of LGBTQIA individuals, recognition of LGBTQIA rights and community organization, both in the US and other western nations as well as elsewhere.⁵ While socio-political obstacles to community

³ "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community.

⁴ The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD.

⁵ Haggerty, George E. "Global Politics." In Gay Histories and Cultures: An Encyclopedia. New York: Garland, 2000.

organization remain in some parts of the world,⁶ the overall historical trend of LGBTQIA rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has 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

0/4 Point(s)

2-A Nexus

0/3 Point(s)

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 does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 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. To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, "Identify' means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community."

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. As cited above:

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).

The application, therefore, acknowledges that "the world at large" understands the Gay community to be an entity substantially different than the community the application defines. That is, the general population understands the "Gay community" to be both those individuals who have "come out" as well as those who are privately aware of their non-heterosexual sexual orientation. Similarly, the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part. That is, the community as defined by the applicant refers only to the sub-set of individuals who have registered with specific organizations, the Authenticating Partners.

As the application itself also indicates, the group of self-identified gay individuals globally is estimated to be 1.2% of the world population (more than 70 million), while the application states that the size of the community it has defined, based on membership with APs, is 7 million. This difference is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

 $^{^6\} http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries$

Moreover, while the applied-for string refers to many individuals not included in the application's definition of membership (i.e., it "substantially over-reaches" based on AGB criteria), the string also fails to identify certain members that the applicant has included in its definition of the .GAY community. Included in the application's community definition are transgender and intersex individuals as well as "allies" (understood as heterosexual individuals supportive of the missions of the organizations that comprise the defined community). However, "gay" does not identify these individuals. Transgender people may identify as straight or gay, since gender identity and sexual orientation are not necessarily linked. Likewise, intersex individuals are defined by having been born with atypical sexual reproductive anatomy; such individuals are not necessarily "gay". Finally, allies, given the assumption that they are heterosexual supporters of LGBTQIA issues, are not identified by "gay" at all. Such individuals may be an active part of the .GAY community, even if they are heterosexual, but "gay" nevertheless does not describe these individuals as required for Nexus by the AGB. As such, there are significant subsets of the defined community that are not identified by the string ".GAY".

The Community Priority Evaluation panel has determined that the applied-for string does not match nor does it identify without substantially over-reaching the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of 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 has no other significant meaning beyond identifying the community described in the application," according to the AGB (emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above,). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

Criterion #3: Registration Policies

4/4 Point(s)

3-A Eligibility

1/1 Point(s)

The Community Priority Evaluation panel has 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 specifying that:

.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC's Authentication Partners (AP) from the community. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Eligibility.

⁷ This prevailing understanding of "ally" is supported by GLAAD and others: http://www.glaad.org/resources/ally

⁸ http://www.glaad.org/reference/transgender

⁹ http://www.isna.org/faq/what_is_intersex

¹⁰ "Gay" is defined by the Oxford dictionaries as "A homosexual, especially a man." The applicant defines the community as "individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society."

3-B Name Selection 1/1 Point(s)

The Community Priority Evaluation panel has 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 must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .Gay top-level domain, including rules barring "[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech." The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Name Selection.

3-C Content and Use 1/1 Point(s)

The Community Priority Evaluation panel has 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.

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. This includes "efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression."

The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Content and Use.

3-D Enforcement 1/1 Point(s)

The Community Priority Evaluation panel has 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 and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

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 application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access. The Community Priority Evaluation panel has determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.

Criterion #4: Community Endorsement

2/4 Point(s)

4-A Support

1/2 Point(s)

The Community Priority Evaluation panel has 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.

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. In this context, "recognized" refers to 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 by the application's defined community.

The Community Priority Evaluation panel has 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 the recognized community institution(s)/member organization(s). (While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent it. There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition 1/2 Point(s)

The Community Priority Evaluation panel has 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 did not receive any relevant opposition. 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 relevant group of non-negligible size.

The Community Priority Evaluation panel has 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 full-time 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 AGB (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.

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 8



New gTLD Program Community Priority Evaluation Report

Report Date: 8 October 2015

Application ID:	1-1713-23699	
Applied-for String:	Gay	
Applicant Name:	dotgay LLC	

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result

Did Not Prevail

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 has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.

Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.

Panel Summary

Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)

The Community Priority Evaluation panel has determined that the community as defined 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 defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.

Delineation

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.

In its application, dotgay LLC defines its community as follows:

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes 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 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...

Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights. (Application, section 20(a))

The applicant relies on the "process of coming out" to delineate its members, who are individuals with non-normative sexual orientation or gender identities, as well as their allies¹. The process of "coming out" is by nature personal, and may vary from person to person. Some individuals within the proposed community may not come out publicly, reflecting real or feared persecution for doing so. Similarly, membership in a community organization may not be feasible for the same reason. Furthermore, organizations within the applicant's defined community recognize "coming out" as a defining characteristic of individuals within the defined community.² Many such organizations advocate on behalf of individuals even though they are not members, precisely because their coming out publicly may be illegal or otherwise harmful. Therefore, the Panel recognizes that the standard of "coming out" – whether publicly or privately – as homosexual, bisexual, transgender, queer, intersex, or ally is sufficiently clear and straightforward to meet the AGB's requirements.³

In addition, the community as defined in the application has awareness and recognition among its members. There is an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies. As cited by the applicant in supporting materials, for example, the American Psychological Association recognizes the process of coming out as a key part of entering the community. For many individuals, this awareness and recognition of community is made more explicit, such as by membership in organizations, participation in events, and advocacy for the rights of individuals with non-normative sexual orientations and gender identities. As the applicant states, organizations and individuals within the community also often cohere around areas of discrimination, whether in the workplace, marketplace, the media, or other areas. Regardless of whether this awareness and recognition of shared community is explicit or rather an implicit consequence of one's coming

¹ The Panel, following the applicant's reference to "individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society", uses the phrase "non-normative sexual orientations and/or gender identities" throughout this document. The term "non-normative" is used both by the applicant as well as organizations, academics, and publications discussing the topic; it is not the Panel's terminology, nor is it considered to be derogatory in this context. This phrase refers to the same individuals usually referred to with the acronyms "LGBT", "GLBT", "LGBTQ", and others. Because issues related to these acronyms are relevant later in this document, they are not used here.

² See as examples http://www.hrc.org/campaigns/coming-out-center and http://www.lalgbtcenter.org/coming_out_support

³ For allies, the "coming out" process may differ from that of individuals who are acknowledging privately or sharing publicly their own non-normative sexual orientation or gender identity. Nevertheless, there are risks associated even with supporting non-heterosexual individuals; making this support explicit is how allies can mark their awareness and recognition of the wider community and their sense of belonging to it. For example, large international organizations within the applicant's defined community, such as GLAAD, HRC, and PFLAG offer concrete avenues for individuals to "come out" as allies. See http://www.glaad.org/form/come-outas-ally-join-allynetwork-today,

http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans, http://community.pflag.org/page.aspx?pid=539

4 http://www.apa.org/topics/lgbt/orientation.pdf

out, the Panel has determined that the link among these individuals goes well beyond "a mere commonality of interest" and satisfies the AGB's requirements for recognition and awareness.⁵

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the 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.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic area and/or segment of the proposed community. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), an umbrella organization whose organizational members also include those representing allies. According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both 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. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007. Individuals with non-normative sexual orientations and/or gender identities, as well as their supporters, have been increasingly active in many countries as they work to advance their acceptance and civil rights.⁶

⁵ Although the score on Delineation is unchanged since the first evaluation, the Panel's analysis has changed due to the applicant's response to a Clarifying Question regarding the role of Authentication Partners (APs). Previously, the Panel had understood the APs to be a mechanism of members' awareness and recognition, but, as above, that is no longer the case and the role of APs is correctly understood to be relevant for the purposes of Section 3.

⁶ See for example, advocacy in China, Guyana, and Argentina: http://www.cnn.com/2013/06/27/world/asia/chinagay-lesbian-marriage/, http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/, http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html

The Community Priority Evaluation panel has 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 that the community meets the requirements for size and demonstrates longevity. 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 it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The application cites global estimates of the self-identified population of individuals with non-normative sexual orientations and/or gender identities, but relies on a more conservative size based on the number of such individuals who are affiliated with one or more of the applicant's community organizations:

Most studies place the global gay population at 1.2% (Williams 1996), higher in countries with existing gays rights protections projected at 4-6% (eg. Australia, Canada, United Kingdom, United States). Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) 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.

As the applicant also acknowledges, estimating the size of the defined community is difficult because, for example, of the risks of individuals self-identifying in many parts of the world. The applicant instead offers a "minimum" size based on the 7 million individuals who are members of one or more of its "Authentication Partners", organizations serving as entry points for domain registration. Regardless of the method used to produce these estimates, the Panel has determined that the size of the delineated community is considerable.⁷

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of 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 community defined in the application are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of individuals with non-normative sexual orientations and/or gender identities and their supporters has accelerated since then, especially in recent decades, and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater visibility of these individuals,

⁷ The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally.

recognition of their civil and human rights, and community organization, both in the US and elsewhere.⁸ While socio-political obstacles to community organization remain in some parts of the world,⁹ the overall historical trend of increasing rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has 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

0/4 Point(s)

2-A Nexus

0/3 Point(s)

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 does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, "Identify' means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community." In addition to meeting the criterion for "identify", in order 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.

In order to identify the community defined by the applicant as required for Nexus, the applied-for string must "closely describe the community or the community members", i.e. the applied-for string is what "the typical community member would naturally be called" (AGB). The Panel has therefore considered the extent to which the string "gay" describes the members of the applicant's defined community and has evaluated whether "gay" is what these individuals would naturally be called. The Panel has determined that more than a small part of the applicant's defined community is not identified by the applied-for string, as described below, and that it therefore does not meet the requirements for Nexus.

The community as defined by the application consists of

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 cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however "Gay".

The applicant's assertion that the applied-for string ("gay") is the "most common" term used by members of its defined community to refer to all gay, lesbian, bisexual, transgender, queer, intersex, and ally individuals is central to its demonstration of Nexus. In order to support this claim, the applicant, in its application and in supporting materials received both prior to and since its initial evaluation, has offered evidence that the Panel has evaluated. The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant's defined community, in particular transgender, intersex, and ally individuals. According to the Panel's own review of the language used in the

⁸ Haggerty, George E. "Global Politics." In Gay Histories and Cultures: An Encyclopedia. New York: Garland, 2000.

⁹ http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries

media¹⁰ as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider "gay" to be their "most common" descriptor, as the applicant claims. These groups are most likely to use words such as "transgender," "trans," "intersex," or "ally" because these words are neutral to sexual orientation, unlike "gay". Both within the community and outside of it, such as in the media, acronyms such as "LGBT," "GLBT," "LGBTQ," or "LGBTQIA"¹¹ are used to denote a group of individuals that includes those described above, i.e. transgender, intersex and ally individuals. In fact, organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor "gay," preferring one of the more inclusive terms¹².

The first piece of evidence offered by the applicant to support the claim that "gay" is the "most common" term used to describe the defined community is the Oxford English Dictionary (OED) and its documentation of uses of the word "gay" over hundreds of years. It summarizes the shifting meaning of "gay" in order to show how the word has become embraced by at least a part of its defined community and to support its claim that it is the "most common" term for the entirety of its defined community. According to the applicant, the OED shows that "Gay by the early 20th century progressed to its current reference to a sexuality that was non-heterosexual" (application, 20(d)). The Panel agrees that the more derogatory uses of "gay" or uses unrelated to sexuality have largely fallen away, and that the word has come to refer to homosexual women as well as men, as the applicant asserts, citing the OED. However, the Panel's review of the OED¹³ as well as other sources (cited below) does not support the applicant's claim that "gay" identifies or closely describes transgender, intersex, or ally individuals, or that "gay" is what these individuals "would naturally be called," as the AGB requires. This is because "gay" refers to homosexuality (and to some extent non-heterosexuality more broadly), while transgender and intersex individuals may or may not identify as homosexual or gay, and allies are generally understood to be heterosexual.

The applicant acknowledges that its application attempts to represent several groups of people, namely lesbian, gay, bisexual, transgender, queer, intersex, and ally (LGBTQIA) individuals. It claims that all of these groups, or "sub-communities", are identified by what it calls the "umbrella" term "gay":

The term "gay" today is a term that has solidified around encompassing several sub-communities of individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. Within these sub-communities even further classifications and distinctions can be made that further classify its members but are equally comfortable identifying as gay, particularly to those outside their own sub-communities. As an example, it has become commonplace for celebrities to acknowledge their homosexuality with the now routine declaration of "Yup, I'm gay" on the cover of newsmagazines as the comedienne Ellen Degeneres did when she "came out" on the cover of TIME magazine.

Notably, "gay" is used to super-identify all these groups and circumstances. Whether homosexual, bisexual, transgender, intersex or ally, all members of the Gay Community march in the "gay pride parade" read the same "gay media" and fight for the same "gay rights." Gay has become the prevalent term in how members of this community refer to themselves when speaking about themselves as demonstrated by the large number of organizations that use the term globally.

Despite the applicant's assertions to the contrary, its own evidence here shows that "gay" is most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others. The applicant's "umbrella term" argument does not accurately describe, for example, the many similar

¹⁰ While a comprehensive survey of the media's language in this field is not feasible, the Panel has relied on both the data in the applicant's own analysis as well as on the Panel's own representative samples of media.

¹¹ There is some variability to these acronyms but one or another of them is very commonly used throughout the community defined by the applicant to refer to Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Allies.

¹² While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes. Details of the Panel's analysis follow.

¹³ See "gay, adj., adv., and n." OED Online. Oxford University Press, June 2015. Web. 19 August 2015.

transgender stories in the mass media where "gay" is not used to identify the subject. ¹⁴ In these cases, "transgender" is used because "gay" does not identify those individuals. With regard to the applicant's argument that the various parts of its defined community are engaged in the same activities, such as "gay pride" events and "gay rights" advocacy, the Panel acknowledges that this is likely the case. However, transgender people's participation in these activities no more identifies them as gay than allies' participation in transgender rights advocacy identifies them as transgender. Indeed, there are many organizations focused on events and advocacy specific to the needs of transgender individuals ¹⁵ and they often take special care to separate labels of sexual orientation from those of gender identity/expression. ¹⁶ Similarly, the Panel has reviewed the literature of several organizations that advocate and provide services and support for intersex individuals and they clarify that sexual orientation is unrelated to being intersex. ¹⁷ That is, while such organizations would fall within the applicant's defined community, they explicitly differ on the applicant's assertion that the applied-for string "gay" identifies all LGBTQIA individuals. Thus, the applicant's assertion that even the members of its so-called sub-communities "are equally comfortable identifying as gay" is in fact often not the case.

In materials provided in support of the application¹⁸, a survey of news media articles is analyzed in an effort to show that "gay" is the most common name used to refer to the community defined by the applicant. This analysis shows that indeed "gay" is used more frequently than terms such as "LGBT" or "LGBTQIA" in reference to both individuals and communities:

In the first random sample period (April 1-8, 2013), "gay" was used 2,342 times, "LGBT" 272 times, "lesbian" 1008 times, "queer" 76 times and "LGBTQ" 19 times. "LGBTQIAA" and "GLBTQ" were not used at all, demonstrating that "gay" remains a default generic term for the community. An overwhelming amount of the time these terms beyond gay were used in articles that also used gay. Said another way, "LGBT" was used in only 35 articles that did not also use the term "gay," "lesbian" in 43 articles, "queer" in 55, and "LGBTQ" in 3. Data shows, thus, that "gay" is both the most frequently used term when referring to non-heterosexual gender identity and sexual orientation and is used as an umbrella term to cover the diversity.

Despite this claim, the analysis fails to show that when "gay" is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities. This is the key issue for the Panel's consideration of Nexus. That is, the greater use of "gay" does not show that "gay" in those instances is used to identify all LGBTQIA individuals, as the applicant asserts and as would be required to receive credit on Nexus. Indeed, the Panel's own review of news media¹¹ found that, while "gay" is more common than terms such as "LGBTQ" or "LGBTQIA", these terms are now more widely used than ever, in large part due to their greater inclusivity and specificity than "gay". Even several of the articles cited by the applicant in its reconsideration request²⁰ as evidence of its "umbrella term" argument do not show "gay" being used to identify the groups in question, nor is "gay" the most commonly used term to refer to the aggregate LGBTQIA community in these articles.²¹ Furthermore, researching sources from the same periods as the

¹⁴ As examples of cover stories that parallel the applicant's own example from Time Magazine, see: http://time.com/135480/transgender-tipping-point/ and http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz. In these two very prominent examples, the articles do not use "gay" to refer to their subjects.

¹⁵ See for instance http://transgenderlawcenter.org/, http://srlp.org/, http://transequality.org/

¹⁶ See National Center for Transgender Equality: http://transequality.org/issues/resources/transgender-terminology

¹⁷ See for example the Organization International Intersex: http://oii-usa.org/1144/ten-misconceptions-intersex

¹⁸ See https://www.icann.org/en/system/files/correspondence/gudelunas-to-icann-eiu-evaluators-30apr14-en.pdf, drafted and submitted by David Gudelunas a member of the dotGay LLC team according to its website, http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter

¹⁹ As noted above, while a comprehensive survey of the media's language in this field is not feasible, the Panel has relied on both the applicant's own analysis, as discussed here, as well as on the Panel's own representative samples of media. ²⁰ See dotGay's Reconsideration Request: https://www.icann.org/en/system/files/files/request-dotgay-annexes-redacted-29nov14-en.pdf

²¹ See http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marchesor-clever-substitutes-pride-and-prejudice, http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html, http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation

applicant's analysis for the terms "transgender" or "intersex" shows again that these terms refer to individuals and communities not identified by "gay". ²² In other words, "gay" is not used to refer to these individuals because it does not *closely describe* them and it is not *what they would naturally be called*, as the AGB requires for partial credit on Nexus.

Finally, the Panel reviewed in detail the many letters of support submitted on behalf of the applicant by many LGBTQIA organizations worldwide. In addition to evaluating these letters of support, as noted in Section 4, the Panel examined how these organizations refer to their members and those for whom they advocate, noting in particular the words used to identify them. In a minority of cases, these organizations included in their letters the view that "gay" is an "umbrella term" for the LGBTQIA community, as argued by the applicant. However, even the organizations that made this claim in their letters do not use the term "gay" to identify their transgender, intersex, and/or ally members in their own organizational materials. In fact, the names of many of these organizations usually include a term other than "gay" such as "LGBTQ" or, in the case of some, "transgender" or "intersex".

GLAAD, as an example of one of the applicant's supporters, writes on its own website, "Transgender people have a sexual orientation, just like everyone else. Transgender people may be straight, lesbian, gay, or bisexual." Indeed, it is for this reason that GLAAD, like other organizations active in the defined community, have revised their names and use of labels specifically to be more inclusive of the individuals in their communities whom "gay" does not identify by using instead terms like LGBTQ or LGBTQIA. Similarly, ally organizations such as PFLAG (Parents, Families and Friends of Lesbians and Gays) support the applicant and reiterate the importance of allies in the struggles facing the LGBTQIA community. However, not even these organizations use "gay" to describe allies. The Panel's research and review of the applicant's materials has demonstrated that even the applicant's supporters recognize that "gay" is insufficient to identify the diversity of the LGBTQIA community, especially with regard to transgender, intersex, and ally individuals.

The Community Priority Evaluation panel has determined that the applied-for string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of 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 has no other significant meaning beyond identifying the community described in the application," (AGB, emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as it does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

Criterion #3: Registration Policies

4/4 **Point(s)**

3-A Eligibility

1/1 Point(s)

The Community Priority Evaluation panel has 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

²² While it is not possible for the Panel to review all the articles in the LexisNexis search results cited by the applicant, the Panel reviewed a representative sample of articles from the same time periods.

²³ See http://www.glaad.org/transgender/transfaq

²⁴ In 2013, to be more inclusive of transgender individuals by not including them in the label "gay" or "lesbian", the organization's name officially was changed to GLAAD, as opposed to being an acronym for Gay and Lesbian Alliance Against Defamation (http://www.glaad.org/about/history). This is reflective of the trend the Panel identified among organizations within the defined community towards greater inclusivity and away from names and labels that identified only gays and lesbians.

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 specifying that registration in ".gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC's Authentication Partners (AP) from the community."

According to the application, and as the applicant has confirmed in follow-up materials, in order to register a domain, the applicant requires

community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations.

As the application explains, these Authentication Partners (APs) include some of the largest organizations dedicated to members of the defined community and these organizations will provide "the most trusted entry points into .gay" while "reducing risk to unqualified registrations".

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Eligibility.

3-B Name Selection 1/1 Point(s)

The Community Priority Evaluation panel has 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.

To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .gay top-level domain, including rules barring "[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech." The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application fulfills the requirements for Name Selection.

3-C Content and Use 1/1 Point(s)

The Community Priority Evaluation panel has 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 gTLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

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. This includes "efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression."

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Content and Use.

3-D Enforcement 1/1 Point(s)

The Community Priority Evaluation panel has 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 and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

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 application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Enforcement.

Criterion #4: Community Endorsement

2/4 Point(s)

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN's website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at http://newgtlds.icann.org/en/applicants/cpe. The table below summarizes the review and verification of all support and opposition documents for the dotgay LLC application for the string "GAY".

Summary of Review & Verification of Support/Opposition Materials as of 5 September 201525

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	177	0	0	0
Attachments to 20(f)	128	128	128	51
Correspondence ²⁶	152	136	136	56
Grand Total	457	264	264	107

4-A Support 1/2 Point(s

The Community Priority Evaluation panel has 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.

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. In this context, "recognized" refers to 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 by the application's defined community.

²⁵ The table below reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application both during the period of its previous evaluation and the present one. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information.

²⁶ The Panel reviewed 41 pieces of correspondence that contained 152 individual letters.

The Community Priority Evaluation panel has 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 the recognized community institution(s)/member organization(s).

While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent them. There is no single such organization recognized by all of the defined community's members as the representative of the defined community in its entirety. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition 1/2 Point(s)

The Community Priority Evaluation panel has 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 source. 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 relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from one group of non-negligible size.²⁷ The opposition comes from a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application. The organization is of non-negligible size, as required by the AGB. The grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community and the opposition is not made for any reason forbidden by the AGB, such as competition or obstruction. Therefore, the Panel has 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>.

²⁷ The Panel has reviewed all letters of opposition and support, even when more than one letter has been received from the same organization. In those cases, as with all others, the Panel has reviewed each letter to determine the most current stance of each organization with respect to the application. In the case of this opposition, all letters have been reviewed.

Exhibit 9

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC) RECONSIDERATION REQUEST 16-3 26 JUNE 2016

The Requester, Dotgay LLC, seeks reconsideration of the Board Governance

Committee's (BGC's) denial of the Requester's previous reconsideration request, Request 15-21.

I. Brief Summary.

The Requester submitted a community application for .GAY (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 Application was community-based, the Requester was invited to and did participate in CPE in October 2014 (First CPE). The Requester's Application did not prevail in the First CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that the Requester had not prevailed in the First CPE (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE (Second CPE Report). As a result, the Application remains in contention with the other applications for .GAY. Just like all other contention sets, the .GAY contention set can be resolved by ICANN's last resort auction or by some other arrangement amongst the involved applicants.

The Requester sought reconsideration of the Second CPE Report and ICANN's acceptance of it (Request 15-21). After reviewing all of the relevant material, the BGC denied Request 15-21 (Determination on Request 15-21). The Requester has now submitted Reconsideration Request 16-3 (Request 16-3), challenging the Determination on Request 15-21

contending that the BGC erroneously determined that the EIU had adhered to all applicable policies and procedures in conducting the Second CPE. Request 16-3 is premised upon one, and only one, basis: the Requester argues that the EIU improperly permitted someone other than one of the "evaluators" to send verification emails to the authors of letters of support and opposition to the Application, which the Requester contends contravenes applicable policies and procedures.

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3. In response, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support. The Presentation, however, did not relate to the sole issue raised in Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the "evaluators" sent verification emails to the authors of letters of support and opposition to the Application. Rather, the Presentation focused on the merits of the Second CPE Report, which is neither the subject of Request 16-3 nor a proper basis for reconsideration.

The Requester's claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the EIU that materially or adversely affected the Requester, and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information.

Instead, the Requester relies on a purely administrative step of the verification process that the EIU took in the course of administering the Second CPE. More specifically, the EIU delegated

the physical sending of verification emails for letters of support/opposition to a member of the EIU's core team to serve as a Verification Coordinator rather than one of the evaluators due to the large number of letters of support/opposition. That protocol did not affect the Requester, materially or adversely, as is required to support reconsideration. To the contrary, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation consistent with the Applicant Guidebook (Guidebook). Additionally, the substantive evaluation of the letters was performed by the evaluators in accordance with Module 4.2.3 of the Guidebook. As such, the BGC recommends that Request 16-3 be denied.

II. Facts.

A. Background Facts.

The Requester submitted a community application for .GAY.¹

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings

Limited each submitted standard applications for .GAY.² Those applications were placed into a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE.

CPE is a method of resolving string contention, described in Module 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 (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.³

¹ See Application Details, available at https://gtldresult.icann.org/applicationstatus/applicationdetails/444.

² 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.

³ See Community Priority Evaluation (CPE), http://newgtlds.icann.org/en/applicants/cpe#status.

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).⁴ The First CPE 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 the First CPE.⁵

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.⁶

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.⁷ On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).⁸

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of it, and of the First DIDP Response.⁹

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure. The BGC directed that "the CPE Panel's Report shall be set aside, and that new [CPE] evaluators will be appointed to conduct a new CPE

⁴ *Id*.

See https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf.

⁶ https://www.icann.org/resources/pages/14-44-2014-10-22-en.

⁷ https://www.icann.org/resources/pages/20141022-02-2014-10-31-en.

⁸ See https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf.

⁹ See https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en.

¹⁰ Determination of BGC, Reconsideration Request 14-44, available at

https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf at Pg. 31.

for the Application."¹¹ In addition to directing that new evaluators conduct the second CPE of the Application, the BGC also recommended that the EIU consider including new members of the core team to assess the evaluation results.¹²

In furtherance of the BGC's Determination on Request 14-44, the EIU administered the Second CPE, appointing two new evaluators as directed by the BGC, and one new core team member as the BGC suggested.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.¹³

On 22 October 2015, the Requester submitted Reconsideration Request 15-21, seeking reconsideration of the Second CPE Report and ICANN's acceptance of it.¹⁴

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN's DIDP (Second DIDP Request), seeking documents related to the Second CPE Report. On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Request 15-21), which sought reconsideration of the Second CPE Report and ICANN's acceptance of it, and of the Second DIDP Response.¹⁷

On 1 February 2016, the BGC issued the Determination on Request 15-21, finding that Request 15-21 should be denied.¹⁸

12 Id

¹¹ *Id*.

¹³ See https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf.

¹⁴ https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en.

¹⁵See https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf.

¹⁶ See https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf.

¹⁷ See generally https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en.

The Requester submitted Request 16-3 on 17 February 2016.¹⁹ Request 16-3 challenges the Determination on Request 15-21 on the sole basis that the person at the EIU who sent verification emails to the authors of letters of support and opposition to the Application was not a CPE "evaluator."²⁰

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3.²¹ In response, Pursuant to Article IV, Section 2.12 of ICANN's Bylaws, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials.

The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support.²² The Requester, however, did not address the sole issue that is the basis for Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the "evaluators" sent verification emails to the authors of letters of support and opposition to the Application.²³ Instead, the

⁽continued...)

¹⁸ Determination on Request 15-21, *available at* https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf.

¹⁹ See generally https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf. ICANN has also reviewed and considered several letters sent in support of Request 16-3, including one from Transgender Equality Uganda and one from Trans-Fuzja. (See

https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en.) In addition, ICANN also reviewed and considered two letters from CenterLink that the Requester submitted along with its Presentation materials, indicating CenterLink's support of the Requester's Application. (*See id.*)

²⁰ See generally https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf. Request, § 8.7, Pg. 8.

²² See https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en.

²³ See https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf.

Presentation addressed the merits of the Second CPE Report, which is not the subject of Request 16-3 and is not a proper basis for reconsideration.²⁴,²⁵

B. Relief Requested.

The Requester asks that ICANN:

- 1. "[A]cknowledge receipt of this Reconsideration Request;"
- 2. "[D]etermine that the [Determination on Request 15-21] is to be set aside;"
- 3. "[I]nvite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;" and
- 4. "[D]etermine that, given the circumstances, any and all of its requests set out in § 9 of Requester's Second Reconsideration Request be awarded, which are incorporated herein by reference."²⁶

III. The Relevant Standards For Reconsideration Requests And CPE.

A. Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a staff or Board action or inaction in accordance with specified criteria, which include a requirement that the requester has been "materially [and] adversely affected" by the challenged action or inaction.²⁷ The Requester here

²⁴ *Id*.

²⁵ The BGC also notes that it received and considered the 24 June 2016 letter from dotgay LLC, which can be found at https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dotgay-to-icann-bgc-24jun16-en.pdf.

²⁶ Request, § 9, Pgs. 8-9.

²⁷ Bylaws, Art. IV, § 2. Article IV, §§ 2.1-2 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 materially and 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

challenges both staff and Board action. 28

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.²⁹ In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports.

Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the EIU violated any established policy or procedure.

A Board action may be subject to reconsideration where it was undertaken "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, where it was "taken as a result of the Board's reliance on false or inaccurate material information." Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

B. Community Priority Evaluation.

(continued...)

⁽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.

²⁸ While the Requester indicated that it challenged staff action (see Request, § 2, Pg. 1), the crux of Reconsideration Request 16-3 is a challenge to the BGC's Determination on Request 15-21, and as such, challenges both Board and staff action

²⁹ See BGC Recommendation on Reconsideration Request 13-5, available at http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc. ³⁰ Bylaws, Art. IV, § 2.

The standards governing CPE are set forth in Module 4.2 of the Guidebook. The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook's CPE provisions³¹ and summarizing those provisions.³² In addition, the EIU 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.³³

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.³⁴ CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.³⁵ A CPE panel's role is to determine whether the community-based application fulfills 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 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.

IV. Analysis And Rationale.

The Requester seeks reconsideration of the Determination on Request 15-21, arguing that the BGC should have "confirm[ed]" that the EIU did not follow applicable policies and

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³¹ 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* 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.

³² CPE Panel Process Document, *available at* https://newgtlds.icann.org/en/applicants/cpe.

³³ CPE Guidelines, *available at* http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.

³⁴ Guidebook, § 4.2. ³⁵ *Id.* at § 4.2.2.

procedures in conducting the Second CPE.³⁶ Specifically, the Requester claims that the EIU violated the CPE Panel Process Document because the person who sent verification emails to the authors of letters of support and opposition to the Application was a member of the core team (serving as a Verification Coordinator) and was not one of the two "evaluators" assigned to conduct the CPE.³⁷ However, the Requester fails to identify any conduct by the EIU that contradicts an established policy or procedure in a manner that materially and adversely affected the Requester.³⁸ The process of verifying letters is an administrative task.³⁹ Regardless of which person physically sent the verification emails, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation in accordance with Module 4.2.3 of the Guidebook, which included an evaluator's substantive evaluation of the letters in compliance with the CPE Panel Process Document.

Moreover, the Requester does not identify any material information the BGC did not consider in reaching the Determination on Request 15-21, or any reliance upon false or inaccurate information. The act of sending a verification email is not material, so long as the evaluators performed their task of evaluating the letters of support and opposition. There is no claim that the evaluators did not conduct the actual evaluation. As such, the Determination on Request 15-21 properly confirmed that reconsideration was not warranted based on the EIU's decision to delegate the sending of verification emails to a Verification Coordinator, and thus the Determination on Request 15-21 does not itself warrant reconsideration.

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³⁶ Request, § 8.6, Pg. 7.

³⁷ *Id.*, § 8.4, Pgs. 5-6.

³⁸ See Bylaws, Art. IV, §§ 2.1-2.

³⁹ See https://www.icann.org/en/system/files/correspondence/abruzzese-to-weinstein-14mar16-en.pdf, at Pg. 2.

⁴⁰ See Bylaws, Art. IV, § 2.

⁴¹ While Request 16-3 generally is styled as a request for the BGC to reconsider the Determination on Request 15-21, the Requester also argues that the "EIU ha[s] not respected the policies and processes" governing CPE. Request, § 8.6, Pg. 7.

A. The EIU's Letter Verification Process Did Not Violate Applicable Policies And Procedures In A Manner That Materially Or Adversely Affected The Requester.

The Requester's claims arise entirely out the CPE Panel Process Document's provisions that an "evaluator" verifies letters of support and opposition to an application undergoing CPE, which the Requester claims did not occur here. In other words, the Requester argues that reconsideration is warranted because the EIU did not adhere to the CPE Panel Process Document insofar as the person who physically sent the emails verifying the letters of support and opposition was not an "evaluator" but, instead, was another EIU employee. However, the EIU's decision to delegate this administrative task to an employee cannot support reconsideration, because it did not affect the substance of the Second CPE in any fashion and did not change the fact that the evaluators conducted the actual evaluation of the letters.

To start, the Determination on Request 15-21 already addressed this argument.⁴⁴ The Determination on Request 15-21 acknowledged that the verification emails were sent by a person "responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU."⁴⁵ The Determination on Request 15-21 also explained that the CPE Panel Process Document mandates that one of the two evaluators

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⁴² CPE Panel Process Document at Pg. 5; Request, § 8.4, Pg. 5-6. Request 16-3 also contains a sentence arguing that the EIU appointed one of the same evaluators to conduct the Second CPE as performed the First CPE. Request, § 8.1, Pg. 3. The powerpoint to which the Requester referred during its Presentation also fleetingly touched upon this issue. (*See* https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf, at Pg. 13.) However, other than in passing reference, Request 16-3 does not argue that reconsideration is warranted because the same evaluator conducted the Second CPE. Instead, that argument appears to be a vestige from the Requester's Request 15-21, which raised that argument. (*See* Request 15-21, § 8.2, Pg. 5, *available at* https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf.) As explained in the Determination on Request 15-21, that argument fails to support reconsideration because it is factually inaccurate; ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and added a new core team member for the administration of the Second CPE. (Determination on Request 15-21 at Pgs. 28-29.)

⁴³ See Request, § 8.1, Pg. 3.

⁴⁴ Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁵ *Id.*, Pgs. 28-29.

be "responsible for the letter verification process." Here, the CPE Panel members delegated the physical sending of the verification emails to a Verification Coordinator. This procedure is in accord with the CPE Panel Process Document's provision that a letter is verified when its author "send[s] an email *to the EIU* acknowledging that the letter is authentic." While the CPE Panel Process Document indicates that an "evaluator" will contact letter authors, there is no policy or procedure that forbids the EIU from delegating the administrative task of sending the verification email to someone other than the actual "evaluator," as the Determination on Request 15-21 correctly noted.

Moreover, the Requester has not demonstrated how it was materially or adversely affected by the EIU's decision to delegate this administrative function to an administrative employee. On that ground alone, no reconsideration is warranted. The identity of the person physically sending the verification emails did not have any impact upon the results of the verification or the results of the Second CPE as a whole; the verification results were communicated to both of the evaluators and the entire core team to permit a full and complete evaluation in accordance with the Guidebook, which included an evaluator's substantive evaluation of the verified letters in compliance with the CPE Panel Process Document. Nor is there anything inherently nefarious to the EIU's decision in this regard; much as a company executive might delegate to her assistant the physical sending of emails sent on her behalf, the EIU evaluators assign the Verification Coordinator the task of physically sending the verification emails. In short, the Requester has not indicated how it was affected by the decision to delegate

⁴⁶ See CPE Panel Process Document at Pg. 5; Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁷ Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁸ CPE Panel Process Document at Pg. 5 (emphasis added).

⁴⁹ *Id*.

⁵⁰ Bylaws, Art. IV, §§ 2.1-2

⁵¹ Guidebook § 4.2.3; CPE Panel Process Document at Pg. 5.

the sending of the verification emails to a Verification Coordinator, much less how it was materially or adversely affected, as is required to support a reconsideration request.⁵²

Nonetheless, "[i]n an effort to provide greater transparency on an administrative aspect of the Community Priority Evaluation (CPE) process," the EIU has provided "additional information regarding verification of letters of support and opposition" (EIU Correspondence). The EIU Correspondence confirms that "the two evaluators assigned to assess a specific application review the letter(s) of support and opposition. For every letter of support/opposition received, both of the evaluators assess the letter(s) as described in the Guidebook, section 4.2.3 Criterion 4: Community Endorsement." As such, the EIU Correspondence confirms that the EIU complied with the CPE Panel Process Document's instruction that an evaluator "assesses both the relevance of the organization and the validity of the documentation." The EIU Correspondence further explains that:

[t]he process of verification of letter(s) is an administrative task. . . . [F]or evaluations involving large numbers of letters of support or opposition, the EIU assigned its Project Coordinator, a senior member of the core team, to serve as Verification Coordinator and to take the purely administrative step of ensuring that the large volume of verification emails, as well as follow-up emails and phone calls, were managed efficiently. ⁵⁶

The need for a Verification Coordinator arose when an "administrative issue[] related to the verification of letters of support" occurred, namely certain entities submitted letters of support or opposition to multiple applications.⁵⁷ Because different evaluators were assigned to conduct CPE with respect to the various applications, those entities began to receive verification

⁵² See Bylaws, Art. IV, §§ 2.1-2.

⁵³ EIU Correspondence, *available at* https://www.icann.org/en/system/files/correspondence/abruzzese-to-weinstein-14mar16-en.pdf, at Pg. 1.

⁵⁴ *Id*

⁵⁵ CPE Panel Process Document at Pg. 5.

⁵⁶ EIU Correspondence at Pg. 2.

⁵⁷ Id

emails from different people within the EIU.⁵⁸ The EIU "received complaints from the authors of the letters, who requested that they be contacted by a single individual," thus the EIU assigned the Verification Coordinator the administrative task of sending all verification emails.⁵⁹ As the EIU Correspondence emphasizes, "the results of the verification [a]re communicated to both of the evaluators" and it is the evaluators who score the applications. ⁶⁰

In sum, the EIU Correspondence confirms that the Verification Coordinator sends the verification emails purely for administrative ease, and that the Requester was not affected (let alone materially or adversely) by the delegation of this administrative task from the evaluator to the Verification Coordinator. As such, the Requester has not identified any conduct on the part of the EIU that warrants reconsideration.

The Requester Has Not Shown That The Determination on Request 15-21 В. Was The Result Of The BGC Failing To Consider Material Information, Or **Considering False Or Inaccurate Information.**

The Requester argues that reconsideration of the Determination on Request 15-21 is warranted because either: (1) "the BGC should . . . have confirmed[] that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator"; or (2) the CPE Panel Process Document sets forth "a process that is more stringent than the one set forth in the Applicant Guidebook, which does not require the independent evaluator [to] perform such verification of support and objection."61 Reconsideration is not warranted on either ground, because the Requester has not shown that the BGC failed to consider material information or

⁵⁸ *Id*.

⁵⁹ *Id*.

⁶⁰ *Id.* at Pg. 1.

⁶¹ Request, § 8.6, Pg. 8.

relied on false or inaccurate information with respect to either issue. The Requester has not shown that either basis for reconsideration it poses actually took place.

First, as explained *supra*, the EIU substantively adhered to the CPE Panel Process Document and the Guidebook in administering the Second CPE, including with respect to the letter verification process. The Requester has not identified any material information the BGC failed to consider, or any false or inaccurate information it relied upon in reaching the Determination on Request 15-21 that no reconsideration was warranted with respect to the fact that an EIU administrative employee sent the verification emails during the Second CPE. As such, no reconsideration of the Determination on Request 15-21 is warranted.⁶²

Second, the Requester argues that the BGC "erred in confirming that 'none of the CPE Materials comprise an addition or change to the terms of the Guidebook.",63 As an initial matter, as the Determination on Request 15-21 explained, any challenge to the CPE materials (including the CPE Panel Process Document) is time-barred.⁶⁴ The Requester argues that through its reconsideration requests and the Determination on Request 15-21, it has discovered that the CPE Panel Process Document "introduces a concept that has not been included in the . . . Guidebook, which only refers to 'evaluators'."65 However, the CPE Panel Process Document does not in fact comprise an addition or change to the terms of the Guidebook. The Guidebook provides that "[c]ommunity priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications."66 The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to

 ⁶² See Bylaws, Art. IV, § 2.
 ⁶³ Request, § 8.6, Pg. 8 (quoting Determination on Request 15-21 at Pg. 12).

⁶⁴ Determination on Request 15-21 at Pgs. 11-12.

⁶⁵ Request, § 8.5, Pg. 7.

⁶⁶ Guidebook § 4.2.2.

implement the Guidebook's CPE provisions⁶⁷ and summarizing those provisions.⁶⁸ The fact that someone other than an evaluator physically sends verification emails to authors of letters of support or opposition does not mean anyone other than a "community priority panel" has "review[ed]" the Application, as the Guidebook instructs.⁶⁹

In sum, the Requester has not demonstrated that the Determination on Request 15-21 reflects a failure on the part of the BGC to consider material information, or that the BGC considered false or inaccurate information, in concluding either that the EIU substantively complied with the CPE Panel Process Document, or that the CPE Panel Process Document adheres to the Guidebook. Therefore, the BGC thinks that no reconsideration of the Determination on Request 15-21 is warranted.

V. Recommendation.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration. The BGC therefore recommends that Request 16-3 be denied. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

In terms of the timing of this decision, 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, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 March 2016. However, the Requester sought, was

⁶⁷ 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* 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.

⁶⁸ CPE Panel Process Document.

⁶⁹ Guidebook, § 4.2.2.

invited to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.⁷⁰ The timing of the Presentation delayed the BGC's consideration of Request 16-3. The first practical opportunity to address Request 16-3 after receiving the Presentation was 26 June 2016.

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⁷⁰ See https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf.

Exhibit 10



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AR F HYDER AL

Contact Information Redacted

Contact Information Redacted Direct

Fax

25 August 2016

Via E-Mail

Mr Göran Marby President and Chief Executive Officer Internet Corporation for Assigned Names and Numbers 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: ICANN Ombudsman Report dated 27 July 2016

Dear Mr. Marby:

I am writing on behalf of my client, dotgay LLC ("dotgay"), to request that ICANN: (1) promptly, and by no later than Monday, August 29, 2016, post the Ombudsman's investigative reports for Case No. 16-00177 issued on 15 July 2016 and 27 July 2016, regarding ICANN and the Economist Intelligence Unit's treatment of dotgay's application for .GAY (the "Report" or the "Ombudsman's Report"); and (2) include the Report amongst the briefing materials that will be provided to the ICANN Board.

Dotgay notes that the Ombudsman's conclusion that ICANN's Board grant community priority status to dotgay, on the basis that such a step was required under ICANN's own Articles and Bylaws, already has been broadly publicized within the ICANN community and in media outlets.¹ The posting of the Report by ICANN, however, is crucial to promote an understanding of the issues raised by the Ombudsman regarding the treatment of dotgay's application in the ICANN community.²

¹ See, e.g., http://www.theregister.co.uk/2016/07/29/give_gays_dot_gay/.

² See, ICANN Ombudsman Framework.



In addition, we note with concern that the Ombudsman's Report was not amongst the board briefing materials provided to ICANN's Board for consideration at its Special Meeting of 9 August 2016.

In the Recommendation to the Board issued by the Board Governance Committee ("BGC") on 26 June 2016, the BGC dismissed the request on technical grounds (improperly, in our view) and *specifically* encouraged dotgay to approach the Ombudsman with any complaints of unfairness:

"If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter" (Recommendation of 26 June 2016, § V, p.16).

Dotgay subsequently followed the BGC's Recommendation and cooperated with the Ombudsman's Investigation. The Ombudsman issued his report after completing his investigation, which included seeking comments from ICANN staff and dotgay. His conclusions vindicated dotgay's complaints about being treated unfairly and in a discriminatory manner. Accordingly, the ICANN Board must thoroughly and properly consider the Ombudsman Report during its future deliberations regarding dotgay's Reconsideration Request No. 16-3.³

We look forward to seeing the Ombudsman's Report posted on ICANN's website and included amongst the briefing materials provided to the ICANN Board when dotgay's application is tabled for consideration.

Arif Hyder Ali

³ *See* Reconsideration Request No. 16-3 (17 Feb. 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf.



cc: Steve Crocker, Chairman of the ICANN Board (steve.crocker@icann.org)
John Jeffrey, General Counsel and Company Secretary (john.jeffrey@icann.org)
Scott Seitz, Chief Executive Officer, dotgay LLC Contact Information Redacted

Exhibit 11



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ARIF HYDER ALI

Contact Information Redacted

Contact Information Redacted Direct

Fax

September 13, 2016

VIA E-MAIL

ICANN Board of Directors c/o Mr. Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay's Community Priority Application

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC ("dotgay"), to submit an independent expert opinion of Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, to the ICANN Board ("Board") with the goal to assist the Board in evaluating dotgay's reconsideration request (16-3) on September 15, 2016. Prof. Eskridge is a world renowned expert both in legal interpretation and in sexuality, gender, and the law, and was recently ranked as one of the ten most-cited legal scholars in American history. Prof. Eskridge's independent expert report explains, step-by-step, fundamental errors in the EIU's reasons for denying dotgay's community status.

Pursuant to the Independent Review Panel's recent findings in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (July 29, 2016) ("Dot Registry Declaration"), which was accepted by the Board by way of its Resolutions 2016.08.09.11 and 2016.08.09.13 on August 9, 2016, it is imperative that the Board carefully reviews and considers Prof. Eskridge's expert report prior to deciding dotgay's reconsideration request (16-3).

First, the Board Governance Committee's ("BGC") June 26, 2016, recommendation to the Board to deny dotgay's reconsideration request (16-3) was

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Expert Report of Professor William N. Eskridge Jr., dated September 12, 2016, Exhibit 1



premised on a standard that was subsequently rejected by the Dot Registry Declaration. Specifically, the BGC rejected dotgay's request for reconsideration because dotgay did not "identify any misapplication of policy or procedure by the EIU that materially or adversely affected [dotgay], and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information." The Dot Registry Declaration, however, rejected this standard for reconsideration and held 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 conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB." At no point in dotgay's recourse to ICANN's accountability processes from 2014 to date has the Board scrutinized the CPE Report for consistency with the principles of fairness, transparency and non-discrimination; as Prof. Eskridge's Report demonstrates, the CPE Report would fail even the most lenient examination.

Second, the BGC's June 26, 2016 Recommendation improperly declined to consider dotgay's May 15, 2016, presentation and written summary of arguments because "the Presentation focused on the merits of the Second CPE Report." According to the Dot Registry Declaration, "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." The BGC's failure to recognize its responsibility to ensure the EIU's compliance with these principles infected its decision to exclude from consideration whether the EIU had in fact been correct in its application of the Articles, Bylaws and AGB. This is troubling because, as explained by Prof. Eskridge in his report, the EIU failed to comply with ICANN's Articles and Bylaws.

Specifically, Prof. Eskridge explains that the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement between the applied-for string (.GAY) and the LGBTQIA community: (1) interpretive errors by misreading the explicit criteria laid out in in ICANN's Applicant Guidebook ("AGB") and ignoring ICANN's mission and core values; (2) errors of inconsistency and discrimination by failure of the EIU to follow its own guidelines and its discriminatory application to dotgay's application

² Dot Registry LLC v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration, p. 34 (29 July 2016).

³ *Id.* at p.34.



when compared with other applications; and (3) errors of fact, namely, a misstatement of important empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities. Prof. Eskridge's report, after discussing EIU's egregious reasoning behind rejecting dotgay's application, concludes that the EIU "engaged in a reasoning process that remains somehow mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory."

Finally, as dotgay has amply demonstrated in its submissions to the ICANN Board, it is entitled to the full two points in relation to community endorsement, ⁴ since it has the support of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) – a global human rights organization focused on the gay community with member organizations in 125 countries.

Accordingly, pursuant to the Board's obligation to exercise due diligence, due care, and independent judgment in reaching reconsideration decisions, we sincerely hope that the Board: (1) will review and agree with Prof. Eskridge's independent expert opinion that the EIU's evaluation of dotgay's community priority application was flawed, and (2) grant dotgay's community priority application without any further delay.

Sincerely,

Arif Hyder Ali

Partner, Co-Chair of International Arbitration Group

See dotgay letter to ICANN Board of Directors (September 8, 2016) pp. 5-9. See also dotgay presentation to the Board Governance Committee (May 17, 2016) pp. 7-9 and Statement of Renato Sabbadini (May 17, 2016).

EXPERT REPORT

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I. EXECUTIVE SUMMARY

Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string ".gay", under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report. authored by the Economist Intelligence Unit (EIU) recommended that the application be denied; the major reason was that dotgay did not meet the nexus requirement between the applied-for string (".gay") and the community of people who do not conform to traditional norms of sexuality and gender. The CPE Report is fundamentally erroneous. The Report's fundamental errors fall into three different groups: (i) interpretive errors, namely, misreading the explicit criteria laid out in ICANN's Applicant Guidebook and ignoring ICANN's mission and core values; (ii) errors of inconsistency and discrimination, namely, failure of the EIU to follow its own guidelines and its discriminatory application to dotgay's application when compared with other applications; and (iii) errors of fact, namely, a misstatement of the empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States. In short, the CPE Report and its recommendations should be rejected, and dotgay should be awarded full credit (4 of 4 points) for establishing the nexus of its string with the community.

II. QUALIFICATIONS OF THE EXPERT

 I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent legal opinion on the validity of the ICANN Community Priority

- Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), evaluating dotgay's community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string ".gay".
- 2. I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,¹ leading monographs,² and dozens of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.³
- 3. My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN's gTLD Applicant Guidebook (AGB), especially Module 4.2.3, "Criterion #2: Nexus Between Proposed String and Community"; (iii) the history of the terminology in dispute, especially the term "gay" and its applicability to the community of sexual and

William N. Eskridge Jr. & Philip Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, Sexuality, Gender, and the Law (Foundation 1997, now in its third edition, with the fourth edition out next year). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, "by far," ever published in the field of legislation and suggesting that it would "alter the law school curriculum").

For interpretation, consult William N. Eskridge Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016), and Dynamic Statutory Interpretation (Harvard 1994), as well as William N. Eskridge Jr., A Republic of Statutes: The New American Constitution (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999), and Dishonorable Passions: Sodomy Law in America, 1861-2003 (Viking 2008), and Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale).

According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/ (viewed September 8, 2016).

gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

III. BACKGROUND

A. DOTGAY'S APPLICATION

 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string ".gay", under procedures established by the Internet Corporation for Assigned Names and Numbers (ICANN).

B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK

- 5. The governing legal materials include ICANN's Bylaws and its Applicant Guidebook. The Bylaws establish ICANN's mission "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." ICANN Bylaws, Art. I, § 1. One of ICANN's "Core Values" is "[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making." ICANN Bylaws, Art. I, § 2(4).
- 6. Moreover, 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." ICANN Bylaws, Art. II, § 3 ("Non-Discriminatory Treatment"). And 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." ICANN Bylaws, Art. III, § 1.

7. ICANN's Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay's application. See AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant "community," nexus between the proposed string and the community, registration policies, and community endorsement. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The CPE Panel of EIU awarded dotgay a score of 10 of 16 points, including a score of 0 of 4 points for Criterion #2, the nexus requirement that will be the focus of this Expert Report.

C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY

- 8. Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay's application. Dotgay's petition lost 4 of 4 possible points on Criterion #2, and I shall focus on that criterion, "Nexus Between Proposed String and Community (0-4 Points)." More particularly, I shall focus on the nexus requirement, which is responsible for 3 of the 4 points. (A uniqueness requirement accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)
- 9. An application merits **3 points** for the nexus requirement if "[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community." AGB, 4-12 (emphasis added). "Name" of the community means 'the established name by which the community is commonly known by others." AGB, 4-13. "[F]or 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." AGB, 4-13.
- 10. An application merits **2 points** if the "[s]tring identifies the community, but does not qualify for a score of 3." AGB, 4-12. "Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 4-13. "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." AGB, 4-13.
- 11. An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that "[s[tring had no other significant meaning beyond identifying the community described in the application." AGB, 4-13.

D. THE CPE REPORT'S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT

- 12. In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus requirement. CPE Report, 4-6. Because dotgay secured 10 points from the remaining Criteria and needed 14 points for approval, Criterion #2 was the critical reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.
- 13. Recall that an application merits 3 points if "[t]he string matches the name of the community or is a well-known short-form or abbreviation of the community." AGB, 4-12. The CPE Report dismissed this possibility: "The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community." CPE Report, 5.

- 14. The CPE Report does not identify precisely what evidence the EIU Panel relied on to conclude that "gay" is not a "well known short-form or abbreviation of the community" defined in dotgay's application, but it does read into the explicit requirement ("well known short-form or abbreviation of the community") an implicit requirement that the string also "identify" the community and its members. This implicit requirement is taken from the Applicant Guidebook's explanation for a partial nexus score. Recall that an application merits 2 points if the "[s]tring identifies the community, but does not qualify for a score of 3." AGB, 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the "identify" requirement (used in the 2-point evaluation) into the 3-point evaluation.
- 15. "Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 413. The CPE Report rephrased the ICANN definition to require that the applied-for string "must 'closely describe the community or the community members', i.e., the applied-for string is what 'the typical community member would naturally be called.' "CPE Report, 5.

 Based upon this narrowing revision of the ICANN criterion, the CPE Report "determined that more than a small part of the applicant's defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus." CPE Report, 5. Specifically, the EIU Panel "determined that the applied-for string does not sufficiently identify some members of the applicant's defined community, in particular transgender, intersex, and ally individuals. According to the Panel's own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender,

- intersex, and ally individuals are not likely to consider 'gay' to be their 'most common' descriptor, as the applicant claims." CPE Report, 5-6.
- 16. The Report did not identify the methodology the EIU followed to support these sweeping empirical statements. Instead, the Report asserted that "a comprehensive survey of the media's language in this field is not feasible," CPE Report, 5 note 10, and that "a survey of all LGBTQIA organizations globally would be impossible." CPE Report, 5 note 12.
- 17. Dotgay's application relied on the common use of "gay" as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in "gay pride" parades, support "gay rights," and follow the "gay media." The CPE Report conceded this point (CPE Report, 7) but nevertheless claimed that "gay" is "most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others." CPE Report, 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are "many similar transgender stories in the media where 'gay' is not used to identify the subject." CPE Report, 6-7 and note 14.
- 18. The CPE Report also conceded that "gay" is used in the media much "more frequently than terms such as 'LGBT' or 'LGBTQIA' in reference to both individuals and communities." CPE Report, 7. Nonetheless, the EIU Panel asserted that there is no evidence that "when 'gay' is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities." CPE Report, 7. The EIU Panel's "own review of the news media" (footnote: the Panel said that "a comprehensive survey of the media's language is not feasible") found that "gay" is "more common than terms such as 'LGBT' or "LGBTQIA', these terms are now more widely used than ever." CPE Report, 7 and note 19.

- 19. The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that "gay" is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, 8.
- 20. Based upon this reasoning, the CPE Report awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the CPE Report awarded 0 of 1 point for uniqueness. CPE Report, 8.

IV. FUNDAMENTAL ERRORS IN THE CPE REPORT'S REASONING

21. The CPE Report compiled by the EIU Panel is fundamentally incorrect in its approach to the nexus criterion and in its evaluation of the evidence of community nexus. The fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN's Applicant Guidebook and ignoring ICANN's mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay's application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world.

A. THE CPE REPORT MISREAD ICANN'S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

- 22. Recall the requirements ICANN has set forth, explicitly, for the nexus requirement in its Applicant Guidebook: An application merits **3 points** if "[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community." AGB, 4-12 (emphasis added). "Name" of the community means 'the established name by which the community is commonly known by others." AGB, 4-13. "[F]or 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."
- 23. An application merits **2 points** if the "[s]tring identifies the community, but does not qualify for a score of 3." AGB, 4-12. "Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 4-13. "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." AGB, 4-13.
- 24. As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.⁴
 As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes.
 - 1. The CPE Report Substantially Ignored The Primary Test: Is the Proposed String a "well known short-form or abbreviation of the community"?

The proposition in text is explained and defended in Aharon Barak, Purposive Interpretation in Law (2005); William N. Eskridge Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution (2016); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 37–38 (2012); Brian G. Slocum, Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation (2015).

- 25. To begin with, a major problem is that the EIU Panel systematically ignored the Applicant Guidebook's focus on whether the proposed string (".gay") is "a well known short-form or abbreviation of the community" (3 points) or "closely describes the community" (2 points) (emphasis added in both quotations). Notice the precise language, especially the language I have set in bold. The proposed string does not have to be "the only well known short-form or abbreviation of the community" and does not have to be "the only term that closely describes the community" (bold type for language I am adding for contrast). More important, the primary focus is "the community," not just "community members" (who are an alternative focus for the 2-point score).
- 26. The overall community is sexual and gender nonconformists. This is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely embraced natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. "Gay" is a "well known short-form or abbreviation of the community" (the requirement for 3 points) and also "closely describes the community" (the requirement for 2 points). There is no requirement that "gay" must be the only umbrella term for the community or even that it be the most popular term—but in fact "gay" remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that "gay" has been a popular word for more than a century, but also demonstrates that once "gay rights" became ascendant in the 1990s, the term's dominance increased and consolidated.

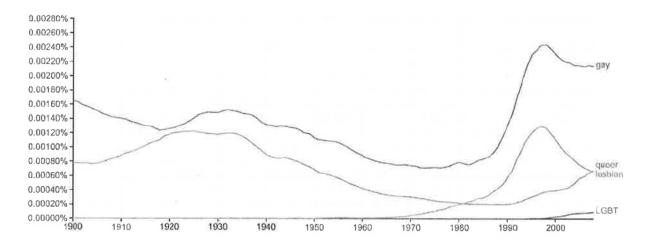


Figure 1. A Comparison of the Frequency of "Gay" "Queer" "Lesbian" and "LGBT" in the English corpus of books published in the United States from 1900 to 2008

2. The CPE Report Created an "Under-Reach" Criterion Not Found in or Supported by the Applicant Guidebook and Applied the Novel Criterion to create a Liberum Veto Inconsistent with ICANN's Rules and Bylaws

27. In another major departure from ICANN's Applicant Guidebook and its Bylaws, the EIU Panel introduced a **Liberum Veto** (Latin for "free veto") into ICANN's nexus criteria. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth's ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The CPE Report created a similar Liberum Veto, by importing a requirement that the applied-for string (".gay") can be vetoed if it "does not sufficiently identify **some**

members of the applicant's defined community, in particular transgender, intersex, and ally individuals." CPE Report, 5 (emphasis added).

- 28. Where did this Liberum Veto come from? It was not taken from the Applicant Guidebook's explicit instructions for the nexus requirement, AGB, 4-12, nor was it taken from the Guidebook's Definitions of "Name" or "Identify," AGB 4-13. Yet the EIU Panel quoted the Applicant Guidebook for its statement of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake.
- 29. According to the Applicant Guidebook, "Identify," a key term in the 2-point test, means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 4-13. The CPE Report recast this Guidebook criterion to require that the applied-for string "must [1] 'closely describe the community or the community members', i.e., the applied-for string is what [2] 'the typical community member would naturally be called.' "CPE Report, 5 (quoting the AGB). Notice that the first part [1] of the CPE Report's requirement is taken from the Guidebook's nexus requirement and the second part [2] is quoted from an illustration of one example where the Guidebook's criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook's focus on "the community" and refocused only on "members of the community," so the Panel ignored the Applicant Guidebook's focus on an objective view of the community and refocused only on subjective usages by some members of the community. And it took subjective usages pretty far by creating a Liberum Veto.

30. Moreover, the EIU Panel's Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that the Guidebook defines "Identify" to mean that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application, like this:

ICANN AGB Concern: Applied-For String > Community Defined in Application

But that's not the concern identified by the EIU Panel's Liberum Veto analysis, which claims that the applied-for string ("gay") "under-reaches" substantially short of the whole community. The Panel's "under-reaching" concern flips the "over-reaching" concern of the Applicant Guidebook. The Panel's worry that the applied-for string is much narrower than the community defined in the application, looks like this:

EIU Panel Concern: Applied-For String < Community Defined in Application

31. Although I shall document how the EIU Panel is mistaken in its application of its "under-reaching" analysis, note that this analysis and the Liberum Veto are errors by the EIU Panel and are contrary to the ordinary meaning of ICANN's Applicant Guidebook. The "under-reaching" analysis and the Liberum Veto are also inconsistent with the CPE Guidelines, Version 2.0, prepared by the EIU itself. See EIU, CPE Guidelines, 7-8 (Version 2.0), analyzed below.

3. The CPE Report Ignored and Is Inconsistent with ICANN's Bylaws

- 32. Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN's mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support "broad, informed participation reflecting the * * * cultural diversity of the Internet." ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.
- 33. There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—
 ".gay"—is ideally suited for these purposes.
- 34. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), "suicide.gay" (one of the community-operated websites proposed in the application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Expert Report) would think "suicide.gay" before they would think "suicide.lgbt" or "suicide.lgbtqia." See Figure 1, above. Indeed, many educated people (including the author of this Expert Report) cannot easily remember the correct order of the letters in the latter string ("lgbtqia"). Does a

Liberum Veto make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as "lgbtqia"). Figure 2, below, is a dramatic illustration of this point: "gay suicide" is a common locution; the search of books published between 1950 and 2008 does not register significant usage for "LGBT suicide" or "LGBTQIA suicide."

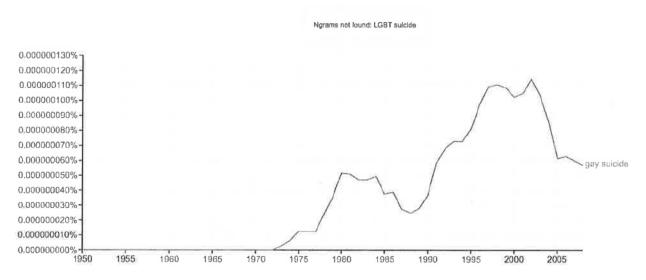


Figure 2. A Comparison of the Frequency of "Gay Suicide" compared to "LGBT Suicide" in the Corpus of Books published between 1950 and 2008

35. Not least important, recall that "non-discriminatory treatment" is a fundamental principle identified in ICANN's Bylaws. As I shall now show, the EIU has arbitrarily created an "under-reaching" test or requirement, without any notice in its own guidelines. Needless to say, other EIU Panel evaluations have ignored that criterion in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an "under-reaching" test in its nexus requirement, the EIU Panel here has applied it in a most draconian

manner, namely, creating a Liberum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION

1. The CPE Report Is Inconsistent with the EIU's Own Guidelines

- 36. Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the appliedfor string "identifies" the community but does not qualify for a score of 3. I believe dotgay
 properly qualified for a score of 3, but the CPE Report combined in a confusing way (and
 apparently contrary to the precise terms of the Applicant Guidebook) the requirements for
 full (3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the
 application "identified" the community.
- 37. "Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community." AGB, 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string "must 'closely describe the community or the community members', i.e., the applied-for string is what 'the typical community member would naturally be called.' "CPE Report, 5.
- 38. Based upon this revision of the ICANN criterion, the CPE Report "determined that more than a small part of the applicant's defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus." CPE Report, 5. Specifically, the EIU Panel "determined that the applied-for string does not sufficiently identify some members of the

applicant's defined community, in particular transgender, intersex, and ally individuals." CPE Report, 5-6.

39. As I concluded above, the EIU Panel has imported a new "under-reaching" test into the nexus analysis—contrary to the Applicant Guidebook's concern only with "over-reaching." Indeed, this CPE Report's unauthorized test is also directly inconsistent with the EIU's own published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the EIU's Guidelines quote the Applicant Guidebook's definition of "Identify," with the "over-reaching language. Then, the EIU announces its own "Evaluation Guidelines" for this term, including this:

"Over-reaching substantially" means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, at 7 (emphasis added). The EIU's Guidelines do not suggest that the inquiry should be whether the string indicates a "narrower geographic or thematic remit than the community has" (emphasis for my substitution).

40. The EIU Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

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?

Does the string capture a wider geographic/thematic remit than the community has?

EIU, CPE Guidelines, Version 2.0, at 8 (emphasis in original).

- 41. Given these Guidelines, one would not expect "under-reaching" decisions, even when an application clearly presents those concerns. An excellent example is the CPE Report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string ".Osaka". "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." Osaka CPE Report, 2. In a nonexclusive list, the applicant identified as members of the community "Entities, including natural persons who have a legitimate purpose in addressing the community." Osaka CPE Report, 2.
- 42. The applied-for string (".Osaka") would seem to be one that very substantially "underreaches" the community as defined by the applicant. Apply to this application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka probably self-identify as "Japanese" rather than "Osakans." Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. Liberum Veto?
- 43. Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular AirBnB location), or even resident might say, "I am only interested in Chūō-ku! The rest of Osaka has no interest for me." If a fair number of people feel this way, "more than a small part of the applicant's defined community is not identified by the applied-for string," Dotgay CPE Report, 5, if one were following the logic of the EIU Panel evaluating dotgay's application.

- 44. I must say that this kind of Liberum Veto evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for ".Osaka" and that posed by the EIU Panel for ".gay." Simply substitute "transgender" for "Chūō-ku" in the foregoing analysis, and you have the EIU Panel's evaluation in the Dotgay CPE Report.
- 45. By its broad definition of the community, including "[e]ntities, including natural persons who have a legitimate purpose in addressing the community," the ".Osaka" applicant is screaming "under-reach." Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the ".Osaka" application simply concluded that the string "matches the name of the community" and awarded the applicant 3 of 3 points for nexus. Osaka CPE Report, 4. "The string name matches the name of the geographical and political area around which the community is based." Osaka CPE Report, 4. Yes, but the applicant defined the community much, much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an "under-reach" analysis or consider a Liberum Veto in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU's CPE Guidelines. And, it almost goes without saying, the EIU Panel's analysis for the dotgay application is strongly inconsistent with the EIU Panel's lenient analysis for the Osaka application.

2. The CPE Report Is Inconsistent with the EIU's Own Previous Reports

46. Dotgay's application may not have been the first time the EIU has performed a nexus analysis suggesting an "under-reach" of an applied-for string, compared with the identified

community. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a Liberum Veto.

- 47. An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether ".hotel" should be approved as a top-level domain. The EIU Panel may have performed a kind of "under-reach" analysis—but it was nothing as critical as that which it performed for dotgay's application, even though the ".hotel" name was a much more dramatic illustration of "under-reach."
- 48. The applicant wanted a domain that would serve the "global Hotel Community." It defined its community in this way: "A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available." Hotel CPE Report,
 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.
- 49. In the discussion of the nexus requirement, the EIU Panel observed that "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." Hotel CPE Report, 4. This is a stunning understatement. The applicant's broad definition of "hotel" would logically sweep into the "community" resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express's

sleeping car a "hotel"? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be "hotel" rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

- 50. The EIU's "under-reach" analysis of the Hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (".hotel") did not match the community defined in the application. Contrast the Panel's tolerant analysis in the Hotel application with its hyper-critical analysis of dotgay's application. The contrast becomes even more striking, indeed shocking, when you also consider the dotgay CPE Report's vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in the current Expert Report (reported below).
- 51. Another example of an EIU Panel's forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for ".spa". The EIU Panel awarded the applicant 14 of 16 points, including 4 of 4 points for nexus and uniqueness. Like the ".hotel" applicant, the ".spa" applicant has more significant problems of "under-reach" than dotgay's application has.
- 52. The ".spa" applicant defined the community to include "Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors." Spa CPE Report, 2. The EIU Panel awarded the

applicant 4 of 4 points based upon a finding that these three kinds of persons and entities "align closely with spa services." Spa CPE Report, 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with "spa" and would not think ".spa" if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this "alignment" concern, and awarded the spa applicant 3 of 3 points for nexus.

C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY'S APPLICATION

- 53. Assume, contrary to any sound analysis, that the CPE Report correctly stated the Applicant Guidebook's requirements for Criterion #2 (community nexus and uniqueness). Even under the EIU Panel's excessively restrictive understanding of ICANN's requirements, dotgay's application would merit 4 of 4 points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.
- 54. Recall that the EIU Panel "determined that more than a small part of the applicant's defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus." CPE Report, 5. Specifically, the EIU Panel "determined that the applied-for string does not sufficiently identify some members of the applicant's defined community, in particular transgender, intersex, and ally individuals. According to the Panel's own review of the language used in the media as well as by organizations that work within the community

described by the applicant, transgender, intersex, and ally individuals are not likely to consider 'gay' to be their 'most common' descriptor, as the applicant claims." CPE Report, 5-6.

55. The CPE Report makes no effort to situate dotgay's claims within the larger history of sexual and gender minorities in history or in the world today. Nor does it identify the methodology the EIU Panel followed to support these sweeping empirical statements. The remainder of this Expert Report will attempt to do that. The analyses contained in Appendix 2 will explain the methodology my research team and I followed for each of the Figures used below.

1. From Stonewall to Madrid: "Gay" as an Umbrella Term for Sexual and Gender Minorities, as Well as a Term for Homosexual Men

56. In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as "degenerates," "moral perverts," "intersexuals," and "inverts," as well as "homosexuals." European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of "inverts" and "perverts" departed from "natural" (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a "degeneration" from natural forms.

E.g., Havelock Ellis, Sexual Inversion (3d ed. 1915); William Lee Howard, The Perverts (1901), and Effeminate Men and Masculine Women, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., Dishonorable Passions: Sodomy Laws in America, 1861-2003, at 39-49 (2008); Jonathan Ned Katz, Gay/Lesbian Almanac: A New Documentary 213 et al. (1983).

⁶ Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, 46-49.

- 57. Even the "inverts" themselves used these terms, as illustrated by Earl Lind's Autobiography of an Androgyne (1918) and The Female Impersonators (1922). Lind's was the first-person account of an underground New York City society of people he describes as "bisexuals," "inverts," "female impersonators," "sodomites," "androgynes," "fairies," "hermaphroditoi," and so forth. What these social outcasts and legal outlaws had in common is that they did not follow "nature's" binary gender roles (biological, masculine man marries biological, feminine woman) and procreative sexual practices that were socially expected in this country. See also Edward Carpenter, The Intermediate Sex: A Study of Some Transitional Types of Men and Women (1908); Xavier Mayne (a/k/a Edward Stevenson), The Intersexes: A History of Simulsexualism as a Problem in Social Life (1908). Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.
- 58. Most of these terms were at least somewhat derogatory, as was "homosexual," a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe "urnings," and Magnus Hirschfeld described "transvestites" with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was "gay," a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this "happy" word as a description of their own amorphous subculture.
- 59. An early literary example is Gertrude Stein's Miss Furr and Miss Skeene (1922, but written more than a decade earlier). The author depicts a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a

woman would "naturally" marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed or posed as a man. (Such an explicit book would have been subject to immediate censorship.) Instead, Gertrude Stein described the women thus:

"They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay."

If they were not completely baffled, most readers in the 1920s would have assumed the traditional reading of "gay," used here in a distinctively repetitive manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the "man's role," or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an "androgyne" or "hermaphrodite."

60. Gertrude Stein's story illustrates how "gay" could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. (As the twentieth century progressed, meaning (1) has been almost completely eclipsed by meanings (2) and (3).) There was in this early, closeted era a "camp" feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences "in the know" could find delight in the ambiguity.

- 61. An early example from popular culture might be helpful. In the hit cinematic comedy Bringing Up Baby (1938), Cary Grant's character sends his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asks why the handsome leading man is thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line highly amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.⁷
- 62. In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular and as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. See Figure 1, above. Indeed, in many countries, "queer" to this day carries more negative connotations than "gay," which continues to make "queer" a less attractive generic term.

⁷ For a provocative analysis of the bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

- 63. A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City's Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the "Gay Revolution." Sympathetic accounts of the Stonewall riots mobilized the popular term "gay" to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the "Gay Revolution." For example, Carter's account reports that this "Gay Revolution" began when a "butch dyke" punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights or protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that "special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. * * * A common theme links those who resisted first and fought the hardest, and that is gender transgression."
- 64. Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts almost universally described as a "gay bar." The patrons of the gay bar included homosexual and bisexual men who were insisting they be called "gay" and not the disapproved Greek terms ("homosexual" and "bisexual") that had been devised by the doctors. Many of the people in the "gay bar" were not homosexual men, but were lesbians,

⁸ David Carter, Stonewall: The Riots That Sparked the Gay Revolution (2010).

⁹ Id. at 261; see id. at 150-51 (describing the first punch thrown by the "butch dyke," who floored a police officer).

- gender-bending "bull dykes" and "drag queens," gender rebels, bisexual or sexually open youth, and the friends of these gender and sexual nonconformists.¹⁰
- 65. Early on, Stonewall was hailed as "the birth of the Gay liberation movement." In New York alone, it spawned organizations for "gay rights" that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other "gay" groups. These groups included "gay" men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and "queers" of all sorts. The community of sexual and gender minorities knowingly used the term "gay" in both senses—as a term displacing "homosexual" for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman's *The Gay Manifesto* (1970) made clear that the "gay agenda" was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. "Closet queens" should "come out" and celebrate their differences.
- 66. Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls "Gay American History." First published in 1976 and reissued many times since, Katz's *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called "hermaphrodites" and "man-women"; ¹² poet Walt Whitman, who celebrated "the love of

See id. at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

Jonathan Ned Katz, Gay American History: Lesbians and Gay Men in the U.S.A. 508 (1976).

¹² Id. at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

comrades," which he depicted as male bonding and intimate friendships; ¹³ "male harlots," or prostitutes, on the streets of New York; ¹⁴ Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans; ¹⁵ lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman. ¹⁶ More recent historical accounts of the diverse community of sexual and gender noncomformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York.* ¹⁷

- 67. Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.
- 68. Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by "lesbian and gay" persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as "LGB" (lesbian, gay, and bisexual) persons, and soon after that the blanket term "LGBT" (lesbian, gay, bisexual, and

¹³ Id. at 509-12 (Whitman).

¹⁴ Id. at 68-73 (male prostitutes, called "harlots" in a contemporary report).

¹⁵ Id. at 317-90 (dozens of women who "passed" as men, many of whom marrying women).

¹⁶ Id. at 118-27 (Smith), 787-97 (Goldman).

Lillian Faderman & Stuart Timmons, Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians (2006) (excellent account of the increasingly diverse and differentiated population of "Gay Los Angeles"); George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940 (1994) (although an account focusing on the world of men, this book includes within the "gay male world" bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term "gay" still captured the larger community. I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: "Gaylaw is the ongoing history of state rules relating to gender and sexual noncomformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgendered people." Although many readers were taken aback that "gaylaw" might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that "gaylaw" and "gay rights" did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

- 69. In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with "queer" added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay's application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.
- 70. Has the expanding acronym rendered "gay" obsolete as the commonly understood umbrella term for our community? Not at all. Recall that the requirement for the nexus requirement

William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn from *Gaylaw* as well. See id. at 567-68. Justice Scalia's dissenting opinion cited *Gaylaw* so often that he short-formed it "Gaylaw." See id. at 597-98 (dissenting opinion).

between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (".gay") "is a well-known short-form or abbreviation of the community." AGB, 4-12. There are many, many specific examples indicating that it is.

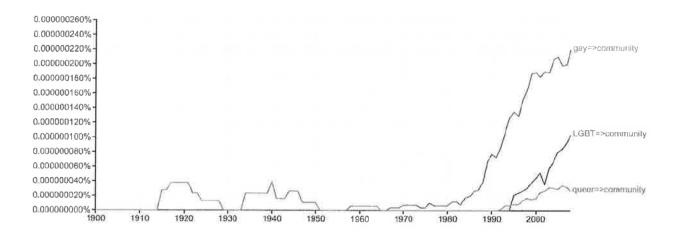


Figure 3. A Depiction of Dependency Relations among "Community" and Modifying Adjectives ("Gay", "LGBT", and "Queer")

- 71. Figure 3, above, reflects the usage in the searchable Internet of "gay" as modifying "community," and offers a comparison with other adjectives, such as "queer" and "LGBT" modifying "community." (As with the other Figures, the methodology for the search is contained in Appendix 2.)
- 72. There are other corpuses that can be searched, and we have done so to check the reliability of the data in Figure 3. Brigham Young University maintains a Corpus of Contemporary

 American English ("BYU Corpus"); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at http://corpus.byu.edu/coca/ (last viewed

Sept. 9, 2016). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that "gay" dominates "LGBT" and other acronyms used to describe sexual and gender minorities. Specifically, we had 26,530 hits on the BYU Corpus for "gay," 673 hits for "LGBT," 193 hits for "LGBTQ," and 0 hits for "LGBTQIA."

73. Does "gay community" generate a comparable number of hits? In our search of the BYU

Corpus, we found "gay community" eight times more frequently than "LGBT community."

("LGBTQIA community" returned no results.) While "LGBT community" is much more
popular now than it was ten or even five years ago, the most popular term remains "gay
community." Figure 3A provides an illustration of these results.

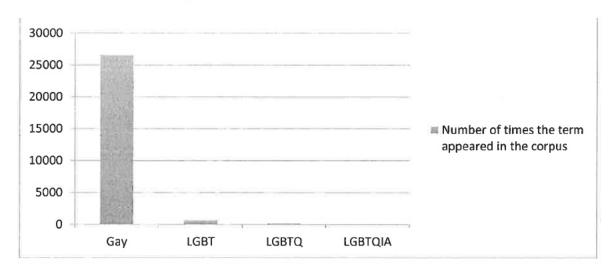


Figure 3A. A Depiction of Dependency Relations found in the BYU Corpus among "Community" and Modifying Adjectives ("Gay", "LGBT", "LGBTQ" and "LGBTQIA")

74. How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN's Applicant Guidebook awards 3 of 3 points

for the community-nexus category if the applied-for string is "a well known short-form or abbreviation for the community" (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that "gay" is a "well known short-form or abbreviation for the community." Indeed, the data would support the proposition that "gay" is the "best known short-form or abbreviation for the community" ("best" substituted for "well"). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is "a well known short-form or abbreviation for the community" (emphasis added). To confirm this point, consider some current evidence.

- 75. Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the "gay bar" in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this unprecedented mass assault by a single person on American soil. Almost all of them described Pulse as a "gay bar," the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a "gay bar" and a "gay community" that included lesbians, bisexual men and women, transgender persons, queer persons, and "allies," as well as many gay men.
- 76. Forty-nine "gay people" died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.²⁰ Most of the victims were

¹⁹ We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

²⁰ For biographies of victims in the Pulse shootings, see http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims (last viewed 9/2/16).

homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer "allies" such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

- 77. Consider, finally, a positive legacy of the Stonewall riots, namely, "gay pride." For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called "the Gay Pride Parade."
- 78. Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Aukland to Gay Pride Rome to Gay Pride Orgullo Buenes Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 "gay pride events"

E.g., *Highlights from New York's Gay Pride Parade*, N.Y. Times, June 26, 2016, available at http://www.nytimes.com/live/gay-pride-parade-nyc-2016/ (viewed Sept. 10, 2016).

all over the world, https://www.nighttours.com/gaypride/ (viewed Sept. 9, 2016). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

79. There are also international gay pride events. In 2017, it will be World Pride Madrid, celebrating Spain's leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid's annual pride celebration was voted "best gay event in the world" by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as "Gay World Pride." Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use "gay" both as a generic, umbrella term for sexual and gender minorities and as a term referring to homosexual men—often in the same article.

2. "Gay" Is an Umbrella Term for the Community That Includes Transgender, Intersex, and "Allied" Persons

80. As illustrated by the accounts of the Orlando "gay bar" and the world-wide "gay pride" events, the term "gay" remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that "gay people," the generic term, remains the most popular use of the term "gay," with "gay men" and "gay women" also popular, but much less so.

E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/.

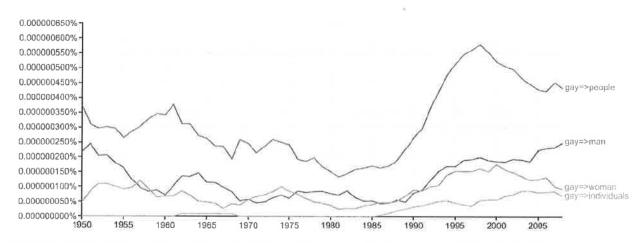


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns ("People", "Man", "Woman", and "Individuals") Modified by "Gay"

- 81. The CPE Report, however, insisted that "gay community" does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition, aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing. As I shall show, the EIU Panel did not browse very extensively.
- 82. To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that "gay" does not describe the overall community. Indeed, the CPE Report and this Expert Report are in agreement that the term "gay" has been the only stable term that has described the community of sexual and gender noncomformists over a period of generations. That "gay" has been a longstanding, stable, and widely referenced term

makes it perfect for an Internet domain (".gay") for the community that consists of sexual and gender minorities.

- 83. Thus, almost all of the CPE Report's examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay's claim that "gay" is a "well known short-form or abbreviation for the community." The EIU Panel objected that dotgay's analysis "fails to show that when 'gay' is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities." CPE Report, 7. Although I do not believe the EIU Panel fairly characterized dotgay's application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).
- 84. Consider the famous "Gay Games," an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. The stated purpose of the Gay Games is to foster "self-respect of lesbian, gay, bisexual, transgender, and all sexually-fluid or gender-varient individuals (LGBT+) throughout the world." The mission of the Federation is "to promote equality through the organization of the premiere international LGBT and LGBT-friendly sports and cultural event known as the Gay Games." Notice how the Federation uses the term "gay" as both a generic, umbrella term ("Gay Games") and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly,

Federation of Gay Games, *Purpose and Mission Statement*, ¶ 1, https://gaygames.org/wp/about-the-fgg/about-the-federation/purpose-and-mission-statement-2/ (viewed Sept. 9, 2016).

- LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., "Gay" Games.
- 85. Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know "gay" to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer "Gay Games" (or its predecessor, "Gay Olympics") than "Trans Games" or "Intersex Olympics."
- 86. The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate "gay pride" events or engage in "gay rights" advocacy. Gay rights include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted

²⁵ CPE Report, 7; Gay Pride Calendar, http://www.gaypridecalendar.com/ (viewed Sept. 9, 2016) (the website that lists dozens of "pride" parades, operating under a variety of names but all clustered under the generic "gay pride calendar").

- transgender and intersex persons, the mainstream media constantly referenced this as an "anti-gay" measure or as a law that implicated "gay rights." 26
- 87. In addition to being a unifying term to describe the community's political and legal activity, the short-form "gay" is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called "gay bars." These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies. ²⁷ *Gay Star News* is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues. ²⁸
- 88. Recent histories by LGBT+ insiders continue to use "gay" as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons' account of *Gay L.A.*They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has "exhausted [her] identity as a 'lesbian of color' * * *. But, as she affirms, there is a

E.g., Richard Socarides, North Carolina and the Gay-Rights Backlash, New Yorker, Mar.
 28, 2016; Jonathan M. Katz & Erik Eckhom, Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina, New York Times, Apr. 5, 2016.

Sunnivie Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, Advocate, June 20, 2016, http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video (viewed Sept. 9, 2016).

Greg Hernandez, Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015, Gay Star News, Sept. 8, 2016, http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA (viewed Sept. 9, 2016).

panoply of identities from which to choose in an expansive gay L.A."²⁹ These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger "gay community." And recall that the test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term "gay community" to be a "short-form or abbreviation" for sexual and gender nonconformists.

89. Consider another recent example, James Franco. He is a famous actor who is as coy about his sexual orientation and gender identity as he is friendly and "allied" with the gay community. He is often asked whether he is "gay," and his characteristic (and current) answer is that, yes, he is "gay," even though he does not have sex with men and is neither transgender nor intersex.³⁰ In a March 2015 interview with himself, "Gay James Franco" said this: "Well, I like to think that I'm gay in my art and straight in my life. Although, I'm also gay in my life up to the point of intercourse, and then you could say I'm straight."³¹ James Franco is a friend, an ally, a co-explorer with sexual and gender nonconformists of all sorts. Like Raquel Gutierrez, he is part of a larger "gay community." Both people illustrate how "gay" can be **both** a popular term referring to sexual orientation and activity **and** a generic, umbrella term referring to a sensibility or a community whose members do not conform to traditional gender and sexual norms.

Faderman & Timmons, Gay L.A., 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

Understanding James Franco, Rolling Stone, April 7, 2016 (account and quotations in text).
 J. Bryan Lowder, James Franco Is Gay—Well, At Least Half of Him Is, Slate, March 16, 2015.

Another example is Miley Cyrus, an announced "pansexual" who has recently been sporting clothes with the slogan "Make America Gay Again." 32

90. As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. My research associates and I have run a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where "gay" is not only in the same sentence as "transgender," but is, more specifically, being used to include "transgender." Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing "gay," as the CPE Report suggested, "transgender" becomes associated with "gay." Specifically, we found thousands of examples where "gay" was used in a way that included "transgender" or "trans" people.

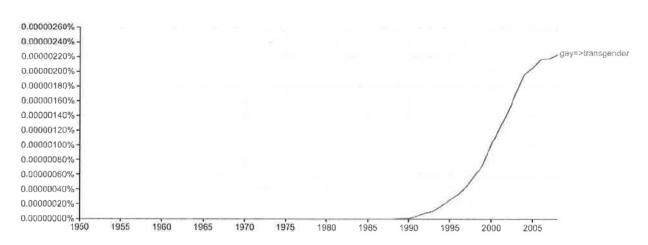


Figure 5. A Depiction of Dependency Relations: Frequency of "Gay" Modifying "Transgender"

Joe Williams, *Miley Cyrus Wants to 'Make America Gay Again*,' Pink News, July, 25, 2016, available at http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/ (viewed Sept. 9, 2016).

- 91. The relationship between the gay community and intersex persons is trickier to establish, because "intersex" is a newer and still-mysterious term, and it is not clear how many acknowledged intersex persons there are in the world. Most discussion of intersexuality in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter ("I") to the expanding acronym—hence the LGBTQIA term used in dotgay's application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon.
- 92. Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya of South Africa won the gold medal in the women's 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a "Gender in Sport" policy that creates opportunities for fair competition without stigmatizing gender minorities.³³
- 93. Common usages of "gay" as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website,

Federation of Gay Games, "Gender in Sport," https://gaygames.org/wp/sport/sports-policiesd/gender/ (viewed Sept. 9, 2016).

Everyone Is Gay.³⁴ The Gay Star News is a news source for the broad gay community, and it includes informative articles in intersex persons.³⁵ While there are many intersex-focused websites, Everyone Is Gay does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

V. CONCLUSION AND SIGNATURE

- 94. Return to ICANN's mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN's mission "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." ICANN Bylaws, Art. I, § 1. One of ICANN's "Core Values" is "[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making." ICANN Bylaws, Art. I, § 2(4).
- 95. Dotgay's application for the string ".gay" would seem to fit perfectly within the mission and core values of ICANN. "Gay" is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Expert Report. Such a ".gay" string would create a readily-identifiable space within the Internet for this community. Not surprisingly,

³⁴ Intersex Advice, Everyone Is Gay, http://everyoneisgay.com/tag/intersex/ (viewed Sept. 9, 2016).

E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, Gay Star News, Mar. 16, 2016, http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg (viewed Sept. 9, 2016).

- ICANN's requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay's application. Indeed, dotgay's application more than meets the requirements actually laid out in the Applicant Guidebook.
- 96. Moreover, 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." ICANN Bylaws, Art. II, § 3 ("Non-Discriminatory Treatment"). And 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." ICANN Bylaws, Art. III, § 1.
- 97. Evaluating dotgay's application, the EIU has not acted in a completely "open and transparent manner," nor has it followed "procedures designed to ensure fairness." To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

98. Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and to grant dotgay's application, for it legitimately deserves at least 14 of 16 points (i.e., including 4 of 4 points for Criterion #2, the community nexus requirement).

Respectfully submitted,

Date, September 13, 2016

William N. Eskridge Jr.

John A. Garver Professor of Jurisprudence Yale Law School

APPENDICES

APPENDIX 1

CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

EDUCATION

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha

(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

POSITIONS HELD

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995

Stanford, 1995

Toronto, 1999, 2001

Vanderbilt, 2003

Columbia, 2003

Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011

Fordham, 2008

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998

Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 - 1979

(SELECTED) PUBLICATIONS

Books

Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016)

Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

A Republic of Statutes: The New American Constitutionalism (Yale 2010) (co-authored with John Ferejohn)

"Dishonorable Passions": Sodomy Law in America, 1861-2003 (Viking 2008)

Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale)

Equality Practice: Civil Unions and the Future of Gay Rights (Routledge 2002)

Legislation and Statutory Interpretation (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999)

Constitutional Tragedies and Stupidities (NYU 1998) (co-authored and edited with Sanford Levinson)

Sexuality, Gender, and the Law (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment? (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

Dynamic Statutory Interpretation (Harvard 1994)

Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

Legislation: Statutes and the Creation of Public Policy (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

(Selected) Articles

"The First Marriage Cases, 1970-74," in Love Unites Us: Winning the Freedom to Marry in America 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

"Law and the Production of Deceit," in Austin Sarat ed., Law and Lies: Deception and Truth-Telling in the American Legal System 254-312 (2015)

"Original Meaning and Marriage Equality," 52 Hous. L. Rev. 1067 (2015)

"Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011," 92 Tex. L. Rev. 1317 (2014) (with Matthew R. Christiansen)

"Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," 93 B.U.L. Rev. 275 (2013)

"Expanding *Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes," 2013 Wis. L. Rev. 411

"The New Texualism and Normative Canons," 113 Colum. L. Rev. 531 (2013) (book review)

"Marriage Equality: An Idea Whose Time Is Coming," 37 NYU Rev. L. & Soc. Change 245 (2013)

"Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms," 57 St. Louis U.L. Rev. 865 (2012)

"Vetogates and American Public Law," J.L. Econ. & Org. (April 2012), available online at http://jleo.oxfordjournals.org/content/early/2012/04/19/jleo.ews009.abstract

"Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules," 100 Geo. L.J. 1881 (2012)

"Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms," 45 Ga. L. Rev. 657 (2011)

"Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?," 50 Washburn L.J. 1 (2010)

"Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases," 110 Colum. L. Rev. 1727 (2010) (with Connor N. Raso)

- "The California Proposition 8 Case: What Is a Constitution For," 98 Calif. L. Rev. 1235 (2010)
- "Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign," 57 UCAL L. Rev. 1333 (2010)
- "The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy," Calif. L. Rev. (2009)
- "A Pluralist Theory of Equal Protection," U. Pa. J. Const'l L. (2009)
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Frankel Lecture, University of Houston Law Center, "Marriage Equality as a Testing Ground for Original Meaning," November 2014, published as "Marriage Equality and Original Meaning," 52 Hous. L. Rev. 1057 (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, "Marriage Equality's Cinderella Moment," September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, "Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012," November 15, 2012, published as "Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States," 93 B.U.L. Rev. 275 (2013)

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APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

FIGURE 1. A Comparison of the Frequency of "Gay" "Queer" "Lesbian" and "LGBT" in the English Corpus of Books published in the United States from 1900 to 2008

This Figure is a comparison of the frequency of "Gay" "Queer" "Lesbian" and "LGBT" in the English corpus of books published in the United States from 1900 to 2008, available at https://books.google.com/ngrams

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are "Gay" "Queer" "Lesbian" and "LGBT"?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

FIGURE 2. A Comparison of the Frequency of "Gay Suicide" compared to "LGBT Suicide" in the English Corpus of Books published in the United States from 1950 to 2008

This Figure is a comparison of the frequency of "gay suicide" and "LGBT suicide" in the English corpus of books publishes in the United States from 1950 to 2008, available at https://books.google.com/ngrams

The X-Axis represents years. The Y-Axis represents represents the following: Of all the bigrams/uniforms in the sample of books, what percentage of them are "gay suicide" and what percentage of them are "LGBT suicide.

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

FIGURE 3. A Depiction of Dependency Relations: Frequency of Various Adjectives ("Gay", "LGBT", and "Queer") Modifying "Community"

This Figure is a comparison of how often "community" is modified by "gay" "LGBT" and "queer" in the English corpus of books published in the United States from 1900 to 2008, available at https://books.google.com/ngrams

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

FIGURE 4. A Depiction of Dependency Relations: Frequency Various Nouns ("People", "Man", "Woman", and "Individuals") Modified by "Gay"

This figure is a comparison of how often "gay" modifies "people" "man" "woman" and "individuals" in the English corpus of books published in the United States from 1950 to 2008, available at https://books.google.com/ngrams

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

FIGURE 5. A Depiction of Dependency Relations: Frequency of "Gay" Modifying "Transgender"

This figure is a comparison of how often "gay" modifies the word "transgender" in the English corpus of books published in the Unites States from 1950 to 2008, available at https://books.google.com/ngrams

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Exhibit 12



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ARIF HYDER ALI

October 17, 2016

VIA E-MAIL

ICANN Board of Directors c/o Mr. Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC ("dotgay"), to submit the independent Expert Opinion of Professor M.V. Lee Badgett, the Director of the Center for Public Policy and Administration, and Professor of Economics at the University of Massachusetts Amherst. Professor Badgett is also co-founder and Distinguished Scholar at the Williams Institute on Sexual Orientation, Gender Identity Law and Public Policy at the UCLA School of Law, a research center recognized worldwide for LGBTI research and expertise. Professor Badgett has published widely, including having written or coedited three books on economics and LGBT life, along with many academic articles and policy reports. She has testified on her research before the U.S. Congress, several U.S. state legislatures, and in litigation. She has also been a consultant and contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues.

Professor Badgett's Opinion will assist the ICANN Board ("**Board**") in evaluating dotgay's pending application (Application No: 1-1713-23699) for community priority status.¹ Prof. Badgett explains that withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community. She relies upon her research to show that the stigma, discrimination and violence faced by the community is real and leads to lower

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¹ Exhibit 1, Expert Report of Professor M.V. Lee Badgett, dated October 17, 2016.



incomes, poverty and lower mental and physical health among other unattractive outcomes. She notes that the internet has become the predominant safe space where members of the community can meet, share ideas and engage in collective action to create a more equal world. The .GAY TLD (as envisaged by the community applicant) is part of the effort to create that safe space for economic activity and social change. Prof. Badgett identifies the many and real benefits to the community from dotgay's Public Interest Commitments and registration policies. She also considers the harm that would befall the community in the absence of a community .GAY TLD (which is the likely outcome if dotgay's application for community priority status is unsuccessful).

In short, her reports adds another dimension of support to dotgay's application for community priority status, which has already been substantiated by dotgay's presentation and submissions to the ICANN Board, the **Expert Opinion** of **Professor William Eskridge Jr** of **Yale Law School**, and **ICANN Ombudsman's Report**, all of which conclusively demonstrate that dotgay's application is entitled to community priority status under ICANN's Articles, Bylaws and Applicant Guidebook. We urge ICANN to consider Professor Badgett's Expert Opinion together with the existing support on record.

Sincerely,

Arif Hyder Ali

EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT IN SUPPORT OF DOTGAY'S COMMUNITY PRIORITY APPLICATION OCTOBER 17, 2016

EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT

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EXPERT OPINION

I. EXPERT OPINION

ICANN's failure to grant dotgay's community priority application for the .GAY top level domain name would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay economic community. That global economic community, made up of LGBTIA individuals exchanging ideas, knowledge, goods, and services, is a central priority of dotgay's application and mission. Below I describe the challenges and needs of the LGBTIA community and how .GAY could support or hinder efforts to achieve their full social and economic inclusion.

a. LGBTIA people experience stigma, discrimination, and violence around the world.

A growing body of evidence demonstrates that LGBTIA people continue to face stigma, discrimination, and violence around the world. While some countries have moved closer to legal equality than others, many governments, employers, educational institutions, faith communities, families, and other social settings in every country continue to treat lesbian, gay, bisexual, transgender, and intersex people as less than fully equal in market, personal, and social interactions. These individual and institutional forms of exclusion from full and equal participation in life reduce access to education, employment, health care, and government services and increase exposure to unhealthy stress. Thus exclusion contributes to lower incomes, poverty, poorer mental and physical health, and other negative outcomes. These disparities are well documented in my own research cited below, and by research by many other scholars, governments, NGOs, and private research organizations. Much of this research is described in my books and reports (fully cited in Section II), including *Money, Myths, and Change: The Economic Lives of Lesbian and Gay Men, Sexual Orientation Discrimination: An International Perspective,* and "The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies."

b. To fight social exclusion, LGBTIA people need to create safe spaces to meet each other.

In this context of exclusion, it is essential for LGBTIA people to be able to create spaces for themselves that enable them to survive and to expand safe spaces into the broader community. They need to meet and support each other, share ideas and knowledge, and engage in collective action to move toward a more equal world. In some countries at different moments in history, we know that markets have allowed the development of such

meeting places. Bookstores, newspapers, magazine, bars, and restaurants emerged in commercial spaces and became important locations that drew LGBTIA people together. More recently in some countries, such spaces have also been found in corporate employee resource groups or gay-straight alliances in educational settings. In many places, LGBTIA organizations have used such settings to create a social movement, economic opportunities, and a community of individuals, bound together in common interest and common challenges.

c. The internet is now one of the most important spaces for LGBTIA people.

Since the early 1990's, the internet has become that meeting space. Over time, the internet has largely replaced some physical locations and products—particularly gay newspapers, gay magazines, and gay bookstores—and greatly influenced others. The internet has proven to be conducive to creating cyberspace locations for LGBTIA people to meet and share their lives and knowledge. Organizations around the world have been able to use the privacy afforded Internet users and new technologies to grow their membership and to connect LGBTIA people with each other online and in person.

In the future, the global gay community will continue to be a creative source of new businesses and organizations that will be tied to the Internet. The community built around the life reality of being seen as "gay"—whether for lesbians, gay men, transgender men and women, intersex individuals, or bisexual people, along with the allies who support them—has developed that term that is recognizable and a form of common property. The .GAY TLD could be used on the internet to promote greater community-building that would lead to social change under the right circumstances.

d. Of all of the applicants for the .GAY TLD, only dotgay has made public commitments to community accountability.

Of the three .GAY applicants that filed public interest commitments, only one—dotgay—made public commitments specific to the gay community, and those commitments to community accountability are significant. Only dotgay expressed an intention and plan to proactively ensure that only members of the community will be allowed to register, an important consideration to prevent abuse that might be likely to occur if a commercial applicant owns .GAY, as discussed further below in section (f). In addition, only dotgay pledged to share a substantial proportion of profits with the community, and only dotgay committed to including members of the community in the development of policies for .GAY. Neither of the other two applicants filing public commitments expressed any knowledge of the challenges and potential concerns of the gay or LGBTIA community, much less any intention to promote the interests of the gay community. Indeed, the only time the word "gay" even appears in the public commitments of the other two applicants is in the term ".GAY".

e. Community accountability will be essential if .GAY is to enhance the economic, social, and legal well-being of LGBTIA individuals around the world.

More specifically, .GAY has enormous potential to promote equality and prosperity for LGBTIA people if the development of .GAY is guided by dotgay, a community organization that would include the broad involvement of the gay community. Indeed, .GAY is highly unlikely to be a powerful platform for LGBTIA people if there is no community accountability. The value of .GAY would be diminished—or even negative—without community ownership.

As suggested by the analysis of public commitments in section (d), commercial ownership of the .GAY TLD would likely not balance community needs with stockholder goals. The failure to weigh community needs would greatly reduce the value of .GAY to LGBTIA organizations and businesses. Without community interaction and oversight, the pricing decisions, marketing strategies, and development of .GAY would not prioritize community benefit. For example, a purely financial incentive would exist to auction or sell domains like Pride.gay, Center.gay, Hate.gay, Lesbian.gay, Transgender.gay and Lambda.gay, Legal.gay, Health.gay to those willing to pay the most for it without considering the community's best interest. Such sales would likely price out existing and new organizations or businesses in the global LGBTIA community. It is highly unlikely that the winning bidders, lacking community oversight, would use such spaces as community resource hubs, as planned by dotgay. Commercial owners' lack of a vision for meeting the community's needs in developing .GAY would simply perpetuate the current economic and social disadvantages of LGBTIA people.

f. Without community oversight, .GAY could become a source of activity that would harm LGBTIA people.

If ICANN rejects dotgay's community priority application, effectively eliminating community oversight of .GAY, the platform would be highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people. For example, the very active efforts in many countries to commit LGBTIA people to coercive (but professionally discredited) "conversion therapies" could be greatly aided by a site that appears to be gay-supportive but is actually feeding personal information to anti-gay organizations or law enforcement. Such information could be used to publicly disclose someone's sexual orientation or to blackmail them into coercive and harmful treatment.

Such outcomes are not mere speculation. Research has uncovered many examples of police, governmental, and individual efforts to entrap, blackmail, or extort LGBTIA people, where consensual same-sex activity is criminalized, such as in countries as diverse as Zimbabwe, Iran, Kuwait, Kenya, Nigeria, India, and (historically) the United States. For examples, see "Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa," International Gay and Lesbian Human Rights Commission, 2011 (https://www.outrightinternational.org/sites/default/files/484-1.pdf). Today, at least 75 countries criminalize same-sex sexual activity, with a death penalty possible in 13 of those countries. In countries that have criminalized advocacy for homosexuals or for certain gay issues, such as Russia or Nigeria, allies participating in .GAY online forums might also be targeted. Thus an online platform seemingly tied to the gay community—while completely unaccountable to actual vital community interests—would be ripe for abuse by people,

organizations, and agencies that would use it to further the oppression of LGBTIA people. Such outcomes would both reduce the economic value of .GAY to its legitimate users in the community and would result in severe personal and economic harms to the individuals targeted.

If ICANN continues to reject dotgay's community priority application, which would provide community oversight of .GAY, these potential negative outcomes are plausible predictions and would make it harder for LGBTIA businesses and organizations to form and to operate effectively. While specific research has not been done to estimate the social and economic cost of these outcomes to the LGBTIA community, those costs would be real and would add to the existing stigma and discrimination faced by LGBTIA people around the world.

II. QUALIFICATIONS

I offer my opinion as an expert on the economic impact of stigma, discrimination, and exclusion of the LGBTI people and on the larger economy. I base this opinion about .GAY on twenty-five years of research as a professor of economics, currently at the University of Massachusetts Amherst. For nine years I was also director of the School of Public Policy at UMass Amherst. My Ph.D. in economics is from the University of California, Berkeley. I am a cofounder of and Distinguished Scholar at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law, a research center that is recognized worldwide for LGBTI research and expertise.

Published Works and Global Consulting: I have written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports, all of which are listed on my CV below. This body of research includes work on many different countries. I have testified on my research to the U.S. Congress, several state legislatures, and in litigation. I have been a consultant or contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues, and I have attended numerous global conferences on LGBTI human rights and development. I have done speaking tours on these topics in Australia, Vietnam, Philippines, China, South Korea, and Peru, among other countries. I have been asked to speak to the ambassadors of the OECD and the board of directors of the Inter-American Development Bank, as well as numerous business audiences around the world.

Signed: ____

M. V. Lee Badgett

Lee Barges

Date: October 17, 2016

Full Curriculum Vitae of Professor M.V. Lee Badgett

M. V. LEE BADGETT



HOME ADDRESS:Contact Information Redacted

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Department of Economics University of Massachusetts Amherst, MA 01003 Contact Information Redacted

CURRENT POSITION and AFFILIATIONS:

Professor Dept of Economics, Univ. of Massachusetts Amherst School of Public Policy, Univ of Mass Amherst Williams Distinguished Scholar Williams Institute, UCLA School of Law Equal Employment Opportunity Commission Salzburg Global Seminar, LGBT Forum

EDUCATION:	DEGREE	DATE	FIELD		
University of California, Berkeley	Ph.D.	1990	Economics		
Dissertation title: "Racial Differences in Unemployment Rates and Employment					
Opportunities"					
University of Chicago	A.B.	1982	Economics		

PREVIOUS POSITIONS:

Director, School of Public Policy (formerly Center for Public Policy and Admin.) (2007-2016 name change), UMass Amherst

Research Director, Williams Institute, UCLA School of Law (2006-2013)

Assistant & Associate Professor, Dept. of Economics, University of Massachusetts-Amherst (1997-2008)

(Adjunct) Professor, Whittier Law School (Summer 2011)

Visiting Professor, UCLA School of Law (2005-2007; Summer 2008)

Visiting Researcher, Amsterdam School for Social Science Research, University of Amsterdam (2003-2004)

Co-founder & Research Director, Institute for Gay and Lesbian Strategic Studies (1994-2006)

Visiting Assistant Professor, Women's Studies and Lesbian and Gay Studies, Yale University (1995-1996)

Research Analyst, National Commission for Employment Policy, U.S. Department of Labor (Summer 1994)

Assistant Professor, School of Public Affairs, University of Maryland, College Park (1990-1997)

CURRENT RESEARCH TOPICS:

Connections between inclusion of LGBT people and economic development Sexual orientation and gender identity discrimination in labor markets and impact of public policy

Poverty in LGBT community

COURSES TAUGHT:

Economics: Microeconomics (University of Massachusetts)

Microeconomics and Public Policy (University of Massachusetts-Amherst)

Political Economy of Sexuality (University of Massachusetts-Amherst)

Labor Economics--undergraduate and Ph.D. level (University of Massachusetts-Amherst)

Feminist Economics (co-taught as part of Traveling Course at University of Minnesota)

Policy: Policy Analysis (University of Massachusetts-Amherst), Capstone course (University of Massachusetts-Amherst)

Social Inequality and Social Justice: Problems and Solutions (University of Massachusetts-Amherst)

Social Science and Public Policy on LGBT Issues (Whittier Law School Barcelona program; UMass Online)

Public Policy Seminar: Global LGBT Human Rights and Criminal Justice Reform in U.S. (Univ. of Mass.)

BOOKS:

The Public Professor: How to Use Your Research to Change the World, NYU Press, 2016.

When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage, New York University Press, 2009. Distinguished Book Award, American Psychological Assoc., Division 44, 2010; Korean translation published, Minumsa, 2016.

Sexual Orientation Discrimination: An International Perspective, co-edited by M. V. Lee Badgett and Jeff Frank, Routledge, 2007.

Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men, University of Chicago Press, 2001.

INSTITUTION-BUILDING PROJECTS

Led growth and transition into School of Public Policy from Center for Public Policy
 & Administration at UMass Amherst

- Co-founder, Institute for Gay and Lesbian Strategic Studies, merged with Williams Institute in 2006
- Co-builder of the Williams Institute on SOGI Law and Public Policy as founding research director
- Co-PI, *EEO DataNet*, Equal Employment Opportunity Network of academics and EEOC, funded by NSF grant.
- Co-founder and steering committee member, LGBT Poverty Collaborative (U.S.)

JOURNAL ARTICLES:

Alyssa Schneebaum and M. V. Lee Badgett, "Poverty in Lesbian and Gay Couple Households," 2016, under review.

Co-editor with Christopher Carpenter of special issue of *Industrial Relations*, Symposium on Sexual Orientation and the Labor Market. Vol. 54, No. 1, January 2015. Author of "Introduction to the Special Issue," pp. 1-3.

"Same-Sex Legal Marriage and Psychological Well-Being: Findings From the California Health Interview Survey," Richard G. Wight, Allen J. LeBlanc, and M. V. Lee Badgett, *American Journal of Public Health*, February 2013, Vol. 103, No. 2, 339-346.

"Separated and Not Equal: Binational Same-Sex Couples," *Signs*, Vol. 36, No. 4, Summer 2011, 793-798.

"Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands," *Journal of Social Issues*, Vol. 67, No. 2, 2011, pp. 316-334.

"Are We All Decisionists Now? Response to Libby Adler," online forum of *Harvard Civil Rights and Civil Liberties Review*, March 2011.

"The Economic Value of Marriage for Same-sex Couples," *Drake Law Review*, Vol. 58, No. 4, 2010, pp 1081-1116.

"Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008," M.V. Lee Badgett, Brad Sears, Holning Lau, and Deborah Ho. *Chicago-Kent Law Review*, Vol. 84, No. 2, 2009.

"The Double-Edged Sword in Gay Economic Life: Marriage and the Market." Washington and Lee Journal of Civil Rights and Social Justice, Vol. 15, No. 1, Fall 2008, pp. 109-128.

"Registered Domestic Partnerships Among Gay Men and Lesbians: The Role of Economic Factors," M. V. Lee Badgett, Gary J. Gates, and Natalya Maisel, *Review of Economics of the Household*, December 2008.

"The Impact on Maryland's Budget of Allowing Same-Sex Couples to Marry," M. V. Lee Badgett, Amanda K. Baumle, Shawn Kravich, Adam P. Romero, R. Bradley Sears, *University of Maryland Law Journal of Race, Religion, Gender and Class*, Vol. 7, No. 2, 2007, pp. 295-339.

"Supporting Families, Saving Funds: An Economic Analysis of Equality for Same-sex Couples in New Jersey," *Rutgers Journal of Law & Public Policy*, by M. V. Lee Badgett, R. Bradley Sears, and Deborah Ho, Vol. 4, No. 1, 2006.

"Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-sex and Unmarried Different-Sex Couples," Michael Ash and M. V. Lee Badgett, *Contemporary Economic Policy*, October 2006, Vol. 24, no. 4, pp 582-599.

"Predicting Partnership Rights: Applying the European Experience to the United States," *Yale Journal of Law and Feminism*, Vol. 17, No. 1, Spring 2005, 71-88.

"Putting a Price on Equality? The Impact of Allowing Same-Sex Couples to Marry on California's Budget," co-authored with R. Bradley Sears, *Stanford Law & Policy Review*, Vol. 16, No. 1, 2005, pp. 197-232. Winner of 2005 Dukeminier Award for Best Sexual Orientation Law Review Articles, reprinted in The Dukeminier Award Journal, Vol. 5, 2006.

"Now That We Do: Same-Sex couples and Marriage in Massachusetts," with Randy Albelda and Michael Ash, *Massachusetts Benchmarks*, Vol. 7, Issue 2, 2005, 17-24.

"Asking the Right Questions: Making the Case for Sexual Orientation Data," 2004 Proceedings of the American Statistical Association, Statistical Computing Section [CD-ROM], Alexandria, VA: American Statistical Association.

"Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?" *Sexuality Research and Social Policy: Journal of NSRC*, Vol. 1, No. 3, September 2004, pp. 1-10.

"Job Gendering: Occupational Choice and the Marriage Market," M. V. Lee Badgett and Nancy Folbre, *Industrial Relations*, April, 42(2), 2003, 270-298.

"Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage," James Alm, M. V. Lee Badgett, and Leslie A. Whittington, *National Tax Journal*, Vol. LIII, No. 2, June 2000, pp. 201-214.

"Assigning Care," co-authored with Nancy Folbre, *International Labour Review*, Vol. 138, No. 3, 1999, pp. 311-326.

"Introduction: Towards Lesbian, Gay, and Bisexual Perspectives in Economics: Why and How They May Make a Difference," Prue Hyman and M. V. Lee Badgett, introduction to special section of *Feminist Economics*, co-edited by Badgett and Hyman, Vol. 4, No. 2, Summer 1998, pp. 49-54.

"Readings Related to Lesbian and Gay Economics: An Annotated Bibliography," *Feminist Economics*, Vol. 4, No. 2, Summer 1998, pp. 111-116.

"A Queer Marketplace: Books on Lesbian and Gay Consumers, Workers, and Investors," (review essay) *Feminist Studies*, Vol. 23, No. 3, Fall 1997, pp. 607-632.

"Employment and Sexual Orientation: Disclosure and Discrimination in the Workplace," *Journal of Gay and Lesbian Social Services*, Vol. 4, No. 4, 1996, pp. 29-52. Simultaneously published as *Sexual Identity on the Job: Issues and Services*, Alan L. Ellis and Ellen D.B. Riggle, editors, Harrington Park Press, 1996. Also published in *Psychological Perspectives on Lesbian, Gay, and Bisexual Experiences*, 2nd edition, ed. Linda D. Garnets and Douglas C. Kimmel, Columbia University Press, 2003.

"The Wage Effects of Sexual Orientation Discrimination," *Industrial and Labor Relations Review*, Vol. 48, No. 4, July, 1995, pp. 726-739. Reprinted in *Women Transforming Politics: An Alternative Reader*, ed. by Cathy J. Cohen, Kathleen B. Jones, and Joan C. Tronto, New York University Press, 1997.

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"Rising Black Unemployment: Changes in Job Stability or Employability?" *Review of Black Political Economy*, Vol. 22, No. 3, Winter 1994, pp. 55-75.

"The Economics of Sexual Orientation: Establishing a Research Agenda," M. V. Lee Badgett and Rhonda M. Williams, *Feminist Studies*, Vol. 18, No.3, 1992.

BOOK CHAPTERS:

"The Economic Impact of Homophobia," in *Lesbian, Gays and Bisexuals Around the World: History, Culture and Law,* ed. By Paula Gerber, Praeger Press, forthcoming.

Badgett, M.V.L., Durso, L., Schneebaum, A., 2015. Lesbians: Social and Economic Situation. In: James D. Wright (editor-in-chief), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd edition, Vol 13. Oxford: Elsevier. pp. 893–898.

"Patterns of Relationship Recognition by Same-Sex Couples in the United States," by M. V. Lee Badgett and Jody Herman, in *International Handbook on the Demography of Sexuality*, ed. by Amanda Baumle, Springer, 2013.

"Marriage by the Numbers," in *Here Come the Brides: Reflections on Lesbian Love and Marriage*, ed. by Audrey Bilger & Michele Kort, Seal Press, Berkeley, 2012, pp. 170-176.

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"The Global Gay Gap: Institutions, Markets, and Social Change," with Jefferson Frank, *Sexual Orientation Discrimination: An International Perspective,* edited by Badgett and Frank, Routledge, 2007.

"Discrimination Based on Sexual Orientation: A Review of the Economics Literature and Beyond," in *The Handbook of the Economics of Discrimination*, ed. By William M. Rodgers III, Edward Elgar, 2006. Also appearing in *Sexual Orientation Discrimination: An International Perspective*, edited by Badgett and Frank.

"Is Affirmative Action Working for Women?" (co-authored with Jeannette Lim) in Mary C. King (ed.) *Squaring Up: Policy Strategies to Raise Women's Incomes in the United States*. Ann Arbor, MI: University of Michigan Press, 2001.

"Lesbian and Gay Think Tanks: Thinking for Success," *Identity/Space/Power: Lesbian, Gay, Bisexual, and Transgender Politics*, edited by Mark Blasius, Princeton University Press, 2000.

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"Choices and Chances: Is Coming Out at Work a Rational Choice?" in *Queer Studies: A Multicultural Anthology*, ed. by Mickey Eliason and Brett Beemyn, New York University Press, 1996.

"Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men," in *Homo Economics: Capitalism, Community, and Lesbian and Gay Life*, ed. by Amy Gluckman and Betsy Reed, Routledge Press, 1997.

"Occupational Strategies of Lesbians and Gay Men," M. V. Lee Badgett and Mary C. King, in *Homo Economics: Capitalism, Community, and Lesbian and Gay Life*, ed. by Amy Gluckman and Betsy Reed, Routledge Press, 1997.

"Thinking Homo/Economically," in Walter L. Williams and James Sears, eds., *Combating Homophobia and Heterosexism,* forthcoming, Columbia University Press. (Reprinted in *A Queer World: The CLAGS Reader*, ed. by Martin Duberman, New York University Press, 1997.)

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POLICY STUDIES:

"Development and Human Rights: Two complementary frameworks," Andrew Park and M. V. Lee Badgett, In *State-Sponsored Homophobia*, ILGA, forthcoming.

"Expert Group Meeting on Measuring LGBTI Inclusion: Increasing Access to Data and Good Practice and Building the Evidence Base Background Paper," September 2015, United Nations Development Programme and UN Office of the High Commissioner for Human Rights.

M.V. Lee Badgett. 2014. *The economic cost of stigma and the exclusion of LGBT people : a case study of India*. Washington, DC : World Bank Group. http://documents.worldbank.org/curated/en/2014/10/23952131/economic-cost-stigma-

exclusion-lgbt-people-case-study-india

"The Impact of Wage Equality on Sexual Orientation Poverty Gaps," M. V. Lee Badgett and Alyssa Schneebaum, Williams Institute, June 2015.

"New Data from Marriage Licenses for Same-Sex Couples", M. V. Lee Badgett and Christy Mallory, Dec. 2014, Williams Institute.

"The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies," M. V. Lee Badgett, Sheila Nezhad, Kees Waaldijk, and Yana Rodgers, USAID and Williams Institute, 2014.

Justin M. O'Neill, Christy Mallory, M. V. Lee Badgett. "Estimating the Economic Boost of Extending Marriage to Same-Sex Couples in Wyoming," "Estimating the Economic Boost of Marriage for Same-Sex Couples in Missouri," "Estimating the Economic Boost of Marriage for Same-Sex Couples in Tennessee," "Estimating the Economic Boost of Marriage for Same-

Sex Couples in Kentucky," "Estimating the Economic Boost of Marriage for Same-Sex Couples in Ohio," "Estimating the Economic Boost of Marriage for Same-Sex Couples in Michigan," Williams Institute, 2014.

E.G. Fitzgerald, Christy Mallory, M. V. Lee Badgett. "Estimating the Economic Boost of Marriage for Same-Sex Couples in Georgia," "Estimating the Economic Boost of Marriage for Same-Sex Couples in Oklahoma," "Estimating the Economic Boost of Marriage for Same-Sex Couples in Florida," "Estimating the Economic Boost of Marriage for Same-Sex Couples in Arizona," Estimating the Economic Boost of Marriage for Same-Sex Couples in Indiana," "Estimating the Economic Boost of Marriage for Same-Sex Couples in Indiana," "Estimating the Economic Boost of Extending Marriage to Same-Sex Couples in Utah," Williams Institute, 2014.

M. V. Lee Badgett and Christy Mallory, "Estimating the Economic Boost of Marriage for Same-Sex Couples in Nevada," Williams Institute 2014.

E.G. Fitzgerald and M. V. Lee Badgett. "Estimating the Economic Boost of Marriage for Same-Sex Couples in Pennsylvania," Williams Institute 2014.

M.V. Lee Badgett, Sheila Nezhad, Christy Mallory, "Estimating the Economic Boost of Extending Marriage to Same-Sex Couples in Virginia, Williams Institute, April 2014.

Erin G. Fitzgerald, Christy Mallory, M.V. Lee Badgett, "Estimating the Economic Boost of Marriage for Same-Sex Couples in Oregon," Williams Institute, April 2014.

M. V. Lee Badgett, Christy Mallory, "Estimating the Economic Boost of Marriage for Same-Sex Couples in Colorado," Williams Institute, April 2014.

M. V. Lee Badgett and Alyssa Schneebaum, "The Impact of a Higher Minimum Wage on Poverty Among Same-Sex Couples," Williams Institute, April 2014.

M. V. Lee Badgett and Jody L. Herman, "Sexual Orientation and Gender Identity Diversity in Entertainment: Experiences and Perspectives of SAG-AFTRA Members," Williams Institute and SAG-AFTRA, September 2013.

M. V. Lee Badgett, Laura Durso, and Alyssa Schneebaum, "New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community," Williams Institute, May 2013.

M. V. Lee Badgett, Laura Durso, Angel Kastanis, and Christy Mallory, "The Business Impact of LGBT-Supportive Policies," Williams Institute, May 2013.

Angel Kastanis and M. V. Lee Badgett, "Estimating the Economic Boost of Marriage Equality in Delaware," Williams Institute, May 2013.

Angel Kastanis and M. V. Lee Badgett, "Estimating the Economic Boost of Marriage Equality in Rhode Island," Williams Institute, May 2013.

Angel Kastanis and M. V. Lee Badgett, "Estimating the Economic Boost of Marriage Equality in Minnesota," Williams Institute, May 2013.

Angel Kastanis and M. V. Lee Badgett, "Estimating the Economic Boost of Marriage Equality in Illinois," Williams Institute, March 2013.

"Administrative Impact of Adding Sexual Orientation and Gender Identity to Texas's Employment Non-Discrimination Law," Christy Mallory and Lee Badgett, December 2012.

"The Economy Impact of Extending Marriage to Same-sex Couples in Australia," M. V. Lee Badgett and Jennifer Smith, Williams Institute, February 2012.

"Impact of Extending Sexual Orientation and Gender Identity Nondiscrimination Requirements to Federal Contractors," Williams Institute, February 2012.

"The Economic Impact of Extending Marriage to Same-Sex Couples in Washington," Angeliki Kastanis, M. V. Lee Badgett, and Jody L. Herman, January 2012.

"Estimating the Economic Boost of Marriage Equality in Iowa: Sales Tax," Angeliki Kastanis, M. V. Lee Badgett, and Jody L. Herman, December 2011.

"Patterns of Relationship Recognition by Same-Sex Couples in the United States," M. V. Lee Badgett and Jody L. Herman, Williams Institute, November 2011.

"Spending on Weddings of Same-Sex Couples in the United States," By Craig J. Konnoth, M.V. Lee Badgett, Brad Sears, Williams Institute, July 2011.

"The Impact of Creating Civil Unions for Same-Sex Couples on Delaware's Budget," By Jody L. Herman, Craig J. Konnoth, M.V. Lee Badgett, Williams Institute, March 2011.

"The Fiscal Impact of Creating Civil Unions on Colorado's Budget," By Jody L. Herman, Craig J. Konnoth, M.V. Lee Badgett, Williams Institute, February 2011.

"The Impact on Rhode Island's Budget of Allowing Same-Sex Couples to Marry," By Jody L. Herman, Craig J. Konnoth, M.V. Lee Badgett, February 2011, Williams Institute.

"Employment Discrimination against Lesbian, Gay, Bisexual, and Transgender People in Oklahoma," By Christy Mallory, Jody L. Herman, M.V. Lee Badgett, Williams Institute, January 2011.

"Employment Discrimination against LGBT Utahns," By Clifford Rosky, Christy Mallory, Jenni Smith, M.V. Lee Badgett, Williams Institute, January 2011.

"Utah Census Snapshot: New Study on Same-Sex Couples in Utah," By Jody L. Herman, Christy Mallory, M.V. Lee Badgett, Gary J. Gates, Williams Institute, November 2010.

"The Potential Impact of HB444 on the State of Hawai'i," by Naomi Goldberg, R. Bradley Sears, and M.V. Lee Badgett, Williams Institute, June 2010.

"The Impact of Expanding FMLA Rights to Care for Children of Same-Sex Partners," M. V. Lee Badgett, Williams Institute, June 2010.

"The Impact of Employment Nondiscrimination Legislation in South Dakota," Naomi Goldberg, M. V. Lee Badgett, and Chris Ramos, Williams Institute, January 2010.

"The Impact of Extending Marriage to Same-Sex Couples on the New Jersey Budget," by Brad Sears, Christopher Ramos, and M.V. Lee Badgett, Williams Institute, December 2009.

"Best Practices for Asking Questions about Sexual Orientation on Surveys," editor and coauthor, Williams Institute, November 2009.

"The Business Boost from Marriage Equality: Evidence from the Health and Marriage Equality in Massachusetts Survey," by Naomi Goldberg, Michael Steinberger, and M.V. Lee Badgett, Williams Institute, May 2009.

"The Effects of Marriage Equality in Massachusetts: A survey of the experiences and impact of marriage on same-sex couples," by Christopher Ramos, Naomi G. Goldberg, and M.V. Lee Badgett, Williams Institute, May 2009.

"The Impact on Maine's Budget of Allowing Same-Sex Couples to Marry," by Christopher Ramos, M. V. Lee Badgett, Michael D. Steinberger, and Brad Sears, Williams Institute, April 2009.

"The Economic Impact of Extending Marriage to Same-Sex Couples in the District of Columbia, "by Christopher Ramos, M. V. Lee Badgett, and Brad Sears, Williams Institute, April 2009.

"Fact Sheet: Tax Implications for Same-Sex Couples," by Naomi Goldberg and M. V. Lee Badgett, Williams Institute, April 2009.

"The Economic Impact of Extending Marriage to Same-sex Couples in Vermont," By M. V. Lee Badgett, Christopher Ramos, and Brad Sears, Williams Institute, March 2009.

"Poverty in the Lesbian, Gay, and Bisexual Community," by Randy Albelda, M.V. Lee Badgett, Gary Gates, and Alyssa Schneebaum, Williams Institute, March 2009.

"Florida Adoption Ban/ Cost Estimate," by Naomi Goldberg and M. V. Lee Badgett, Williams Institute, February 2009.

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"The Economic Impact of Extending Marriage to Same-sex Couples in Maine," By M. V. Lee Badgett, Christopher Ramos, and Brad Sears, Williams Institute, February 2009.

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"The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners," Naomi G. Goldberg, Christopher Ramos, and M.V. Lee Badgett, September 2008.

"Marriage, Registration and Dissolution by Same-sex Couples in the U.S.," Gary J. Gates, M.V. Lee Badgett, and Deborah Ho, Williams Institute, July 2008.

"The Impact of Extending Marriage to Non-Resident Same-Sex Couples on the Massachusetts Budget," By M. V. Lee Badgett and R. Bradley Sears, Williams Institute memo to Massachusetts Secretary of Housing and Economic Development, June 2008.

"The Impact of Extending Marriage to Same-Sex Couples on the California Budget," Brad Sears and M.V. Lee Badgett, Williams Institute, June 2008.

"The Impact on Iowa's Budget of Allowing Same-Sex Couples to Marry," M.V. Lee Badgett, Amanda K. Baumle, Adam P. Romero and Brad Sears, Williams Institute, April 2008.

"The Impact on Oregon's Budget of Introducing Same-Sex Domestic Partnerships," By M.V. Lee Badgett, R. Bradley Sears, Elizabeth Kukura, and Holning Lau, Williams Institute, February 2008.

"Implications of HB 9 for Businesses in New Mexico," M.V. Lee Badgett, Williams Institute, January 2008.

"Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits," M.V. Lee Badgett, Center for American Progress and Williams Institute, December 2007.

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"Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination," by Lee Badgett, Holning Lau, Brad Sears, and Deborah Ho, Williams Institute, UCLA, June 2007.

Census Snapshot series: 50 state reports; Williams Institute, UCLA, with various co-authors, 2007.

"Methodological Details for Census Snapshot," August 2007, Danielle MacCartney, M. V. Lee Badgett, and Gary Gates.

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"The Financial Impact of Domestic Partner Benefits in New Hampshire," Williams Institute, December 2006.

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"Frequently Asked Questions about Providing Domestic Partner Benefits," M. V. Lee Badgett and Michael A. Ash, Williams Institute, October 2006.

"The Impact of the Colorado Domestic Partnership Act on Colorado's State Budget," M.V. Lee Badgett, R. Bradley Sears, Roger Lee, and Danielle MacCartney, Williams Institute. October 2006

"The Effect of Marriage Equality and Domestic Partnership on Business and the Economy," M.V. Lee Badgett and Gary J. Gates, Williams Institute, October 2006.

"The Impact on Washington's Budget of Allowing Same-Sex Couples to Marry," M.V. Lee Badgett, R. Bradley Sears, Elizabeth Kukura, and Holning Lau, IGLSS and Williams Institute, 2006.

"The Impact on New Mexico's Budget of Allowing Same-Sex Couples to Marry," M.V. Lee Badgett, R. Bradley Sears, Steven K. Homer, Patrice Curtis, and Elizabeth Kukura, IGLSS and Williams Institute, 2006.

"Positive Effects on State of Alaska from Domestic Partnership Benefits," Williams Institute, 2006.

"The Cost to Ocean County of Providing Pension Benefits to Employees' Domestic Partners," Williams Institute, 2006.

"The Impact on New Hampshire's Budget of Allowing Same-Sex Couples to Marry," R. Bradley Sears, M. V. Lee Badgett, and Elizabeth Kukura, IGLSS and Williams Institute, 2005.

"Counting on Couples: Fiscal Savings from Allowing Same-Sex Couples in Connecticut to Marry," M.V. Lee Badgett, R. Bradley Sears, Patrice Curtis, and Elizabeth Kukura, IGLSS and Williams Project on Sexual Orientation and the Law, 2005.

"Will Providing Marriage Rights to Same-sex Couples Undermine Heterosexual Marriage? Evidence from Scandinavia and the Netherlands," Discussion paper, Council on Contemporary Families and the Institute for Gay and Lesbian Strategic Studies, July 2004.

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"Same-sex Couples and Their Children in Massachusetts: A View from Census 2000," coauthored with Michael Ash, Nancy Folbre, Lisa Saunders, and Randy Albelda, *Angles*, Institute for Gay and Lesbian Strategic Studies, Amherst, MA, February 2004.

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"The Bottom Line on Family Equality: The Impact of AB205 on California Businesses," M. V. Lee Badgett and R. Bradley Sears, Institute for Gay and Lesbian Strategic Studies and Williams Project, August 2003.

"Supporting Families, Saving Funds: A Fiscal Analysis of New Jersey's Domestic Partnership Act," M.V. Lee Badgett and R. Bradley Sears, Institute for Gay and Lesbian Strategic Studies and Williams Project of UCLA Law School, December 2003.

"Equal Rights, Fiscal Responsibilities: The Impact of AB205 on California's Budget," M.V. Lee Badgett and R. Bradley Sears, Institute for Gay and Lesbian Strategic Studies and Williams Project of UCLA Law School, May 2003.

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"Calculating Costs with Credibility: Health Care Benefits for Domestic Partners," *Angles*, Vol. 5, Issue 1, 2000.

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"The Fiscal Impact on the State of Vermont of Allowing Same-Sex Couples to Marry," IGLSS Technical Report 98-1, October 1998.

Creating Communities: Giving and Volunteering by Gay, Lesbian, Bisexual, and Transgender People, Working Group on Funding Lesbian and Gay Issues, Institute for Gay and Lesbian Strategic Studies, February 1998. (Co-authored with Nancy Cunningham)

"Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination," *Angles: The Policy Journal of the Institute for Gay and Lesbian Strategic Studies*, Vol. 2, No. 1, September 1997.

"For Richer, For Poorer: The Cost of Nonrecognition of Same Gender Marriages," M. V. Lee Badgett and Josh A. Goldfoot, *Angles: The Policy Journal of the Institute for Gay and Lesbian Strategic Studies*, Vol. 1, No. 2, May 1996.

"Pervasive Patterns of Discrimination Against Lesbians and Gay Men: Evidence from Surveys Across the United States," Lee Badgett, Colleen Donnelly, and Jennifer Kibbe, National Gay and Lesbian Task Force Policy Institute, 1992.

"The Impact of the Construction of Luz SEGS VIII on California and the Project Area," William T. Dickens, Lee Badgett, and Carlos Davidson, February 1989.

OP-EDS AND OTHER PUBLICATIONS:

Laura E. Durso and M. V. Lee Badgett, "Policymakers should take seriously the need to make all LGBT stories visible through data," *The Hill*, Congress Blog, Sept. 20, 2016, http://thehill.com/blogs/congress-blog/civil-rights/296727-policymakers-should-take-seriously-the-need-to-make-all-lgbt#disqus thread.

"Becoming a Public Professor," Contexts Magazine, Winter 2016.

"Using Your Research For Change," *Inside Higher Ed*, https://www.insidehighered.com/advice/2016/01/13/how-communicate-research-results-beyond-academe-essay, January 13, 2016.

"Handling the Hot Water," *Inside Higher Ed,* https://www.insidehighered.com/advice/2016/01/27/tips-managing-controversies-result-research-essay, Jan. 27, 2016.

Foreword, "The Developmental Cost of Homophobia: The Case of Jamaica," January 2016.

Foreword, in "Open for Business: The Economic and Business Case for Global LGB&T Inclusion," Sept. 2015.

"Same-sex Marriage Will Fuel Economy," *Atlanta Journal-Constitution*, http://atlantaforward.blog.ajc.com/2015/07/21/marriage-equality/, July 22, 2015.

"The Next Irish Revolution: Same-sex Marriage," *Time,* May 20, 2015, http://time.com/3882869/ireland-same-sex-marriage/, *Pacific Standard*, http://www.psmag.com/politics-and-law/the-next-irish-revolution, Originally published

by *Weekly Wonk*, New America Foundation, May 14, 2015 https://www.newamerica.org/the-weekly-wonk/the-next-irish-revolution/

"The New Case for LGBT Rights: Economics," *Time*, http://time.com/3606543/new-case-for-lgbt-rights/, published as "The Economic Case for Supporting LGBT Rights," *The Atlantic* http://www.theatlantic.com/business/archive/2014/11/the-economic-case-for-supporting-lgbt-rights/383131/. Originally published by *Weekly Wonk*, New America Foundation, http://weeklywonk.newamerica.net/#article-5, Nov. 20, 2014.

"If Gay Rights Stop Moving Forward They Could Get Pushed Back," *Time*. Sept. 5, 2014. http://time.com/3274211/if-gay-rights-stop-moving-forward-they-could-get-pushed-back/. Originally published as "The Precarious LGBT Tipping Point," Sept. 4, 2014, in *Weekly Wonk*, New America Foundation, http://weeklywonk.newamerica.net/articles/precarious-lgbt-tipping-point/

"The Economic Benefits of Gay Marriage," March 29, 2013, PBS News Hour Blog, The Business Desk, http://www.pbs.org/newshour/businessdesk/2013/03/the-economic-benefits-of-gay-m.html

"The Books that Inspired Lee Badgett," blog post, LSE Review of Books, November 2012. http://blogs.lse.ac.uk/lsereviewofbooks/2012/11/25/the-books-that-inspired-lee-badgett/

Review of *Counted Out: Same-Sex Relations and Americans' Definitions of Family*, in Gender & Society, August 2012, Vol. 26, No. 4, 674-676.

"Gay Marriage Good for Family and Economy," *The Drum Opinion*, ABC Online (Australian Broadcasting Corp.), March 6, 2012.

"What Obama Should Do About Workplace Discrimination," *New York Times*, February 6, 2012. http://www.nytimes.com/2012/02/07/opinion/what-obama-should-do-about-workplace-discrimination.html

"High Costs of Discrimination," *Worcester Telegram, M. V. Lee Badgett and Jody Herman, May 11, 2011.*

Featured guest column, *The Economist* debate on marriage for same-sex couples, January 6, 2011, http://www.economist.com/debate/days/view/638.

"Summer of Love and Commitment," The Huffington Post, September 3, 2008.

"Sexual Orientation, Social and Economic Consequences," in *International Encyclopedia of the Social Sciences, 2nd Edition*, ed. William A. Darity, Jr., Macmillan Reference USA, 2008.

"The Wedding Economy," The New York Times, January 7, 2007.

"The Closet Door's Open: What's Behind Hartford's Surge in Gay Population?" *The Hartford Courant*, Gary J. Gates and M. V. Lee Badgett, November 5, 2006.

"The Future of Same-Sex Marriage," Social Work Today, November 2006.

"The Gay Health Insurance Gap," www.alternet.org, October 26, 2006.

"What's Good for Same-Sex Couples is Good for Colorado," *The Daily Camera*, Boulder, CO, October 28, 2006.

Book review of *Inheritance Law and the Evolving Family*, by Ralph Brashear, *Feminist Economics*, vol. 12, no. 1-2, 2006.

"Equality Doesn't Harm 'Family Values'", with Joop Garssen, *National Post* (Canada), August 11, 2004.

"Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia?" Slate Magazine, May 20, 2004, http://slate.msn.com/id/2100884/.

Brad Sears and Lee Badgett, "Tourism and Same-sex Marriage," *San Diego Union-Tribune*, June 2, 2004.

http://www.signonsandiego.com/uniontrib/20040527/news lz1e27sears.html

"Equality Is Not Expensive," Connecticut Law Tribune, April 19, 2004.

"Domestic Partner Bill Won't Be Burden to Business," *Orange County Register*, April 18, 2004, with Brad Sears.

"Economics" and "Boycotts", entries for *Encyclopedia of Gay, Lesbian, Bisexual, and Transgender History*, ed. by Marc Stein, Scribners, forthcoming December 2013.

"Recognizing California Couples: Domestic-Partner Law Attacked by Anti-Gay Senator Could Boost Flow of Cash to State," M. V. Lee Badgett and R. Bradley Sears, *Daily Journal*, October 14, 2003.

"A Win at Cracker Barrel," The Nation, February 10, 2003.

"Why I was a Dem for a Day," Daily Hampshire Gazette, June 2002.

Commentary on Boy Scouts of America, WFCR, Amherst, MA, August 13, 2001.

"Sexual Orientation," Richard Cornwall and M. V. Lee Badgett, entry for *Encyclopedia of Feminist Economics*, ed. by Meg Lewis and Janice Peterson, Edward Elgar, 2000.

"Lesbians, social and economic situation," entry for *International Encyclopedia of the Social and Behavioral Sciences*, forthcoming.

"One Couple's 'Penalty' remains another's privilege", with James Alm and Leslie A. Whittington, *Boston Globe*, September 3, 2000, p. E2.

"Domestic partner status unfair to gay couples," *Springfield Sunday Republican*, op-ed April 2, 2000, p. B3.

"Do Sexual Orientation Policies Help Lesbians?" in *Women's Progress: Perspectives on the Past, Blueprint for the Future*, Institute for Women's Policy Research, Fifth Policy Research Conference Proceedings, Washington, DC, 1998.

"Census Data Needed," letter to the editor, *The Washington Blade*, November 7, 1997, p. 37.

"Same-sex partners bring nurturing--and financial benefits--to the altar," op-ed piece with Gregory Adams, *Chicago Sun-Times*, June 8, 1996, p. 16.

"The Last of the Modernists: A Reply," Feminist Economics, Vol. 1, No. 2, 1995.

"Domestic Partner Recognition: Doing the Right--and Competitive--Thing," *Synthesis: Law and Policy in Higher Education*, Vol. 6, No. 4, Spring 1995.

"Equal Pay for Equal Families," *Academe*, May/June 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," in *Higher Education Collective Bargaining During a Period of Change*, Proceedings, Twenty-Second Annual Conference, April 1994, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, 1994.

"Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men," pamphlet published by National Organization of Gay and Lesbian Scientists and Technical Professionals and the Institute for Gay and Lesbian Strategic Studies, 1994. (Early version of book chapter of same title.)

Co-author and co-editor, *Labor and the Economy*, published by the Center for Labor Research and Education, Institute of Industrial Relations, UC Berkeley, 1989.

"Looking for the Union Label: Graduate Students at U.C.," *California Public Employee Relations*, No. 85, June 1990.

"Rusted Dreams: Documenting an Economic Tragedy," *Labor Center Reporter*, No. 219, October 1987.

"How the Fed Works," Labor Center Reporter, No. 177, November 1986.

EXPERT WITNESS EXPERIENCE (LITIGATION 2009-2014):

Written testimony, *Birchfield and Mocko v. Armstrong and Jones*, March 2016 (challenge to Florida's policies on death certificates for same-sex spouses)

Written testimony, *Whitewood et al. v. Wolf et al.*, February 2014 (challenge to Pennsylvania's marriage equality prohibition)

Written testimony, *Harris v. McDonnell*, No. 5:13-cv-00077 (W.D. Va.), December 2013 (challenge to Virginia's marriage equality prohibition)

Written testimony, *DeLeon v. Perry*, No. 5:13-cv-00982 (S.D. Tex.), November 2013 (challenge to marriage equality prohibition in Texas)

Written testimony, *Kitchen v. Herbert*, No. 2:13-cv-00217 (D. Utah), October 2013 (challenge to Utah's marriage equality prohibition)

Written testimony, *Darby/Lazaro v. Orr*, No. 12 CH 19718 (Ill. Cir. Ct., Cook Cnty.), April 2013 (challenge to Illinois' marriage equality prohibition)

Written testimony, *Sevcik v. Sandoval*, No. 2:12-cv-00578 (D. Nev.), 2012 (challenge to Nevada's marriage equality prohibition)

Written testimony and deposition, *Bassett v. Snyder*, No. 2:12-cv-100382012 (E.D. Mich.), 2012 and 2013 (challenge to Michigan's Domestic Partner Benefit Restriction Act).

Written testimony, *Glossip v. Missouri Dep't of Transp. and Highway Patrol Employees' Ret. Sys.*, No. 10-CC00434 (Mo. Cir. Ct., Cole Cnty.), 2011 (challenge to denial of death benefit to state trooper's surviving same-sex partner).

Written testimony, *Collins v. Brewer* (later *Diaz v. Brewer*), No. 2:09-cv-02402 (D. Ariz.), 2010 (challenge to Arizona's cancellation of domestic partner benefits).

Deposition and trial testimony, *Perry v. Schwarzenegger* (later *Perry v. Brown, Hollingsworth v. Perry*), No. 3:09-cv-02292 (N.D. Cal.), 2010 (challenge to California's Proposition 8).

LEGISLATIVE WITNESS EXPERIENCE (Selected):

U.S. Senate Committee on Health, Education, Labor, and Pensions, S.811, The Employment Non-Discrimination Act of 2011, June 12, 2012.

Written testimony, S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families, M. V. Lee Badgett, Ilan H. Meyer, Gary J. Gates, Nan D. Hunter, Jennifer C. Pizer, Brad Sears. July 2011.

U.S. House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Postal Service, and the District of Columbia on HR 2517: Domestic Partnership Benefits and Obligation Act of 2009, July 2009.

U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions, Testimony on Employment Non-Discrimination Act (HR 2015), September 2007.

Written and oral testimony on legislation or regulations in Alaska, California, Hawaii, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Vermont.

SELECTED MEDIA APPEARANCES AND PROFILES:

Featured solo panelist, *The Economist* "Pride and Prejudice: The Business and Economic Featured economist, "Gay Myths Derailed by Economist Badgett's Data Research," by Jeanna Smialek, *Bloomberg*, June 20, 2014,

http://www.bloomberg.com/news/articles/2014-06-20/gay-myths-derailed-by-economist-badgett-s-data-research

Featured guest, Tell Me More, NPR, June 10, 2013.

Featured guest, *Encounter*, Radio National, ABC (Australian Broadcasting Corp), October 9, 2011.

Featured guest, Faith Middleton Show, January 13, 2011.

http://www.yourpublicmedia.org/content/wnpr/faith-middleton-show-when-gay-peopleget-married

Featured guest, "Same-Sex Marriage, Five Years On," *On Point*, National Public Radio, May 27, 2009. http://www.onpointradio.org/2009/05/same-sex-marriage-five-years-on

Featured guest, "Gay Commerce," Talk of the Nation, National Public Radio, 1997.

Featured guest, "Gay Market," *Odyssey: A Daily Talk Show of Ideas*, NPR nationally syndicated show, 2005.

http://www.chicagopublicradio.org/DWP XML/od/2005 05/od 20050512 1200 4906/episode 4906.ram

Interviewed on *All Things Considered*, "Gay Marriage in Massachusetts, One Year Later," May 2005. http://www.npr.org/templates/story/story.php?storyId=4655621

Featured guest, CNN American Morning: "The Future of Marriage," June 2006. http://www.law.ucla.edu/williamsinstitute/images/CNN AmericanMorning FutureOfMarriage LeeBadgett 062006.mov

SELECTED PRESENTATIONS OF PAPERS SUBMITTED TO ACADEMIC CONFERENCES:

"Assessing the best policy approach for reducing LGBT poverty," M. V. Lee Badgett and Alyssa Schneebaum, APPAM research conference, Nov. 2015, Miami.

Invited panelist, Roundtable on Marriage Equality, American Political Science Association, Sept. 4, 2015, San Francisco.

Invited panelist, Roundtable on Employment Discrimination Against LGBT People, American Sociological Association meeting, August 25, 2015, Chicago.

"The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies," Amherst College conference, LGBT Rights in the Americas and Beyond (May 2015), International Associate for Feminist Economics (Berlin, July 2015); Williams Institute Webinar, Feb. 25, 2015; Allied Social Science Associations (economist orgs) meeting, SF, January 2016

Roundtable participant at Institute for Development Studies (UK) panel, "Sexuality, law, and economic development: what are the key conversations and alliances?" Mar. 6, 2015.

"Assessing the effect of nondiscrimination policies related to sexual orientation and gender identity," Badgett and Samantha Schenck. Presented at: Sexual Orientation Discrimination in the Labor Market, University of Paris 1 Pantheon-Sorbonne, 6/20/2012; International Association for Feminist Economics, Barcelona Spain. 6/27/2012; APPAM conference, November 2012.

"Waves of Change: Is Latin America Really Following Europe in Same-Sex Couples?," at 8th Annual Update, Williams Institute, "Global Arc of Justice: Sexual Orientation Law Around the World, March 14, 2009.

"Gay poverty," Presented at 2009 Allied Social Science Association Meeting; 2009 Association for Public Policy Analysis and Management Research Conference; 2008 IAFFE Research Conference, Torino, Italy, June 2008; Williams Institute Annual Update, February 2008.

"Registered Domestic Partnerships Among Gay Men and Lesbians: The Role of Economic Factors," (with Gary J. Gates and Natalya Maisel), presented at 2007 APPAM Meeting, Washington, DC; 2008 Allied Social Science Associations Annual meeting, New Orleans.

"Predicting Same-Sex Marriage in Europe & the US," Presented at 2008 IAFFE Research Conference, Torino, Italy, June 2008.

"Social Lab Outcomes: Same-Sex Couples and Legal Recognition," Temple University Law School, "States as Social Laboratories," October 20, 2007.

"The Double-Edged Sword in Gay Economic Life: Marriage and the Market." Washington & Lee School of Law, Feb 2008.

"Why Marry?" Presented at 2006 IAFFE Research Conference, Sydney, Australia, July 2006; New School for Social Research, October 2006; Sociology Family Working Group, UCLA, 2006.

"An exploration of foster care and adoption among lesbians and gay men," joint work with Jennifer Macomber, Kate Chambers, Gary Gates. Family Pride conference, Philadelphia, PA, May 2006.

"Survey Data on Sexual Orientation: Building a Professional Consensus," presented at 2005 Joint Statistical Association Meetings, August 2005. Also presented to Canadian Population Society, June 2005; Williams Project Annual Update, UCLA Law School, February 2005.

"Alternative Legal Statuses for Same-sex couples and other families: Can Separate Be Equal Enough?" Presented at International Association for Feminist Economics, Washington DC, July 2005; APPAM, Washington, DC, November 2005; UCLA Law School 2006.

"Looking into the European Crystal Ball: What Can the U.S. Learn About Same-Sex Marriage?" Tulsa Gay and Lesbian History Project, October 2004; University of Connecticut, October 2004; Yale University, February 2005; American Psychological Association, August 2005; National Council of Family Relations (invited special session), 2005.

"Predicting Partnership Rights: Applying the European Experience to the United States," Yale University Law School, March 5, 2005.

"Asking the Right Questions: Making the Case for Sexual Orientation Data," Joint Statistical Meetings of the American Statistical Association, Toronto, August 2004; Williams Project Annual Update, UCLA, February 2005; Canadian Population Society, June 3, 2005.

"A New Gender Gap: Sex Differences in Registered Partnerships in Europe," International Association for Feminist Economics research conference, London, August 2004.

"Variations on an Equitable Theme: International Same-sex Partner Recognition Laws," Research Conference of International Associate for Feminist Economics, July 2002. Stockholm University, September 2003; University of Linz, Austria, November 2003; University of Amsterdam, June 2004; American Political Science Association, Chicago, September 2004.

"The Myth of Gay Affluence and Other Tale Tales: The Political Economy of Sexual Orientation," University of California, San Diego, June 2002.

"A Family Resemblance: Legal Recognition of Same-Sex Partners in the United States," Research Conference of International Association for Feminist Economics, Oslo, Norway, June 2001; University of Southern Maine, October 2001; University of Massachusetts, February 2002; Washington University Political Science Department, March 2002; University of Wisconsin, LaCrosse, April 2002.

"A Movement and a Market: GLBT Economic Strategies for Social Change," University of Wisconsin, LaCrosse, April 2002; Macalester College, April 2002.

"Job Gendering: Occupational Choice and the Marriage Market," Research Conference of International Association for Feminist Economics, Ottawa, CA, June 1999.

"Tolerance, Taboos, and Gender Identity: The Occupational Distribution of Lesbians and Gay Men," Research Conference of International Association for Feminist Economics, Amsterdam, The Netherlands, June 1998.

"The Impact of Affirmative Action on Public-Sector Employment in California," ASSA Meetings, 1997.

"Tolerance or Taboos: Occupational Differences by Sexual Orientation," presented at American Economic Association Meetings, January 1996, and American Psychological Association convention in Toronto, August 1996.

"A Race, Ethnicity, and Gender Analysis of the 1990-91 Recession," ASSA Meetings 1995.

"Choices and Chances: Is Coming Out at Work a Rational Choice?" The Sixth North American Lesbian, Gay, and Bisexual Studies Conference, University of Iowa, November 18, 1994.

"Civil Rights and Civilized Research: Constructing a Sexual Orientation Policy Based on the Evidence," Association for Public Policy Analysis and Management Research Conference, October 27, 1994

"Where the Jobs Went in the 1990-91 Downturn," National Conference on Race Relations and Civil Rights in the Post Reagan-Bush Era, The Roy Wilkins Center, Humphrey Institute, University of Minnesota, October 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," The American Political Science Association meeting, September 1994.

Panelist, "Developing Lesbian/Gay Studies in Economics," ASSA Meetings, 1994.

"The Rainbow at Work: Differences in the Economic Status of Women Workers in the United States," presented at the 5th International Interdisciplinary Congress on Women, 1993.

"The Economic Well-Being of Lesbians and Gay Men: Pride and Prejudice," December 1992, presented at 1993 ASSA Meetings.

"Affirmative Action in a Changing Legal and Economic Environment," revised, December 1992, presented at 1993 ASSA Meetings.

"The Effects of Structural Change on the Race and Gender Distribution of Employment," with Rhonda M. Williams, presented at Eastern Economic Association Meeting, 1992.

"Changes in Racial Inequality Among Women: Evidence from Unemployment Rates," presented at AEA Meetings, 1992.

"Labor Market Discrimination--Economic and Legal Issues for Gay Men and Lesbians," presented at AEA Meetings, 1992.

"Rising Black Unemployment: Changes in Job Stability or in Employability?" presented at National Economic Assoc., 1992.

"Rising Black Unemployment and the Role of Affirmative Action Policy," presented at APPAM Research Conference, October 1990.

INVITED KEYNOTES AND OTHER PRESENTATIONS (Selected):

"The Public Professor," book talks at University of Massachusetts Amherst, Duke University, University of North Carolina-Chapel Hill, Odyssey Bookstore, UCLA, Hunter College, Vanderbilt University, Georgia State University, University of Washington, January-May 2016; "Author meets critics" session at Southern Sociological Society, April 2016.

"The Marriage Equality Experience—An International Perspective," East China Normal University, Shanghai; Renmin University Beijing; Ewha University, Seoul; Korea University School of Law; March 2016.

"The Business Case for LGBT Equality and Inclusion," Sookmyung Women's University (SMU) Entrepreneurship Center, Seoul, Korea, March 11, 2016.

"Left Out—Lesbian, Gay, and Bisexual Poverty in the U.S." Franklin and Marshall College, Oct 21, 2015; Colorado State Univ, Nov 2015; Univ of Minnesota, Feb 2016.

"The Economic Cost of Stigma and Exclusion of LGBT People," Board of Directors of Inter-American Development Bank, Oct. 2, 2015 and March 6, 2015; Boston Consulting Group, Oct. 7, 2015; Salzburg Global LGBT Forum, June 14-18, 2015; Clinton Global Initiative learning call, April 8, 2015, World Bank Fall Meeting, Nov. 9, 2014; UN Development Programme Experts Meeting, Sept. 16-17, 2015.

US State Department Speaker Program: Oct. 12-18, 2014: Series of talks to government ministries, American Chamber of Commerce, universities, community groups, international agencies, Lima, Peru. August 12-21, 2015: Series of talks to Congress, universities, municipal policymakers, community groups, and other government agencies, The Philippines.

"Sexual Orientation and Gender Identity Diversity in Entertainment: Experiences and Perspectives of SAG-AFTRA Members," Gender, Sexual Orientation, and Labor in Entertainment Panel at conference of UCLA Institute for Research on Labor and Employment, April 18, 2015.

Dublin City University, School of Applied Language and Intercultural Studies, and Marriage Equality; Keynote speaker for The Marriage Equality Experience: An International Perspective, my talk: When Gay People Get Married Dublin, Ireland, March 19, 2015.

Presentation at Overseas Development Institute and Kaleidoscope Trust meeting, London (by skype), "The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies", Feb. 12, 2015.

Panelist, USAID Frontiers in Development, Sept. 2014.

Invited keynote speaker, "The Economic Cost of Homophobia," The World Bank, March 12, 2014.

Invited speaker, "The Impact of LGBT Inclusion on Economic Outcomes," OECD, Paris, February 12, 2014.

Invited Keynote Speaker, "Workshop on Comparative Experiences in Protection of LGBT Rights in the Family and Marriage Relations," hosted by Ministry of Justice, Viet Nam, and UNDP, December 20-21, 2012, Hanoi.

"When Gay People Get Married," London School of Economics and Politics, Keynote for LSE Pride Week, November 2012; Bryant University, November 2013; University of Pennsylvania Dept of Sociology, March 2014.

Keynote speaker at Roundtable, "Taking Poverty Out of the Closet," Horizons Foundation, San Francisco, March 19, 2012.

"The Impact of Allowing Same-sex Couples to Marry," Australian National University College of Law. March 1, 2012; Gough Whitlam Institute, Sydney Australia, March 2, 2012.

Australian Parliament, Canberra, "The Impact of Allowing Same-Sex Couples to Marry," February 27, 2012.

Keynote lunch speaker, E-Marriage Symposium, Michigan State University Law School, "My Marriage," November 11, 2011.

"When Gay People Get Married," University of North Carolina Chapel Hill, October 13, 2011.

IAFFE, 2011, Hangzhou China: Roundtable on Sexuality and the Economy, Roundtable on Enhancing IAFFE's Vision in the 21st Century. June, 2011.

Panelist, "Same-Sex Marriage: Past, Present and Future," M. V. Lee Badgett, David Boies, and Nancy Cott, UCLA History Department, February 24, 2011.

Janus Lecture, Debate on same-sex marriage, Brown University, February 17, 2011.

Panelist, "Queering Where We Work: Bridging LGBTQ Policy Advocacy, Front-Line Activism, and Research," University of Toronto, Rotman School of Management, November 5, 2010.

"The Economic Value of Marriage," Drake Constitutional Law Center's Annual Symposium, The Same-Sex Marriage Divide, Drake University, Iowa. April 10, 2010.

Keynote address, "Out and Equal in the Workplace: Sexual Orientation Discrimination, Univ of Pittsburgh School of Law. March 18, 2010.

"When Gay People Get Married": Portland State Univ Portland, OR. 4/23/2010; University of Chicago Alumni Weekend, Chicago, IL; University of Chicago, June 3, 2010; Kennesaw State University, Atlanta, GA, March 24, 2010; Andrew Young School of Public Affairs; Georgia State University, March 25, 2010; and many other bookstores and locations.

"Challenges for LGBT Workers" Department of Labor at invitation of Assistant Secretary for Policy, January 29, 2010.

Keynote Address on Sexual orientation and economics, University of Illinois-Chicago, September 30, 2009.

Multiple talks, University of Minnesota, Duluth, April 2009.

"On the Road to Equality: Health Care for LGBT Americans," Opening address, 2007 National LGBT Health Expo, Washington, DC, November 2, 2007.

"Does diversity make a difference? A view from the marketplace." *Keynote Address*, 7th annual international conference on diversity in organizations, communities, and nations, Amsterdam, The Netherlands, July 1, 2007.

"Not-So-Gay Divorce: A Reason for Marriage," Gay Divorce Conference, King's College London, May 20, 2006.

"Thinking for Change/Changing our Thinking: Effective Research in GLBT Policy Debates", Presidential Invited Address, Division 44, American Psychological Association Convention, August 2005.

"Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men," University of Toronto, March 16-17, 2005.

Panelist, "Aging in the Gay Community," American Association of Retired Persons, June 2000.

"Money and Our Discontents," Keynote speech, Smart Women/Smart Money conference by the Astraea Foundation. November 1999.

"Homo Economics: The Myth of Gay Affluence and Other Tall Tales," University of Connecticut, March 1999; American University, October 1999.

Same-Sex Couples and Public Policy, panel member, University of Maryland, College Park, October 1999.

"A Bridge to the Future or the Road to Nowhere? Respectability and Lesbian and Gay Think Tanks," Remarks prepared for the Politics of Respectability Conference, University of Chicago, April 1999

Panelist, Unifying Anti-Subordination Theories, DePaul University Law School, February 1999.

"Lesbians, Gays, and Bisexuals in a Gender Agenda," Roundtable on Feminism and Public Policy, 1998 ASSA Meetings, Chicago, IL.

"Economic Issues for Lesbians," Workshop on Lesbian Health Research Priorities, Institute of Medicine, Board on Neuroscience and Behavioral Health, Washington, DC, October 6, 1997.

"Lesbians, Gays, Bisexuals, and Transgenders: Who Gives, How Much, and Why," OutGiving Conference, Aspen, CO, September 1997; Horizons Foundation and United Way, San Francisco, CA, October 1997; NGLTF Creating Change conference, San Diego, November 1997; Cream City Foundation Milwaukee, WI; Chicago, IL; Boston Foundation, February 1998.

"Lesbian and Gay Money: Is There a Gender Gap?" Towson State University, March 1997.

Panelist, "Out in the Workplace," University of Pennsylvania, February 10, 1997.

"Workplace Policy Issues for Lesbian, Gay, and Bisexual People," Gender, Race, Economics, and Public Policy Conference of the New School for Social Research, April 5, 1996.

Panelist, "Compensating for Gender, Race, and Class Inequalities: Is Affirmative Action the Means to Social Justice," A Future of Equality: Feminist Rethinkings of the Affirmative Action and Welfare Debates, Yale University Women's Center, March 30, 1996.

"Equal Pay for Equal Work," University of Delaware Lavender Scholars Series, March 7, 1996.

"Lesbian and Gay Think Tanks," Center for Lesbian and Gay Studies, CUNY Graduate School, February 9, 1996.

Panelist, Affirmative Action in the 21st Century, Chicago United, February 15, 1996.

"The Economic Status of Lesbians and Gay Men: Discrimination, Data, and Debate," Bureau of Labor Statistics, U.S. Department of Labor, June 15, 1995; Institution for Social and Policy Studies, Yale University, September 1995; University of Massachusetts, Boston, May 1996.

Panelist, "Gay Money: Power of the Purse," National Lesbian & Gay Journalists Association, October 19, 1995.

Panelist, Domestic Partner Benefits and Other Gay Rights Policy Issues: Creating Change on Campus, American Association of University Professors, June 9, 1995.

Prepared testimony, Select Education and Civil Rights Subcommittee, Committee on Education and Labor, U. S. House of Representatives, Testimony on the 30th Anniversary of the Equal Pay Act, 1994. (Hearing cancelled at the last minute.)

"Economic Evidence of Sexual Orientation Discrimination," Gay, Lesbian, and Bisexual Studies Faculty Seminars, Univ. of Massachusetts, Amherst, Dept. of Economics and Program for Gay, Lesbian, and Bisexual Concerns, May 11, 1994.

"The Economics of Being Lesbian, Gay, or Bisexual: Pride, Prejudice and Politics," Brown Bag Series in Gay, Lesbian, and Bisexual Studies, University of Massachusetts, Amherst, May 11, 1994.

"Thinking Homo/Economically," conference presentation, Center for Lesbian and Gay Studies, CUNY Graduate School, May 7, 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," Annual Conference, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, April 19, 1994. Also presented at the American Political Science Association meeting, September 1994.

"The Changing Contours of Discrimination: Race, Gender, and Structural Economic Change," presented at University of Michigan, School of Social Work, Profs. Mary Corcoran and Sheldon Danziger, March, 15, 1994.

"Redefining Families: Research and Policy," American Political Science Association meetings, Washington, D.C., September 3, 1993.

"A Cost/Benefit Analysis of Coming Out," presented at OUT Magazine press conference, broadcast on CSPAN, April 21, 1993.

GRANTS:

U.S. Department of State, Speaker's Grants for trip to Peru, October, 2014; Trip to The Philippines, August, 2015.

National Science Foundation, "Building an Interdisciplinary Equal Employment

Opportunity Research Network and Data Capacity," 7/1/13 to 6/30/16 (\$245,216), co-PI.

Five Colleges Inc (from Mellon Foundation): Bridging the Liberal Arts and Professional Training in Public Policy & Social Innovation (\$178,000)

Five Colleges Inc: Social Justice Public Policy Practitioners-in-Residence (\$95,000)

Ford Foundation, 2003-2006 (2 grants), Data on Sexual Orientation (total \$600,000)

2002 Wayne F. Placek Award, American Psychological Foundation, "Health Insurance Inequality for Gay, Lesbian, and Bisexual People," with Michael A. Ash.

1995 Wayne F. Placek Award, American Psychological Foundation, "The Impact of Attitudes on Lesbian and Gay Male Earnings and Occupations." (\$15,000)

The Aspen Institute, Nonprofit Sector Research Fund, "Lesbian, Gay, and Bisexual Giving and Volunteering," 1996. (\$40,000)

CONSULTANCIES: World Bank; UN Development Programme; Pew Research Center

BOARDS, PANELS, AND COMMITTEES:

Board, Interdisciplinary Studies Institute, UMass Amherst, 2013-2016

Co-convener of LGBT economists network, American Economic Association, 2016

Board, International Association for Feminist Economics, 2015-2017

Board member and Co-chair of Board, Wellspring Cooperative Corporation, 2014-present.

Chair, Diversity Committee, International Association for Feminist Economics, 2011-2013.

Association for Public Policy Analysis and Management (APPAM): Institutional

representative, 2007-present and Vice Chair of Inst. Reps 2011-12; Program Committee for 2010 conference.

Nat'l Association of Schools of Public Administration and Affairs (NASPAA): Leslie Whittington Teaching Award Committee, 2010.

Advisory Committee for "Real Families, Real Facts: Research Symposiums on LGBT-headed Families," Family Pride, held May 2006.

Planning committee and facilitator for research meeting held at Out & Equal Workplace conference, September 2005.

Reviewer, Wayne F. Placek Award, American Psychological Foundation

Women's Funding Network, Lesbian Donor Research Project Advisory Committee, 1997-1998

Visiting Lecturer and co-designer, Traveling Feminist Economics Ph.D. Course, Univ. of Minnesota, 1997-1998

FELLOWSHIPS AND HONORS:

School of Public Policy faculty created an annual "M. V. Lee Badgett Social Justice Award" for a graduating student, 2016

Women in Leadership Award, Williams Institute, UCLA School of Law, 2015.

Samuel F. Conti Faculty Fellowship, University of Massachusetts Amherst, 2013-2014.

"When Gay People Get Married," Distinguished Book Award, American Psychological Association, Division 44, 2010; chosen for Diversity Book Club, Kennesaw State University, 2010.

Distinguished Faculty Lecture, University of Massachusetts-Amherst, November 9, 2009, and Chancellor's Medal (the highest honor bestowed on individuals for exemplary and extraordinary service to the campus)

Named one of twenty most influential lesbians in academia, *Curve Magazine*, 2008 Rockwood Leadership Fellow in Lesbian, Gay, Bisexual, and Transgender Community & Advocacy, 2008-09

2005 Dukeminier Award for Best Sexual Orientation Law Review Article College Outstanding Teacher Award, Social and Behavioral Sciences, University of Massachusetts, 2000-2001

Out 100, Out Magazine, 2001.

One of Our Best and Brightest Activists, *The Advocate*, 2000.

Lilly Fellow, Center for Teaching, University of Massachusetts- Amherst, 1999-2000 Certificate of Appreciation, Stonewall Center, 1999.

Certificate of Recognition, University of Maryland at College Park Diversity Initiative, 1994-95

Graduate Opportunity Fellowship, 1985-86, UC Berkeley A.B. with General Honors, University of Chicago Maroon Key Society, University of Chicago Abram L. Harris Prize, 1978-79, 1979-80, University of Chicago

AFFILIATIONS

Association for Public Policy Analysis & Management
American Economic Association
Editorial Board (and past Associate Editor), Feminist Economics
International Association for Feminist Economics (past and present board member)
Past editorial boards, Sexuality Research and Social Policy; Sexuality & the Law (Social Science Research Network); Law and Social Inquiry

REFEREE:

Quarterly Journal of Economics, Industrial Relations, Journal of Human Resources, Feminist Economics, Journal of Policy Analysis & Mgmt., Amer. Sociological Review, Review of Social Economy, Review of Economics and Statistics, Columbia University Press, National Science Foundation, Qualitative Sociology, Social Problems, Social Forces, University of Wisconsin Press, Journal of Population Economics, Routledge Press, Princeton University Press, Industrial and Labor Relations Review, Demography, American Journal of Sociology, Contemporary Economic Policy, Journal of Marriage and the Family, Cambridge Journal of Economics, Social Forces, Health Affairs, and others

Exhibit 13



1900 K Street, NW Washington, DC 20006-1110 +1 202 261 3300 Main +1 202 261 3333 Fax www.dechert.com

ARIF HYDER ALI



12 March 2017

VIA E-MAIL

Mr. Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094 ICANN Board of Directors c/o Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Dear President Marby and Members of the Board:

We write on behalf of our client, dotgay LLC ("dotgay"), to inquire when the ICANN Board (the "Board") will issue its final decision on the 26 June 2016 Recommendation of the Board Governance Committee ("BGC") on dotgay's Reconsideration Request 16-3 regarding the .GAY top-level domain (the "Reconsideration Request"). We further write to protest ICANN's lack of transparency in its treatment of dotgay's application and ICANN's failure to provide any sort of response to dotgay's various inquiries about that status of its application. ICANN's actions and inaction continues to cause harm to the gay community, which today more than ever is need of a safe space on the Internet to protect and promote the ideals, principles and interests of the community.

Dotgay submitted its Reconsideration Request *more than one year ago* and *nearly nine months* have passed since the BGC issued its Recommendation. As we noted in our most recent correspondence of 30 January 2017, we find ICANN's protracted delays in reaching a decision on dotgay's Reconsideration Request and ICANN's continued lack of

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Reconsideration Request 16-3 (17 February 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf.





responsiveness to dotgay's inquiries about the status of its request troubling, particularly in light of ICANN's commitments to transparency enshrined in its governing documents.²

Although we understand that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider" and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports," ICANN cannot indefinitely delay resolving dotgay's Reconsideration Request. ICANN owes affected parties, like dotgay, a response to their inquiries regarding the nature and status of the independent review and information request. Again, we find ICANN's lack of communication disappointing and inconsistent with its duties of transparency.

With this letter, we renew our request that ICANN extend dotgay, and the global community that dotgay represents through its application, the common courtesy of a response to its inquiries regarding the anticipated resolution of dotgay's Reconsideration Request and disclosure of information about the nature of the independent review ICANN apparently has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. We are unaware of any rule of law, administrative procedure or corporate governance that would justify ICANN's silence and delays.

We look forward to your prompt response.

See letter from Arif H. Ali, to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017).

Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures (17 September 2016), https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a.

Minutes of the Board Governance Committee (18 October 2016), https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.



Mr. Göran Marby ICANN Board of Directors 12 March 2017 Page 3

Dotgay reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

Arif Hyder Ali

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

Exhibit 14



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.



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: $\underline{14-30}$ (.LLC), $\underline{14-32}$ (.INC), $\underline{14-33}$ (.LLP), $\underline{16-3}$ (.GAY), $\underline{16-5}$ (.MUSIC), $\underline{16-8}$ (.CPA), $\underline{16-11}$ (.HOTEL), and $\underline{16-12}$ (.MERCK).

For more information about CPE criteria, please see ICANN's <u>Applicant Guidebook</u>, 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 <u>Bylaws</u>.

Sincerely,

Chris Disspain

Chair, ICANN Board Governance Committee

Exhibit 15



1900 K Street NW Washington DC 20006 1110 +1 202 261 3300 Main +1 202 261 3333 Fax www.dechert.com

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

VIA E-MAIL DIDP@ICANN.ORG

ICANN c/o Steve Crocker, Chairman Goran Marby, President and CEO 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

Re: Request under ICANN's Documentary Information Disclosure Policy concerning Community Priority Evaluation for .GAY Application ID 1-1713-23699

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report¹ found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.²

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 <u>compelling</u> reason for confidentiality.³ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

GAY CPE Report, https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf

² See https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en

³ See ICANN DIDP, https://icann.org/resources/pages/didp-2012-02-25-en





Documentary Information Disclosure Policy (DIDP) Requests.⁴ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, <u>ICANN staff</u> determines whether the <u>public interest</u> in the disclosure of those documents <u>outweighs the harm</u> that may be caused by such disclosure.⁵ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the "BGC"). Dotgay has sent several letters to ICANN noting that ICANN's protracted delays in reaching a decision and ICANN's continued lack of responsiveness to dotgay's inquiries about the status of dotgay's request represent a violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"⁷ and that the BGC may have requested from the CPE provider "the materials and research

14.

Process for Responding to DIDP Requests, https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf

⁵ *Id*.

https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf; See also *dotgay* 's powerpoint presentation:

Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a



relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."8

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator. ⁹ Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation. ¹⁰

Dotgay has received a letter from ICANN's BGC Chair Chris Disspain ("BGC Letter") indicating that the RR is "on hold" and inter alia that:¹¹

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

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Minutes of the Board Governance Committee, October18, 2016, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf

Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf

Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf



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. 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).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3..." According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway." Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf



- 1. All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;" 14
- 2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," ¹⁵ and (b) all communications between the EIU and ICANN regarding the request;
- 3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation:
- 4. The identity of the individual or firm ("the evaluator") undertaking the Review;
- 5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 6. The date of appointment of the evaluator;
- 7. The terms of instructions provided to the evaluator;
- 8. The materials provided to the evaluator by the EIU;
- 9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
- 10. The materials submitted by affected parties provided to the evaluator;
- 11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en

ICANN DIDP Request 18 May 2017 Page 6



- 12. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,

Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

Exhibit 16



Community Priority Evaluation Process Review Update

2 June 2017

The following is an update on the ongoing Community Priority Evaluation (CPE) process review.

Background on CPE Process Review

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of CPE process, including certain concerns that some applicants have raised regarding the process. On <u>17 September 2016</u>, the ICANN Board directed the President and CEO, or his designees, to undertake a review of the process by which ICANN has interacted with the CPE provider. In his <u>letter of 26 April 2017 to concerned parties</u>, Chris Disspain, the Chair of the Board Governance Committee, provided additional information about the scope and status of the review. Below is additional information about the review, as well as the current status of the CPE process review.

CPE Process Review and Current Status

The scope of the review consists of: (1) review of the process by which the ICANN organization 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 provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI 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.

For more information about the CPE process, please visit https://newgtlds.icann.org/en/applicants/cpe.

Exhibit 17



Contact	n	ormation
Radacta	А	

www dechert com

ARIF HYDER ALI

Contact n ormation Redacted

10 June 2017

VIA E-MAIL

Chris Disspain Chair, ICANN Board Governance Committee 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094 Jeffrey A. LeVee, Esq. Jones Day 555 South Flower Street Los Angeles, CA 90071 2300

Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited ("DotMusic") and dotgay LLC ("dotgay"), regarding ICANN's 2 June 2017 Community Priority Evaluation Process Review Update ("CPE Process Review Update").

Our review of ICANN's CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws. As you are aware, after the ICANN Board announced in September 2016 that it is conducting "an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider," we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization's remit, the information it had been provided,

See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 ("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"); Art. I, Section 2 (8) ("Make decisions by applying documented policies neutrally and objectively, with integrity and fairness").

² Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).



whether the evaluator will seek to consult with the affected parties, etc.³ In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.⁴ At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, inter alia, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—after DotMusic and dotgay filed their requests for documentary information⁵ and two weeks before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has already completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."

This is troubling for several reasons. *First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

See e.g., Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

⁴ ICANN Madrid GDD Summit, May 9, 2017.

See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

⁶ 2 June 2017 CPE Process Review Update.



Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. *Second*, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation 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," and that (ii) "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."

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

- Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
- 2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
- 3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
- 4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. http://schd.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf, pp. 10 – 14.

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We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

Herb Waye, ICANN Ombudsman (ombudsman@icann.org)

Annex A DotMusic Limited

Key Documents

	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

Other Relevant Documents

	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	Description
5.	Reconsideration Request 14-8 (4 March 2014)
6.	Revised Reconsideration Request 14-8 (5 March 2014)
7.	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
8.	Reconsideration Request 14-28 (7 June 2014)
9.	Letter from Constantine Roussos to ICANN (13 June 2014)
10.	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
11.	Letter from Constantine Roussos to ICANN (1 July 2014)
12.	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
13.	Letter from Rich Bengloff to ICANN (7 March 2015)
14.	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
15.	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
16.	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
17.	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
18.	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	Description
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	Description
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	Description
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	Description
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	Description
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	Description
87.	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
88.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
89.	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
90.	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

Annex B dotgay LLC

Key Documents

Tab	Description
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

Other Relevant Documents

Tab	Description
1.	Letter from Centrelink to ICANN Board regarding support of ICANN's consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN's consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

Exhibit 18

Dotgay's Presentation to the Board Governance Committee

15 May 2016



The EIU Contradicted ICANN's Policies in Evaluating Dotgay's Application

EIU is Bound by the AGB

Bylaws, Art. I, § 2(8)

 "Making decisions by applying documented policies neutrally and objectively, with integrity and fairness."

CPE Guidelines, p. 1

 "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."

AGB, Module 1

 "This Applicant Guidebook is the implementation of the Boardapproved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period."

EIU Egregiously Misapplied the AGB (I)

- The EIU misapplied Module 4.2.3 of the AGB by failing to truly consider whether the applied for string "matches the name of the community" as the "name by which the community is commonly known by others."
- The EIU misapplied Module 4.2.3 of the AGB by failing to consider whether the applied-for string "closely describes the community" and not "the community members."
- The EIU misapplied Module 4.2.3 of the AGB by adding a nonestablished nexus requirement, i.e., by requiring that the name of the community apply to each community member.

EIU Egregiously Misapplied the AGB (II)

- The EIU misapplied Module 4.2.3 of the AGB by failing to distinguish the "community" from the "community members", making clear that the string need not be applied to each community member, but simply "match the community name" for a score of 3, or alternatively, closely "describe the community" for a score of 2.
- The EIU misapplied Module 4.2.3 of the AGB by altering the community endorsement criterion to require that the endorsing organization have community recognition beyond membership.
- The EIU misapplied Module 4.2.3 of the AGB by altering the community opposition criterion to include a local community center as an organization of non-negligible size when this community center is merely one out of hundreds of community centers that are members of a global organization that endorsed the Dotgay application.
- The EIU misapplied Module 4.2.3 of the AGB in relation to the letter of opposition filed by the Q Center, even though the Center had been influenced by a competing applicant for .GAY, and the EIU should have discounted it as "filed for the purpose of obstruction" within the meaning of the AGB.

EIU is Prohibited from Discriminating

Bylaws, Art. 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."

CPE Guidelines, p. 22

- "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and nondiscrimination. Consistency of approach in scoring Applications will be of particular importance."
- See similarly CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

EIU Discriminated against Dotgay (I)

- The EIU discriminated against Dotgay by requiring that the name of the community apply to each community member when the EIU had found sufficient in other instances that a member self-identify as having a tie to the community. [E.g., .OSAKA]
- The EIU discriminated against Dotgay by requiring that the name of the community apply to each community member when the inclusion of other members "not automatically associated with the gTLD" did not prevent the EIU from establishing nexus in other instances. [E.g., .HOTEL and .RADIO]
- The EIU discriminated against Dotgay by rejecting the ILGA as a representative organization when the EIU had found in other instances that a community may have more than one such organization. [E.g., .HOTEL and .RADIO
- The EIU discriminated against Dotgay by accepting that a local community center is an organization of non-negligible size when the EIU had found in the instance of the International Radio Emergency Support Coalition that it was not. [E.g., .RADIO]

EIU Discriminated against Dotgay (II)

- The EIU discriminated against Dotgay by deeming it had insufficiently representative support despite support from equivalent organizations being sufficient for other community strings:
 - The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is a global organization dedicated to promoting gay rights composed of over 1,100 member organizations covering countless individuals in 125 countries. It is recognized by the United Nations. [.GAY]
 - The International Hotel & Restaurant Association (IH&RA) is an umbrella trade organization that is composed of national hotel and trade organizations for the hotel and restaurant industries in over 100 countries. It is recognized by the United Nations. [.HOTEL]
 - The World Broadcasting Unions (WBU) is an umbrella organization that is composed of eight regional broadcasting organizations and is dedicated to coordinating international broadcasting. [.RADIO]

EIU's Discriminatory Treatment Denied Dotgay **Community Priority Status (I)**

- The EIU would have granted Dotgay Community Priority Status had it applied the same standard to .GAY that it applied to other Community Applications with equivalent facts:
 - .OSAKA received the maximum score for nexus despite the fact that the community was identified not only as those who are within the OSAKA geographical area, but those "who self-identify as having a tie to OSAKA, or the culture of OSAKA." In the case of .GAY, the EIU applied a new and heightened standard for nexus in requiring the name of the community apply to each specific individual or sub-group to that may self-identify and use the applied-for string. It is irrelevant to the analysis that OSAKA is a geographic region.
 - .HOTEL was found to "closely describe the community, without overreaching substantially" despite the fact that the hotel community included entities that "may not be automatically associated with the gTLD," such as marketing associations. If the same standard had been applied to .GAY, the outcome would have been different. The BGC cannot accept the EIU's conclusion that "more than a small part" of the community would not be automatically associated with .GAY without further due diligence. It is clear that the EIU did not ask the right questions and made no efforts to quantify the part of the community that supposedly is not described as gay.

EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (II)

• .RADIO was found to "closely describe[s] the community, without overreaching substantially beyond the community" despite the EIU acknowledging that "the community, as defined in the application, also includes some entities that are only tangentially related to radio, such as companies providing specific services or products to radio broadcasting organizations." The EIU further accepted that these companies "would not likely be associated with the word RADIO. However, these entities are considered to comprise only a small part of the community and . . . public will generally associate the string with the community as defined by the applicant." If the EIU had asked whether the public generally associated the string with the community as defined by the applicant, .GAY would have been as successful as .RADIO.

EIU is Bound to Act Fairly and Openly

- Bylaws Art. I, § 2(8)
 - "Making decisions by applying documented policies [i.e. the AGB] neutrally and objectively, with integrity and fairness."
- Bylaws, Art. 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."
- CPE Guidelines, p. 22
 - "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."
 - See similarly CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

EIU Acted Unfairly and Opaquely (I)

- The EIU ignored the ICC Expert Determination that found the name of the string .GAY matches Dotgay's definition of the gay community.
- The EIU did not disclose any due diligence, including any research, it may have conducted when evaluating the Application nor did ICANN provide documents from the EIU in response to Dotgay's DIDP Requests.
- The EIU presented no support for and made no quantification effort to justify its finding that the alleged overreach extends to "more than a small part" of the identified community.

EIU Acted Unfairly And Opaquely (II)

- The EIU asked only one clarifying question unrelated to Nexus or Community Support/Opposition Criteria and thus denied Dotgay the opportunity to address EIU misunderstandings and mistakes.
- The EIU involved the same personnel in the Second CPE as in the First CPE, raising serious doubts as to who evaluated the application and giving rise to a potential conflict of interest.
- ICANN's refusal to disclose the names of the evaluators based on a confidentiality provision is not consistent with ICANN's and the EIU's transparency obligations.

The Duties of the Board Governance Committee

The Bylaws Demand the BGC to Ensure Correct Application of the AGB and Correct Finding of Material Facts

Bylaws, Art. IV, §2(1)

"Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have 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."

The Bylaws Demand the AGB to Independently Assess the CPE Report and Make a Recommendation to the Board

Bylaws, Art. IV. §2(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."

The Bylaws Demand that the BGC Conduct its Review with Care and Independent Judgment

- Duty to evaluate the due diligence performed by the EIU and independently conduct due diligence as appropriate.
- Bylaws Art. I, § 2(8)

"Making decisions by applying documented policies neutrally and objectively, with integrity and fairness."

Bylaws, Art. IV, § 3(4)(b)

"did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?"

Bylaws, Art. IV, § 3(4)(c)

"did the Board members exercise **independent judgment** in taking the decision...?"

IRP Panel Confirmed the BGC's Duty to Review Underlying Facts and Ensure Correct Application of ICANN policies

Despegar IRP Panel, ¶ 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."

The BGC Must Ensure the Correct Application of the AGB and Correct Finding of Material Facts (I)

- Duty to correct the EIU's misapplication of the AGB in requiring the name of the community to apply to each community member in order for nexus to be established.
- Duty to ensure that the EIU determined nexus in the precise manner set out in the AGB and by applying the standard set out in the AGB.
- Duty to ensure the EIU does not rewrite the AGB by requiring support from an organization with "reciprocal recognition on the part of the community members of the organization's authority to represent them" beyond membership in the organization.
- Duty to ensure the EIU does not rewrite the AGB by requiring support from a "single [] organization recognized by all of the defined community's members as the representative of the defined community in its entirety."

The BGC Must Ensure Correct Application of the AGB and Correct Finding of Material Facts (II)

- Duty to independently assess the Determination of the ICC Expert, which found that the string .GAY matches Dotgay's definition of the gay community.
- Duty to **independently assess** whether a local gay community is an organization of "non-negligible size," particularly when the organization is a member of a global organization that supported the application, and to assess whether its opposition raises serious conflict of interest issues.

The BGC Has the Duty to Ensure Non-Discrimination

- The BGC must ensure non-discriminatory treatment by applying the same standard for community support applied by other CPE Panels (e.g., .OSAKA, .HOTEL, .RADIO) for Dotgay.
- Bylaws, Art. 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."

Despegar IRP Panel, ¶¶ 146-147

"ICANN itself has no quality review or control processThe Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations [T]here needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators."

The BGC Must Ensure Procedural Fairness

- Duty to ensure fairness in the CPE process in light of the findings of the ICC Independent Expert that the string .GAY matches Dotgay's definition of the gay community.
- ILGA v. Afilias Expert Determination, ¶ 13:

"ILGA's standing has not been doubted by Afilias and is not to be doubted. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), i.e. with a group that is publicly recognized as a community at a local and/or global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence."

ICANN Has a Duty to Foster Diversity and Safety of the Internet Community

Articles of Incorporation, Art. IV

"The Corporation shall operate for the benefit of the Internet community as a whole "

Bylaws Art. III, § 1

"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."

The Denial of a .GAY Community gTLD will Undermine Diversity and Public Interest

- ICANN has a positive obligation to foster diversity on the Internet. The Community gTLD program is an attempt to fulfil that obligation.
- This includes ensuring vulnerable and deserving communities are empowered and protected in the public interest.
- Dotgay is the only applicant for the .GAY gTLD with Public Interest Commitments, including:
 - Pledging to provide a minimum of 67% profits from domain name registrations to a separate foundation to support gay community initiatives.
 - Appropriate Authentication Policies to ensure community-appropriate material.
 - Reserving key domain names as a community resource and support websites:
 Rights.gay; HIV.gay; Safe.gay; Suicide.gay; Health.gay; Ally.gay;
 Transgender.gay, Lesbian.gay; Queer.gay; Pride.Gay.

The Bylaws and Articles Demand That the BGC Ensure Transparency

Articles of Incorporation, Art. IV

"The Corporation shall operate for the benefit of the Internet community . . . through open and transparent processes "

Bylaws Art. 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."

IRP Panel and ICANN Board Confirmed Transparency Duty

Despegar IRP Panel, ¶ 145

"The Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and objects to be achieved by ICANN, transparency and administrative due process should be applicable."

Board Resolution dated 19 March 2016

"Board accepts the findings of the Panel's Final Declaration . . . The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes "

The BGC Must Ensure Transparency

EIU and ICANN staff have not disclosed the underlying materials from the EIU analysis.

The EIU withheld documents from both the BGC and Dotgay, preventing Dotgay from knowing how its Application was treated and the BGC from independently reviewing whether the principles of fairness and non-discrimination were satisfied.

Subject: Re: [reconsider] Reconsideration Request 17-3

Date: Wednesday, July 19, 2017 at 5:17:22 AM Pacific Daylight Time

From: Herb Waye (sent by reconsider-bounces@icann.org < reconsider-bounces@icann.org >)

To: Reconsideration

Reconsideration Request 17-3

Pursuant to Article 4, Section 4.2(I)(iii), I am recusing myself from consideration of Request 17.3.

Best regards,

Herb Waye ICANN Ombudsman

https://www.icann.org/ombudsman[icann.org]

https://www.facebook.com/ICANNOmbudsman[facebook.com]

Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf[icann.org]

Community Anti-Harassment Policy

 $\underline{https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en[icann.org]}$

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

From: Reconsideration < Reconsideration@icann.org >

Date: Wednesday, July 19, 2017 at 1:41 AM **To:** Herb Waye herb.waye@icann.org

Cc: Reconsideration < Reconsideration@icann.org >

Subject: Reconsideration Request 17-3

Dear Herb,

ICANN recently received the Reconsideration Request 17-3 (Request 17-3), https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en[icann.org], which was submitted on 30 June 2017 by dotgay LLC seeking reconsideration of ICANN's response to the Requestor's DIDP. The Requestor's DIDP sought the disclosure of documents relating to the Community Priority Evaluation Process Review. The Board Governance Committee (BGC) has determined that Request 17-3 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BGC to determine if the request is sufficiently stated. Specifically, Section 4.2 (l) [icann.org] states:

- (I) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in <u>Section 4.2(I)(iii)</u> and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.
- (i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.
- (ii) The Ombudsman shall submit to the Board Governance Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Governance Committee shall thereafter promptly proceed to review and consideration.
- (iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to <u>Article 5</u> of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Governance Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 17-3 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(I)(iii). If you are accepting Request 17-3 for evaluation, please note that your substantive evaluation must be provided to the BGC within 15 days of receipt of Request 17-3.

Best regards, ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094

RECOMMENDATION OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECONSIDERATION REQUEST 17-3 23 AUGUST 2017

The Requestor, dotgay LLC, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review). Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.

I. Brief Summary.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with three other .GAY applications. The Requestor was invited to, and did, participate in CPE, but did not prevail.

On 22 October 2015, the Requestor sought reconsideration of the CPE report (Request 15-21). The BGC denied Request 15-21. On 17 February 2016, the Requestor sought reconsideration of the BGC's determination on Request 15-21 (Request 16-3).³

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should also include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation

² Request 17-3, § 10, at Pg. 16.

¹ Request 17-3, § 3, at Pg. 1.

³ Request 16-3, https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf.

of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.⁴ The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-3, pending completion of the CPE Process Review.

On 18 May 2017, the Requestor submitted the DIDP Request. The Requestor sought 13 categories of documents and information relating to the CPE Process Review.⁵ On 18 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response further explained that the documents responsive to Items No. 1-3, 8, and 13 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances

⁴ Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/governance/bylaws-en/#article4.

⁵ Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited in May 2017. *Compare* DIDP Request No. 20170505-1, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf, with the DIDP Request. DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging both DIDP Requests. *See* Reconsideration Request 17-2; Request 17-3. Reconsideration Request 17-2 raises many of the same arguments that the Requestor raises in Request 17-3. *Compare* Reconsideration Request 17-2, with Request 17-3.

for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-3 (Request 17-3), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws concerning non-discriminatory treatment and transparency by: (1) determining not to produce certain documents responsive to Item No. 9; and (2) determining not to produce any documents responsive to Items No. 1-3, 8, and 13.6

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration, and the Ombudsman recused himself.⁷

The BAMC has considered Request 17-3 and all relevant materials and recommends that the Board deny Request 17-3 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

II. Facts.

A. Background Facts.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 February 2014, the Requestor's Application was invited to participate in CPE.⁸ The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.⁹

⁶ Request 17-3, § 3, at Pg. 3.

⁷ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); see also Ombudsman action Regarding Request 17-3, Pg. 1.

⁸ 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

⁹ See Id.

On 6 October 2014, the CPE panel issued a "First CPE report," concluding that the Application did not qualify for community priority.¹⁰ The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE report.¹¹ The BGC granted reconsideration on Request 14-44 on the grounds that the CPE provider had inadvertently failed to verify 54 letters of support for the Application.¹² At the BGC's direction, the CPE provider conducted a "Second CPE" of the Application. The Application did not prevail in the Second CPE.¹³

On 22 October 2015, the Requestor sought reconsideration of the Second CPE report (Request 15-21).¹⁴ On the same day, the Requestor filed a DIDP Request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 DIDP Request).¹⁵ The 2015 DIDP Request sought, among other things, "policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered 'policy' under ICANN by-laws." ICANN organization responded to the 2015 DIDP Request on 21 November 2015, providing links to all the responsive, publicly available documents, furnishing an email not previously publicly

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¹⁰ See CPE Report at 1.

¹¹ BGC Determination on Request 15-21, at Pg. 1, https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf.

 $^{^{12}}$ *Id*.

 $^{^{13}}$ *Id*.

¹⁴ *Id*.

¹⁵ DIDP Request No. 20151022-1, at Pg. 2-5, https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf.

¹⁶ *Id.* at Pg. 2. The Requestor made an identical request in a 2014 DIDP Request. *See* DIDP Request No. 20141022-2 (2014 DIDP Request), at Pg. 2, https://www.icann.org/en/system/files/files/lieben-request-22oct14-en.pdf. ICANN organization responded that to the extent it had documents responsive to that request, the documents were subject to certain identified Nondisclosure Conditions. Response to 2014 DIDP Request, https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf.

available, explaining that it did not possess documents responsive to several of the requests, and explaining that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.¹⁷ On 4 December 2015, the Requestor revised Request 15-21 to challenge the response to the 2015 DIDP Request in addition to the Second CPE report.¹⁸

On 1 February 2016, the BGC denied Request 15-21.¹⁹ On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.²⁰ On 26 June 2016, the BGC recommended that the Board deny Request 16-3.²¹ The Board was scheduled to consider Request 16-3 on 17 September 2016. On 13 September 2016, the Requestor submitted an independent expert report for the Board's consideration as part of its evaluation of Request 16-3.²² Accordingly, the Board deferred consideration of Request 16-3 to provide time for review of the report.²³

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by

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 $^{^{17} \} Response\ to\ DIDP\ Request\ No.\ 20151022-1, https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf,$

¹⁸ Amended Request 15-21, https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf.

¹⁹ BGC Determination on Request 15-21, at Pg. 1

²⁰ Request 16-3, https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf.

²¹ BGC Recommendation on Request 16-3, https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf.

Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf

²³ Minutes of ICANN Board, 15 September 2016, https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.g.

the Requestor on 15 May 2016 during its presentation to the BGC regarding Request 16-3, as well as issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²⁴ As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to 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 their evaluations of the community applications.²⁵ The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 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).²⁶

On 18 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:²⁷

- 1. All documents relating to ICANN's request to "the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
- 2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their

²⁴ Dot Registry IRP Final Declaration, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

²⁵ 18 October 2016 Minutes of BGC Meeting, at Item 2, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1,

https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf. ²⁶ 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2,

https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf. ²⁷ DIDP Request at Pg. 4, https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf.

- determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request;
- 3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
- 4. The identity of the individual or firm undertaking the CPE Process Review;
- 5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 6. The date of appointment of the evaluator;
- 7. The terms of instructions provided to the evaluator;
- 8. The materials provided to the evaluator by the EIU;
- 9. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board;
- 10. The materials submitted by affected parties provided to the evaluator;
- 11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
- 12. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 13. All materials provided to ICANN by the evaluator concerning the CPE Process Review.²⁸

Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited on 5 May 2017.²⁹ DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging the DIDP Requests.³⁰

²⁸ *Id*. at Pg. 5-6.

²⁹ Compare DIDP Request No. 20170505-1, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf, with the DIDP Request.

³⁰ See Reconsideration Request 17-2, https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf; Request 17-3.

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).³¹ The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.³² The Status Update explained that the CPE Process Review is occurring on two parallel tracks--the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, which was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.³³

On 18 June 2017, ICANN organization responded to the DIDP Request.³⁴ As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.³⁵ The DIDP Response further explained that all the documents responsive to Items No. 1-3, 8, and 13, and certain documents responsive to Item No. 9, were subject to Nondisclosure Conditions and were not appropriate for disclosure.³⁶ Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and

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³¹ Status Update, https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf.

 $^{^{32}}$ *Id*.

³³ *Id*

³⁴ DIDP Response, https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf ³⁵ See generally id.

³⁶ *Id*. at Pg. 3-7.

determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.³⁷

On 30 June 2017, the Requestor filed Request 17-3, seeking reconsideration of ICANN organization's determination not to produce certain documents responsive to Item No. 9 and all documents responsive to Items. No. 1-3, 8, and 13 because they were subject to Nondisclosure Conditions.³⁸ The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency[,] and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it "increases the likelihood of [community members] resorting to" IRP, which is "expensive and time-consuming."³⁹

On 19 July 2017, the BGC concluded that Request 17-3 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.⁴⁰

On 19 July 2017, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.⁴¹ Accordingly, the BAMC reviews Request 17-3 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

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³⁷ DIDP Response at Pg. 7.

³⁸ The BAMC notes that the Requestor does not seek reconsideration of the response to Items No. 5, 7, or 11, although DotMusic, represented by the same counsel as the Requestor here, challenged ICANN organization's response to identical requests (to which ICANN organization provided an identical response to the one provided to the Requestor here) in Request 17-2. *See* Request 17-2, § 3, Pg. 9-10 (incorrectly marked 8-9).

³⁹ Request 17-3, § 6, at Pg. 6-8.

⁴⁰ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-3 was pending. The BGC was tasked with reviewing Request 17-3 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-3.

⁴¹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-3, Pg. 1, https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-response-ombudsman-19jul17-en.pdf.

B. Relief Requested

The Requestor asks the BAMC to "disclose the documents requested under Request Nos. 1-3, 8, 9, and 13."⁴²

III. Issue.

The issues are as follows:

- Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
- 2. Whether ICANN organization complied with its Core Values, Mission, and Commitments.⁴³

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-3 seeks reconsideration of staff and Board action or inaction. 44 The only subsequent discussion of Board action is the Requestor's passing reference to its view that the BGC was required to provide materials it requested from CPE panels for use in its evaluation of pending reconsideration requests to the Requestor. 45 The Requestor makes no further arguments concerning the BGC's actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on ICANN organization's response to the Requestor's DIDP request. 46 Accordingly, the BAMC understands Request 17-3 to seek reconsideration of ICANN organization's response to the Requestor's DIDP Request, and *not* reconsideration of BGC action or inaction. 47

⁴² Request 17-3, § 9, at Pg. 15.

⁴³ Request 17-3, § 3, at Pg. 3; *id*, §§ 6-7, Pg. 5-8.

⁴⁴ Request 17-3, § 2, at Pg. 1.

⁴⁵ Request 17-3, § 6, at Pg. 5.

⁴⁶ Request 17-3, §§ 8-9, at Pg. 9-15.

⁴⁷ Further, we note that the BAMC has not completed its consideration of Request 16-3, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.

A. 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.⁴⁸

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-3 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁴⁹ That substantive provision did not change when ICANN's Bylaws regarding reconsideration were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current 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.⁵⁰ Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC

⁴⁸ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

⁴⁹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1).

⁵⁰ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(1)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁵¹

On 19 July 2017, the BGC determined that Request 17-3 is sufficiently stated and sent Request 17-3 to the Ombudsman for review and consideration.⁵² The Ombudsman thereafter recused himself from this matter.⁵³ Accordingly, the BAMC has reviewed Request 17-3 and issues this Recommendation.

B. Documentary Information Disclosure Policy

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course. In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information "concerning ICANN's operational activities, and within ICANN's possession, custody, or control," that is not already publicly available. The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization's operational activities, and within ICANN organization's

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⁵¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r). ⁵² Ombudsman Action Regarding Request 17-3, Pg. 1-2.

⁵³ Ombudsman Action Regarding Request 17-3, Pg. 1.

⁵⁴ See ICANN Documentary Information Disclosure Policy, https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁵⁵ *Id*.

possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.⁵⁶

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the "Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests" (DIDP Response Process).⁵⁷ 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]."⁵⁸

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- 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;
- ii. 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

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⁵⁶ *Id*.

⁵⁷ See DIDP Response Process, https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.

⁵⁸ *Id.*; *see also*, "Nondisclosure Conditions," *available at* https://www.icann.org/resources/pages/didp-2012-02-25-en.

ICANN cooperates by inhibiting the candid exchange of ideas and communications;

- iii. Confidential business information and/or internal policies and procedures; and
- iv. 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.⁵⁹

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁶⁰

V. Analysis and Rationale.

- A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.
 - 1. The DIDP Response Complies With Applicable Policies And Procedures.

The DIDP Response identified documentary information responsive to nine of the 13 items. For Items No. 4 through 7 and 9 through 12, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website. Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available, ICANN organization identified and provided the hyperlinks to 18 publicly available categories of documents that contain information responsive to Items No. 4 through 7 and 9-12.

⁵⁹ DIDP.

⁶⁰ *Id*.

⁶¹ See generally DIDP Response.

⁶² DIDP https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁶³ DIDP Response at Pg. 4-7.

The DIDP Response also explained that some of the documents responsive to Item No. 9, as well as all documents responsive to Items No. 1-3, 8, and 13, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.⁶⁴

The Requestor claims that ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 violated established policies and procedures. However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure. As demonstrated below, ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 adhered to established policies and procedures.

The DIDP Response Process provides that "[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request." Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions. If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.

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⁶⁴ DIDP Response at Pg. 7.

⁶⁵ Request 17-3, § 3, Pg. 3.

⁶⁶ DIDP Response Process, https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.

⁶⁷ *Id*.

⁶⁸ *Id*.

a. ICANN organization's response to Items No. 1, 2, 3, 8, and 13 adhered to established policies and procedures.

Items No. 1, 2, 3, 8, and 13 sought the disclosure of documents relating to the CPE Process Review, including:

- [D]ocuments relating to ICANN's request to "the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports" (Item. No. 1);
- All documents from the EIU to ICANN, including but not limited to: (a)
 ICANN's request for "the materials and research relied upon by the CPE panels in
 making their determinations with respect to certain pending CPE reports," and (b)
 all communications between the EIU and ICANN regarding the request (Item No.
 2);
- All documents relating to requests by ICANN staff or Board Members to access
 the research provided by the EIU or the ongoing evaluation or any comments on
 the research or evaluation (Item No. 3);
- The materials provided to the evaluator by [the CPE provider] (Item No. 8)
- The materials provided to ICANN by the evaluator concerning the review (Item No. 13) ⁶⁹

With respect to these Items, ICANN organization explained that documents responsive to the requests "are not appropriate for disclosure" based on certain Nondisclosure Conditions.⁷⁰ Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Items No. 1, 2, 3, 8, and 13, then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.⁷¹ Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the

⁶⁹ Request 17-3, § 3, at Pg. 9 (marked 8).

⁷⁰ DIDP Response at Pg. 4.

⁷¹ DIDP Response Process.

disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.⁷²

b. ICANN organization's response to Item No. 9 adhered to established policies and procedures.

Item No. 9 sought the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board.⁷³ In response to Item No. 9, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization's response to the 2015 DIDP Request, which sought the same documentary information.⁷⁴ The BGC previously denied the Requestor's Request 16-7, which challenged ICANN organization's response to the 2015 DIDP Request.⁷⁵

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⁷² DIDP Response at Pg. 7.

⁷³ DIDP Request at Pg. 5.

⁷⁴ DIDP Response at Pg. 5-6, *citing* Response to 2015 DIDP Request. The 2015 DIDP Request in turn cites the Response to the Requestor's 2014 DIDP Request. *See* Response to 2015 DIDP Request, at Pg. 5; *see also* Response to 2014 DIDP Request, at Pg. 4-5.

As noted in footnote 5, ICANN organization previously provided the same response to DotMusic Limited's DIDP request for the same documents. *See* DIDP Response to Request No. 20170505-1, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf.

⁷⁵ BGC Determination on Request 15-21, at Pg. 29-32 (reviewing challenge to the 2015 DIDP Request).

2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information. Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply. In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Item No. 9, ICANN organization determined that the internal correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because, as ICANN organization previously explained in response to the 2014 and 2015 DIDP Requests, they comprised:

- 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;
- 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

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⁷⁶ DIDP.

⁷⁷ Id.

ICANN cooperates by inhibiting the candid exchange of ideas and communications;

- 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;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.⁷⁸

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Item No. 9. Those items request correspondence between ICANN organization and the CPE Provider. The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 15-21 without success. The BAMC recommends that Request 17-3 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Items No. 1, 2, 3, 8, and 13 seek materials shared between FTI, EIU, and ICANN organization concerning the CPE Process Review. In response to Items No. 1, 2, 3, 8, and 13, ICANN organization noted that it was in possession of requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

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⁷⁸ DIDP Response at Pg. 6, citing Response to 2015 DIDP Request at Pg. 6, https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf.

⁷⁹ DIDP Request at Pg. 5.

⁸⁰ BGC Determination on Request 15-21, at Pg. 29-32, https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf.

- 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;
- 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;
- 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; and
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.⁸¹

These materials certainly comprise information that may "compromise the integrity of" ICANN organization's and FTI's "deliberative and decision-making process" with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because "ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy." The Requestor's arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling

⁸¹ DIDP Response at Pg. 4; *see also* ICANN Defined Conditions for Nondisclosure. https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁸² Request 17-3, § 6, at Pg. 6.

reasons for not disclosing the materials.⁸³ There is no policy or procedure requiring that ICANN organization to provide *additional* justification for nondisclosure.

3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public's Interest In Disclosing The Information.

The DIDP states that documents subject to 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." In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.⁸⁵

B. The Requestor's Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.

The Requestor argues that ICANN violated the following Commitments and Core Values in the DIDP Response:⁸⁶

- Operating in a manner consistent with the [] Bylaws for the benefit of the Internet community as a whole;⁸⁷
- Employing open and transparent policy development mechanisms;⁸⁸
- Applying documented policies neutrally and objectively, with integrity and fairness;⁸⁹

⁸³ DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

⁸⁴ See id.

⁸⁵ DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

⁸⁶ Request 17-3, § 6, at 5).

⁸⁷ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a).

⁸⁸ The Requestor cites ICANN Bylaws, 1 October 2016, Art. 3, Section 3.1 in support; that Bylaw states that ICANN "shall operate to the maximum extent feasible in an open and transparent manner . . . including implementing procedures to . . . "encourage fact-based policy development work."

⁸⁹ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(v).

• Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.⁹⁰

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-3 or how ICANN organization has violated these Commitments and Core Values.⁹¹ The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

VI. Recommendation

The BAMC has considered the merits of Request 17-3, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-3.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-3 was submitted on 30 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 30 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-3 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-3.

⁹⁰ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(vi).

⁹¹ See generally Request 17-3, § 10, Pg. 13-14.

⁹² ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).



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ARIF HYDER ALI

Contact Information Redacted

10 June 2017

VIA E-MAIL

Chris Disspain Chair, ICANN Board Governance Committee 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094 Jeffrey A. LeVee, Esq. Jones Day 555 South Flower Street Los Angeles, CA 90071 2300

Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited ("DotMusic") and dotgay LLC ("dotgay"), regarding ICANN's 2 June 2017 Community Priority Evaluation Process Review Update ("CPE Process Review Update").

Our review of ICANN's CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws. As you are aware, after the ICANN Board announced in September 2016 that it is conducting "an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider," we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization's remit, the information it had been provided,

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See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 ("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"); Art. I, Section 2 (8) ("Make decisions by applying documented policies neutrally and objectively, with integrity and fairness").

² Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).



whether the evaluator will seek to consult with the affected parties, etc.³ In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.⁴ At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, inter alia, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—after DotMusic and dotgay filed their requests for documentary information⁵ and two weeks before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has already completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."

This is troubling for several reasons. *First*, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

See e.g., Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

⁴ ICANN Madrid GDD Summit, May 9, 2017.

See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

⁶ 2 June 2017 CPE Process Review Update.



Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. *Second*, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation 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," and that (ii) "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."

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

- 1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
- 2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
- 3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
- 4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. http://schd.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf, pp. 10 – 14.

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We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

Herb Waye, ICANN Ombudsman (ombudsman@icann.org)

Annex A DotMusic Limited

Key Documents

	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

Other Relevant Documents

	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	Description
5.	Reconsideration Request 14-8 (4 March 2014)
6.	Revised Reconsideration Request 14-8 (5 March 2014)
7.	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
8.	Reconsideration Request 14-28 (7 June 2014)
9.	Letter from Constantine Roussos to ICANN (13 June 2014)
10.	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
11.	Letter from Constantine Roussos to ICANN (1 July 2014)
12.	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
13.	Letter from Rich Bengloff to ICANN (7 March 2015)
14.	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
15.	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
16.	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
17.	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
18.	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	Description
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	Description
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	Description
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	Description
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	Description
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	Description
87.	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
88.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
89.	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
90.	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

Annex B dotgay LLC

Key Documents

Tab	Description
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

Other Relevant Documents

Tab	Description
1.	Letter from Centrelink to ICANN Board regarding support of ICANN's consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN's consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

To: Arif Ali on behalf of dotgay LLC and DotMusic Limited

Date: 10 July 2017

Re: Request No. 20170610-1

Thank you for your request for documentary information dated 10 June 2017 (Request), which was submitted to the Internet Corporation for Assigned Names and Number's (ICANN) outside counsel on behalf of dotgay LLC (dotgay) and DotMusic Limited (DotMusic) (collectively Requestors). As the Request seeks the disclosure of documentary information, it is being addressed through ICANN's Documentary Information Disclosure Policy (DIDP). 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 information relating to the Board initiated review of the Community Priority Evaluation (CPE) process:

- Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
- 2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
- Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
- 4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

Response

Your Request seeks information relating to the review of the CPE process initiated by the ICANN Board (the Review). ICANN's DIDP is intended to ensure that documentary 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. The DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. As such, requests for information are not appropriate DIDP requests.

ICANN notes that it previously provided documentary information regarding the Review in response to the DIDP Requests submitted by DotMusic and dotgay. (See Response to DIDP Request 20170505-1 and Response to DIDP Request 20170518-1.) Rather than repeating the information here, ICANN refers to those DIDP Responses, which are incorporated into this Response.

Items 1 and 3

Item 1 seeks confirmation that FTI will review the materials submitted by DotMusic and dotgay in the course of their reconsideration requests, including all the documents identified in Annexes A and B to the Request. Item 3 seeks the disclosure of information regarding FTI's selection process and "the terms under which FTI currently operates for ICANN." The information responsive to Items 1 and 3 were previously provided in Response to DIDP Request 20170505-1 and Response to DIDP Request 20170518-1.

Items 2 and 4

Item 2 seeks the disclosure of the identities of "ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review." Item 4 requests "[c]onfirm[ation] that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review." As noted above, the DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Notwithstanding this requirement, ICANN organization has provided significant information about the Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee and 2 June 2017 Community Priority Evaluation Process Review Update. This request for information is not an appropriate DIDP request. Moreover, while the first track which is focused on gathering information and materials from ICANN organization has been completed, the Review is still ongoing. This request is subject to the following DIDP Conditions of Non-Disclosure:

- 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.
- 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.

• 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.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the information subject to these conditions to determine if the public interest in disclosing them at this point in time outweighs the harm that may be caused by such disclosure. ICANN 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 makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN 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'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.

Rebuttal to the BAMC's Recommendation on Reconsideration Request 17-3

dotgay¹ submits this rebuttal to the Board Accountability Mechanisms Committee's ("BAMC") Recommendation on Request 17-3 (the "Recommendation"),² which concerns the reconsideration of ICANN's refusal to disclose documents requested in dotgay's DIDP Request.³ The denied document requests all involve the disclosure of pre-existing documents and are not "unfettered information requests" or requests "to create or compile summaries of any documented information." Specifically, dotgay asked ICANN to disclose the following documents:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports."

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (1) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request.

<u>Request No. 3</u>: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation to any comments on the research or evaluation

<u>Request No. 8</u>: The materials provided to the evaluator by the EIU.

<u>Request No. 9</u>: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board.

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This rebuttal adopts the same exhibits and terms as in dotgay's Reconsideration Request 17-3. *See* Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en.

Exhibit 2, dotgay DIDP Request (May 18, 2017), https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en. As explained in the Request, ICANN refused to disclose documents related to Request Nos. 1-3, 8-9, and 13. *See* Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 13, https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf.

<u>Request No. 13</u>: All materials provided to ICANN by the evaluator concerning the Review.⁵

As explained in Request 17-3,⁶ ICANN improperly refused to disclose these documents because (1) its assertion that the responsive documents fall under the Defined Conditions of Nondisclosure are conclusory and unsupported by ICANN, (2) the public interest outweighs any reason for nondisclosure, and (3) the decision violates ICANN's Commitments and Core Values.

Significantly, the Recommendation improperly implies that several Commitments and Core Values are not implicated in the DIDP Response, that dotgay made unsupported references to these policies, and that these policies do not support reconsideration of the DIDP Response.⁷ These claims are unfounded.⁸ To provide further clarity for both the BAMC and the ICANN Board, dotgay will now further clarify its position in this rebuttal to the Recommendation.

1. The DIDP Response Must Adhere to ICANN's Commitments and Core Values

In issuing the DIDP Response, ICANN must comply with its Commitments and Core Values or violate its own Bylaws. ICANN, in performing its mission "to ensure the stable and secure operation of the Internet's unique identifier systems," must "act in a manner consistent with [its] Bylaws" and "in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values." There is no exception carved out for the DIDIP¹² and ICANN

Exhibit 2, dotgay DIDP Request (May 18, 2017), pp. 5-6, https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en.

Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en.

Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 21, https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf.

See Exhibit 2, dotgay DIDP Request (May 18, 2017), pp. 5-8, https://www.icann.org/resources/pages/didp-20170518-1-ali-request-2017-06-19-en.

⁹ ICANN Bylaws, Art. 1, § 1.1(a).

¹⁰ *Id.* at Art. 1, § 1.2(a).

¹¹ *Id.* at Art. 1, §1.2.

See id.; see also ICANN Articles of Incorporation.

has not contested that its actions here are governed by these Commitments and Core Values.¹³ In fact, the BAMC explained in the Recommendation that the DIDIP is the direct result of ICANN's Commitment to transparency:

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publically available a comprehensive set of materials covering ICANN organization's operational activities. ¹⁴

ICANN's refusal to disclose several documents in response to the DIDP Request is thus in direct contravention of its Commitment to transparency, as well as other Commitments and Core Values.

2. ICANN Must Disclose the Requested Documents in Accordance with Its Commitments to Transparency and Openness

The DIDP is clearly "[a] principal element of ICANN's approach to transparency and information disclosure." The principle of transparency "is one of the essential principles in ICANN's creation documents, and its name reverberated through its Articles and Bylaws." ICANN's Articles of Incorporation (the "Articles") commit it to "operate in a manner consistent with [its] Articles and Bylaws for the benefit of the Internet community as a whole . . . through open and transparent processes." ICANN's Bylaws only reaffirm the same Commitment. The Bylaws explicitly state that "ICANN must operate in a manner consistent with [its] Bylaws for the

Exhibit 21, ICANN Documentary Information Disclosure Policy, https://www.icann.org/resources/pages/didp-2012-02-25-en.

Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), p. 21-2, https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf.

¹⁴ *Id.* at p. 12.

Exhibit 6, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), ¶ 101, https://www.icann.org/en/system/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

¹⁷ ICANN Articles of Incorporation, § 2.III.

benefit of the Internet community as a whole . . . through open and transparent processes." And, in addition to dedicating an entire Article on transparency, 19 the Bylaws further reaffirm that the processes for policy development, such as the use and evaluation of a CPE provider, must be "accountable and transparent." 20

However, ICANN did not adhere to its Commitment to openness and transparency when it denied dotgay's requests for further information about the ongoing review of the CPE process. The CPE has affected several gTLD applicants,²¹ and drawn criticism from legal experts²² and venerable institutions, such as the Council of Europe.²³ And, even though concerns by both applicants and third parties led to ICANN's initiation of an independent review of the CPE process, the review itself has been mired in secrecy since its inception.

This lack of transparency is evident upon a review of dotgay's attempts to have the CPE for .GAY reevaluated by the BGC. On June 26, 2016, the BGC issued a recommendation regarding Request 16-3, which concerns dotgay's community application for .GAY.²⁴ ICANN was subsequently silent regarding the status of Request 16-3 for nearly *nine months*, and even then

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¹⁸ ICANN Bylaws, Art. 1, § 1.2(a).

See id. at Art. 3 ("TRANSPARENCY"). Article 3 concerns ICANN's Commitment to "operate to the maximum extent feasible in an open and transparent manner." *Id.* at Art. 3, § 3.1.

²⁰ *Id.* at Art. 1, § 1.2(b)(ii).

See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

See Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf.

See Exhibit 5, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf.

See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf.

dotgay only learned that its application was "on hold" as the BGC reviewed the CPE process.²⁵ No other substantive information about the review was disclosed to dotgay for another *two months*, when dotgay and other community applicants finally learned the name of the independent evaluator that was conducting the review.²⁶

ICANN, despite its Commitments to transparency and openness, still has not disclosed relevant information about the independent review. For instance, dotgay and the other applicants do not know (1) the documents being reviewed by FTI as part of its independent review, (2) the terms and scope of FTI's work for ICANN, and (3) the documents relied on by the EIU during the CPE. The DIDP remains the only mechanism for applicants to obtain this information from ICANN by obtaining the relevant documents. In rejecting the DIDP Request, ICANN has closed-off this possibility in clear contradiction of its own stated Commitments and Core Values.

3. ICANN Must Disclose the Requested Documents Because of its Commitment to Fairness, Which Shows that the Public Interest Outweighs Nondisclosure

This secretive review of the CPE process is clearly significant not only to dotgay, but also to other gTLD applicants. The results of the independent review may change how ICANN evaluates community applications for the foreseeable future, and many gTLD applicants currently have pending reconsideration requests concerning the CPE process.²⁷ This evaluation process, which is currently mired with complaints, has clearly disproportionately treated community gTLD

Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf.

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See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017) (identifying seven other gTLD strings with pending reconsideration requests), https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

applicants by inconsistently and unfairly applying criteria between applicants.²⁸ And, yet, ICANN summarily accepted the CPE determinations, and is only now reconsidering the CPE process through a secretive review process.

ICANN's refusal to disclose relevant documents through its DIDP not only fails to uphold its openness and transparency obligations but also fails to uphold the principle of fairness. ICANN has specifically stated 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, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).²⁹

It further made the Commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment."³⁰

ICANN's refusal to disclose the requested documents is in clear violation of this Commitment. There is a clear problem with the CPE process, evident by the EIU's determinations and ICANN's own investigation of the process. Furthermore, the Minutes from ICANN's Board Governance Meeting of August 1, 2017 clearly show that the CPE Provider itself has been

See Exhibit 5, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf.

²⁹ ICANN Bylaws, Art. 3, § 3.1.

³⁰ *Id.* at Art. 1, § 1.2(a)(v).

uncooperative with ICANN, thus indicating that the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff.³¹ This problem not only affects all of the community gTLD applicants but also the entire Internet community, which will be indisputably affected by whether ICANN approves certain community gTLDs, such as .GAY. Despite the clear public interest in maintaining a fair CPE process, however, ICANN continues to unfairly exclude community applicants and the Internet community from the independent review process, even though the applicants will be and are affected by the improperly administered CPE, have continuously raised this issue before ICANN, and have contributed to the dialogue regarding the problem. Instead of welcoming their contributions to the review of an important gTLD process, ICANN has instead restricted their access to information regarding the independent review in a blatantly unfair decision that keeps affected applicants uninformed and raises several red flags regarding the integrity of the independent review itself.

ICANN's failure to provide the requested documents raises questions as to its credibility, reliability, and trustworthiness. It implies to the community applicants and the general public that there is something to hide regarding the independent review and CPE. In an attempt to defend its reluctance to disclose documents, ICANN has argued that these documents are covered by its Nondisclosure Policy. However, in both the DIDP Response and the Recommendation, neither ICANN nor the BAMC offer any explanation for this singular defense. Instead, both have simply made conclusory statements that the requested documents are covered by the nondisclosure policy

See Exhibit 22, Minutes of BGC Meeting (Aug. 1, 2017), https://www.icann.org/resources/board-material/minutes-bgc-2017-08-01-en. "This is in large part because, despite repeated requests from ICANN beginning in March 2017, the CPE provider failed to produce a single document until just very recently – four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced." *Id.*

without any explanation other than simply listing several conditions for nondisclosure, expecting dotgay to understand how these conditions apply to unknown documents.³²

ICANN's actions are therefore in contravention of its commitments to transparency, openness, and its dedication to neutrality, objectiveness, integrity, and fairness. In all fairness, given the import of the review to the public, ICANN should disclose the documents to the public; it is clear that the public interest outweighs any nondisclosure policies.

4. ICANN Must Disclose the Requested Documents to Remain Accountable to the Internet Community and Maintain its Effectiveness

ICANN's refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community for a clearly flawed evaluation process in violation of its Commitments and Core Values. Through its Bylaws, ICANN has committed itself to "[r]emain accountable to the Internet community through mechanisms defined in [its] Bylaws that enhance ICANN's effectiveness." It has also adopted two significant Core Values: (1) "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;" and (2) "[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community."

Exhibit 20, Recommendation of the BAMC on Reconsideration Request 17-3 (Aug. 23, 2017), pp. 16-9, https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-bamc-23aug17-en.pdf; Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), pp. 3-4, 6, https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en.

³³ ICANN Bylaws, Art. 1, § 1.2(a)(vi).

³⁴ *Id.* at Art. 1, § 1.2(b)(ii).

³⁵ *Id.* at Art. 1, § 1.2(b)(v).

The DIDP Response and the Recommendation support a decision that contradicts these Commitments and Core Values. As explained prior, ICANN has kept hidden details regarding the review process, prohibiting informed participation in the review by the Internet Community and avoiding all possibility of accountability for its actions during the review. In additions to violating its Bylaws, ICANN's attempts to avoid accountability will prevent it from operating in a fully effective manner as it prevents a large community from offering advice and solutions for resolving the problems with the CPE process, and forces community applicants to continually seek information from ICANN that should have already been disclosed to the public.

5. Conclusion

Therefore, it is clear that ICANN has failed to uphold its Commitments and Core Values in denying the DIDP Request. The BAMC has only further perpetuated this violation by recommending that the Board deny Request 17-3. In addition to the reasons stated in the Request 17-3,³⁶ then, the Board should grant Request 17-3 and produce the requested documents regarding the CPE independent review.

	September 8, 2017
Arif Hyder Ali	Date

Exhibit 19, dotgay Reconsideration Request 17-3 (June 30, 2017), https://www.icann.org/resources/pages/reconsideration-17-3-dotgay-request-2017-07-03-en.

Exhibit 19

dotgay LLC Reconsideration Request ("RR")

1. Requester Information

Requester:

Name: dotgay LLC ("dotgay")

Address: Contact Information Redacted

Email: Jamie Baxter, Contact Information Redacted

Requester is represented by:

Counsel: Arif Hyder Ali

Address: Dechert LLP, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

X Board action/inaction

X Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

dotgay LLC (the "Requester") seeks reconsideration of ICANN's response to its DIDP Request, which denied the disclosure of certain categories of documents requested pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP").

On May 18, 2017, the Requester submitted a DIDP request seeking disclosure of documentary information relating to ICANN's Board Governance Committee's (the "BGC")

review of the Community Priority Evaluation ("CPE") process (the "DIDP Request"). Specifically, the Requester submitted 13 document requests as follows:

<u>Request No. 1</u>: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,"15 and (b) all communications between the EIU and ICANN regarding the request;

<u>Request No. 3</u>: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

<u>Request No. 4</u>: The identity of the individual or firm ("the evaluator") undertaking the Review:

<u>Request No. 5</u>: The selection process, disclosures, and conflict checks undertaken in relation to the appointment;

Request No. 6: The date of appointment of the evaluator;

<u>Request No. 7</u>: The terms of instructions provided to the evaluator;

<u>Request No. 8</u>: The materials provided to the evaluator by the EIU;

<u>Request No. 9</u>: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;

<u>Request No. 10</u>: The materials submitted by affected parties provided to the evaluator;

<u>Request No. 11</u>: Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

<u>Request No. 12</u>: The most recent estimates provided by the evaluator for the completion of the investigation; and

Request No. 13: All materials provided to ICANN by the evaluator concerning the

Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

Review.²

Subsequently, on June 18, 2017, ICANN responded to the Requester's DIDP Request by denying the Requester's (1) five document requests (Request Nos. 1-3, 8 and 13) in whole, and (2) one document request (Request No. 9) in part. ICANN reasoned that (1) the documents under Request Nos. 1-3, 8 and 13 are not appropriate for disclosure "based on . . . [the] DIDP Defined Conditions of Non-Disclosure;" and (2) the documents under Request No. 9 concerning "the correspondence between the ICANN organization and the CPE provider regarding the evaluations" are not appropriate for disclosure for "the same reasons identified in ICANN's response to the DIDP previous[1y] submitted by dotgay."³

4. Date of action/inaction:

ICANN acted on June 18, 2017 by issuing its response to the DIDP Request.

5. On what date did you become aware of action or that action would not be taken?

The Requester became aware of the action on June 18, 2017, when it received ICANN's response to the DIDP Request.

6. Describe how you believe you are materially affected by the action or inaction:

The Requester is materially affected by ICANN's refusal to disclose certain categories of documents concerning the BGC's review of the CPE process at issue in the DIDP Request.

Exhibit 2, dotgay DIDP Request (May 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf.

Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf; see Exhibit 3, Request No. 20151022-1, ICANN DIDP Response (Oct. 21, 2015), https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf.

By way of background, the Requester filed a community-based generic Top-Level Domain ("gTLD") application for the string ".GAY." However, the CPE report, authored by the Economist Intelligence Unit (the "EIU"), recommended that ICANN reject the Requester's application for the .GAY gTLD. As evident from the Requester's submissions, including an independent expert report by Prof. William Eskridge of Yale Law School, the CPE report is fundamentally erroneous based on (1) interpretive errors created by misreading the explicit criteria laid out in ICANN's Applicant Guidebook and ignoring ICANN's mission and core values; (2) errors of inconsistency derived from the EIU's failure to follow its own guidelines; (3) errors of discrimination, namely the EIU's discriminatory treatment of dotgay's application compared with other applications; and (4) errors of fact, as the EIU made several misstatements of the empirical evidence and demonstrated a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States.⁴

In January 2017, ICANN retained an independent reviewer, FTI Consulting, Inc. ("FTI"), to review the CPE process and "the consistency in which the CPE criteria were applied" by the CPE provider. As part of the review, FTI is collecting information and materials from ICANN and the CPE provider. FTI will submit its findings to ICANN based on this underlying information.

FTI's findings relating to "the consistency in which the CPE criteria were applied" will directly affect the outcome of the Requester's Reconsideration Request 16-3 ("Request 16-3"), which is currently pending before the ICANN Board. This was confirmed by ICANN BGC Chair Chris Disspain's April 26, 2017 letter to the Requester, which stated that FTI's review "will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration

Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf Requests related to CPE." Thus, the Requester filed the DIDP Request seeking various categories of documents concerning the BGC's review of the CPE process. In submitting this DIDP Request, the Requester expected ICANN to "operate in a manner consistent with [its] Bylaws" and "through open and transparent processes." ICANN failed to do so.

Specifically, according to Article 4 of ICANN's Bylaws, "[t]o the extent any information [from third parties] gathered is relevant to any recommendation by the Board Governance Committee . . . [a]ny information collected by ICANN from third parties shall be provided to the Requestor." The Bylaws require that ICANN (1) "operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole;" (2) "employ[] open and transparent policy development mechanisms;" (3) "apply[] documented policies neutrally and objectively, with integrity and fairness;" and (4) "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."

The Bylaws also require that ICANN hold itself to high standards of accountability, transparency, and openness. ¹¹ ICANN's failure to provide complete responses to the Requester's DIDP Request and failure to adhere to its own Bylaws raises additional questions as to the credibility, reliability, and trustworthiness of the New gTLD Program's CPE process and its management by ICANN, especially in the case of the CPE Report and the CPE process for the Requester's .GAY gTLD application (Application ID: 1-1713-23699), which is the subject of Request 16-3. ¹²

⁵ ICANN Bylaws, Art. 1, § 1.2(a).

⁶ *Id.*, Art. 4, § 4.2(o).

⁷ *Id.*, Art. 1, § 1.2(a).

⁸ *Id.*, Art. 3, § 3.1.

⁹ *Id.*, Art. 1, § 1.2(v).

¹⁰ *Id.*, Art. 1, § 1.2(vi).

¹¹ See id., Arts. 1, 3-4.

Exhibit 4, CPE Reconsideration Request 16-3 (Feb. 17, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf.

Moreover, the public interest clearly outweighs any "compelling reasons" for ICANN's refusal to disclose certain categories of documents in the DIDP Request. Indeed, ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.¹³ It is surprising that ICANN maintains that FTI can undertake such a review without providing to ICANN stakeholders and affected parties all the materials that will be used to inform FTI's findings and conclusions.

To prevent serious questions from arising concerning the independence and credibility of the FTI investigation, it is of critical importance that all the material provided to FTI in the course of its review be provided to the Requester and to the public in order to ensure full transparency, openness, and fairness. This includes the items requested by the Requester that were denied by ICANN in its DIDP Response. For similar reasons of transparency and independence, ICANN must disclose not only the existence of selection, disclosure, and conflict check processes (Request No. 2) but also the underlying documents that substantiate ICANN's claims.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

ICANN's action materially affects the global gay community represented by the Requester. Not disclosing these documents has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency, and fairness of the CPE process. Without an effective policy to ensure openness, transparency, and accountability, the very legitimacy and existence of ICANN is at stake, thus creating an unstable and unsecure operation of the identifiers managed by ICANN. Accountability, transparency, and

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¹³ ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("If ICANN denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial."), https://www.icann.org/resources/pages/didp-2012-02-25-en.

openness are professed to be the key components of ICANN's identity. These three-fold virtues are often cited by ICANN Staff and Board in justifying its continued stewardship of the Domain Name System.

A closed and opaque ICANN damages the credibility, accountability, and trustworthiness of ICANN. By denying access to the requested information and documents, ICANN is impeding the efforts of anyone attempting to truly understand the process that the EIU followed in evaluating community applications, both in general and in particular in relation to the parts relevant to the EIU's violation of established processes as set forth in the Requester's BGC presentation and accompanying materials. In turn, this increases the likelihood of resorting to the expensive and time-consuming Independent Review Process ("IRP") and/or legal action to safeguard the interests of the LGBTQIA members of the gay community, which has supported the Requester's community-based application for the .GAY string, in order to hold ICANN accountable and ensure that ICANN functions in a transparent manner as mandated in the ICANN Bylaws.

Further, ICANN's claim that there is no legitimate public interest in correspondence between ICANN and the CPE Provider is no longer tenable in light of the findings of the Dot Registry IRP Panel. The Panel found a close nexus between ICANN staff and the CPE Provider in the preparation of CPE Reports.¹⁵ This is a unique circumstance where the "public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."¹⁶ ICANN has not disclosed any "compelling" reason for confidentiality for the requested items that

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See Exhibit 18, dotgay's Presentation to the Board Governance Committee (May 15, 2016), pp.2-3 https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf.

See Exhibit 6, Dot Registry v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶¶ 93-101, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

¹⁶ ICANN's Documentary Information Disclosure Policy (last visited June 29, 2017) ("Information that falls within any of the conditions set forth above 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."), https://www.icann.org/resources/pages/didp-2012-02-25-en.

were denied in its DIDP Response, especially if these items will be used by FTI in its investigation. In fact, rejecting full disclosure of the items requested will undermine both the integrity of the FTI report and the scope of the FTI investigation that the ICANN Board and the BGC intends to rely on in determining certain reconsideration requests relating to the CPE process, including Request 16-3. In conclusion, failure to disclose the items requested does not serve the public interest and compromises the independence, transparency, and credibility of the FTI investigation.

8. Detail of Staff/Board Action/Inaction – Required Information

8.1 Background

The Requester elected to undergo the CPE process in early 2014 and discovered that it did not prevail as a community applicant later that year – having only received 10 points.¹⁷ In response, the Requester, supported by multiple community organizations, filed a Reconsideration Request with the BGC. The BGC granted the request, determining that the EIU did not follow procedure during the CPE process. As a result, the Requester's application was sent to be reevaluated by the EIU. However, the second CPE process produced the exact same results based on the same arguments.¹⁸

When this issue was brought before the BGC via another Reconsideration Request, though, the BGC excused the discriminatory conduct and the EIU's policy and process violations. It refused to reconsider the CPE a second time. The Requester therefore filed a third Reconsideration Request, Request 16-3, on February 17, 2016 in response to the BGC's non-response on many of

Exhibit 7, Community Priority Evaluation Report for .GAY (Oct. 6, 2014), p. 6 https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf.

See Exhibit 8, Community Priority Evaluation Report for .GAY (Oct. 8, 2015), https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf_

the issues highlighted in the second Reconsideration Request. On 26 June 2016, the BGC denied the request a third time and sent it to the ICANN Board to approve.¹⁹

Almost a year later, and after numerous letters to ICANN,²⁰ on April 26, 2017, ICANN finally updated the Requester on the status of Request 16-3. The Requester received a letter from ICANN BGC Chair Chris Disspain indicating that Request 16-3 was "on hold" and that:

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. 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).²¹

8.2 The DIDP Request

In response to this new information regarding the delay, on May 18, 2017, Arif Ali, on behalf of the Requester, filed the DIDP Request, in relation to the .GAY CPE.²² The reason for

See Exhibit 9, Recommendation of the Board Governance Committee (BGC) Reconsideration Request 16-3 (June 26, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf.

See Exhibit 10, Letter from Dechert LLP on behalf of dotgay LLC to ICANN President (Aug. 25, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf; Exhibit 11, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Sep. 13, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf; Exhibit 12, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board, (Oct. 17, 2016), https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf; Exhibit 5, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (Nov. 15, 2016), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-15nov16-en.pdf; Exhibit 13, Letter from Dechert LLP on behalf of dotgay LLC to the ICANN Board (March 12, 2017), https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf.

See Exhibit 14, Update on the Review of the New gTLD Community Priority Evaluation Process (April 26, 2017), https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf.

Exhibit 15, dotgay DIDP Request (May 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf.

this request is twofold. *First*, the Requester sought to "ensure that information contained in documents concerning ICANN's operational activities, within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."²³ *Second*, the Requester, like other gTLD applications, sought *any* information regarding "how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc."²⁴ The Requester sought this information because "both the BGC Letter and Mr. LeVee's letter fail[ed] to provide *any* meaningful information besides that there is a review underway and that [Request 16-3] is on hold."²⁵

As a result of this dearth of information from ICANN, the Requester made several separate sub-requests as part of its DIDP Request. It submitted 13 document requests to ICANN, which are identified in **Question 3** above. The Requester concluded in its DIDP Request that "there are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review."²⁶

Prior to issuing its response to the DIDP Request, ICANN issued an update on the CPE Process Review on June 2, 2017 that provided information relevant to the DIDP Request.²⁷ ICANN explained that:

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Id.

²⁴ *Id*.

²⁵ *Id*.

²⁶ Id.

Exhibit 16, Community Priority Evaluation Process Review Update (June 2, 2017), https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf.

The scope of the review consists of: (1) review of the process by which the ICANN organization 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 provider to the extent such reference materials exist for the evaluations which are the subject of pending Requests for Reconsideration.

The review is being conducted in two parallel tracks by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.²⁸

No other information was provided to the Requester regarding the CPE Review Process at issue in its Request until ICANN issued its formal response to the DIDP Request on June 18, 2017.²⁹

In response to ICANN's update on the CPE Review Process, and the lack of any additional information, the Requester sent ICANN a joint letter with DotMusic on June 10, 2017. The letter stated, *inter alia*, that:³⁰

ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection." This is troubling for several reasons.

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²⁸ Id

Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

Exhibit 17, Letter from Arif Ali to Jeffrey LeVee and Chris Disspain (June 10, 2017), https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf.

First, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply no reason why ICANN has failed to disclose this material and relevant information to the CPE applicants.

Second, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation 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," and that (ii) "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."

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

- 1. Confirm that FTI will review all of the documents submitted by DotMusic and DotGay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
- 2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
- 3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
- 4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and DotGay, immediately after FTI completes its review.

ICANN has not responded to the Joint Letter of June 10, 2017.

8.3 ICANN's Response to the Request

However, on June 18, 2017, ICANN responded to the DIDP Request. ICANN issued a

response that provided the same information that had already been given to the Requester regarding the BGC's decision to review the CPE Process and to hire FTI in order to conduct an independent review.³¹ ICANN further denied Requests Nos. 1-3, 8, and 13 in whole and Request No. 9 in part. ICANN's responses to these requests are as follows:

Request No. 1: All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"

As stated in ICANN's Response to DIDP Request 20170505-1 that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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.
- 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.
- 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.

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Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

• Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.³²

Request No. 2: All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,"15 and (b) all communications between the EIU and ICANN regarding the request;

ICANN provided the same response as for Item 1.33

<u>Request No. 3</u>: All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;

ICANN provided the same response as for Item 1.34

<u>Request No. 8</u>: The materials provided to the evaluator by the EIU; *ICANN provided the same response as for Item 1.*³⁵

<u>Request No. 9</u>: The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;

While ICANN provided a list of materials that it provided FTI, but also determined that the internal "documents are not appropriate for disclosure for the same reasons identified in ICANN's response to the DIDP previous submitted by dotgay."³⁶

Request No. 13: All materials provided to ICANN by the evaluator concerning the Review.³⁷

ICANN provided the same response as for Item 1.38

³² *Id*.

³³ *Id*.

³⁴ *Id*.

³⁵ *Id*.

³⁶ Id

Exhibit 2, dotgay DIDP Request (May 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf.

Exhibit 1, Request No. 20170518-1, ICANN DIDP Response (June 18, 2017), https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf.

ICANN, in providing such responses to the DIDP Request, has thus failed to disclose the relevant documents in accordance with its Bylaws, Resolutions, and own DIDP Policy as described in **Question 6** above.

9. What are you asking ICANN to do now?

The Requester asks ICANN to disclose the documents requested under Request Nos. 1-3, 8, 9, and 13.

10. Please state specifically 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.

As stated above, the Requester is a community applicant for .GAY and the organization that issued the DIDP Request to ICANN. It is materially affected by ICANN's decision to deny its Request for documents, especially since its gTLD application is at issue in the underling Request. And, further, the community it represents – the gay community – is materially affected by ICANN's failure to disclose the requested documents.

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

This is not applicable.

12. Do you have any documents you want to provide to ICANN?

Yes, these documents are attached as Exhibits.

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.

June 30, 2017

Arif Hyder Ali Date

Exhibit 20

RECOMMENDATION OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECONSIDERATION REQUEST 17-3 23 AUGUST 2017

The Requestor, dotgay LLC, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review). Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN organization violated its Core Values and policies established in the Bylaws concerning non-discriminatory treatment and transparency.

I. Brief Summary.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with three other .GAY applications. The Requestor was invited to, and did, participate in CPE, but did not prevail.

On 22 October 2015, the Requestor sought reconsideration of the CPE report (Request 15-21). The BGC denied Request 15-21. On 17 February 2016, the Requestor sought reconsideration of the BGC's determination on Request 15-21 (Request 16-3).³

On 17 September 2016, the ICANN Board directed the President and CEO, or his designees, to undertake the CPE Process Review to review the process by which ICANN organization interacted with the CPE provider. On 18 October 2016, the Board Governance Committee (BGC) decided that the CPE Process Review should also include: (1) evaluation of the research process undertaken by the CPE panels to form their decisions; and (2) compilation

² Request 17-3, § 10, at Pg. 16.

¹ Request 17-3, § 3, at Pg. 1.

³ Request 16-3, https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf.

of the reference materials relied upon by the CPE provider for the evaluations which are the subject of pending Requests for Reconsideration concerning CPE.⁴ The BGC also placed the eight pending reconsideration requests relating to CPE on hold, including Request 16-3, pending completion of the CPE Process Review.

On 18 May 2017, the Requestor submitted the DIDP Request. The Requestor sought 13 categories of documents and information relating to the CPE Process Review.⁵ On 18 June 2017, ICANN organization responded to the DIDP Request (DIDP Response) and explained that, with the exception of certain documents that were subject to DIDP Defined Conditions for Nondisclosure (Nondisclosure Conditions), all the remaining documents responsive to eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response further explained that the documents responsive to Items No. 1-3, 8, and 13 were subject to certain Nondisclosure Conditions and were not appropriate for disclosure. Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and determined that there were no circumstances

⁴ Prior to 22 July 2017, the Board Governance Committee was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4. Pursuant to the amended Bylaws effective 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is designated to review and consider Reconsideration Requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at https://www.icann.org/resources/pages/governance/bylaws-en/#article4.

⁵ Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited in May 2017. *Compare* DIDP Request No. 20170505-1, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf, with the DIDP Request. DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging both DIDP Requests. *See* Reconsideration Request 17-2; Request 17-3. Reconsideration Request 17-2 raises many of the same arguments that the Requestor raises in Request 17-3. *Compare* Reconsideration Request 17-2, with Request 17-3.

for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.

The Requestor thereafter filed the instant Reconsideration Request 17-3 (Request 17-3), which challenges certain portions of the DIDP Response. The Requestor claims that ICANN organization violated ICANN's Core Values and policies established in the DIDP and Bylaws concerning non-discriminatory treatment and transparency by: (1) determining not to produce certain documents responsive to Item No. 9; and (2) determining not to produce any documents responsive to Items No. 1-3, 8, and 13.6

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration, and the Ombudsman recused himself.⁷

The BAMC has considered Request 17-3 and all relevant materials and recommends that the Board deny Request 17-3 because ICANN organization adhered to established policies and procedures in its response to the DIDP Request.

II. Facts.

A. Background Facts.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 February 2014, the Requestor's Application was invited to participate in CPE.⁸ The Requestor elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation.⁹

⁶ Request 17-3, § 3, at Pg. 3.

⁷ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); see also Ombudsman action Regarding Request 17-3, Pg. 1.

⁸ 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

⁹ See Id.

On 6 October 2014, the CPE panel issued a "First CPE report," concluding that the Application did not qualify for community priority.¹⁰ The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE report.¹¹ The BGC granted reconsideration on Request 14-44 on the grounds that the CPE provider had inadvertently failed to verify 54 letters of support for the Application.¹² At the BGC's direction, the CPE provider conducted a "Second CPE" of the Application. The Application did not prevail in the Second CPE.¹³

On 22 October 2015, the Requestor sought reconsideration of the Second CPE report (Request 15-21).¹⁴ On the same day, the Requestor filed a DIDP Request seeking the disclosure of 24 categories of documents relating to the Second CPE determination (2015 DIDP Request).¹⁵ The 2015 DIDP Request sought, among other things, "policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered 'policy' under ICANN by-laws." ICANN organization responded to the 2015 DIDP Request on 21 November 2015, providing links to all the responsive, publicly available documents, furnishing an email not previously publicly

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¹⁰ See CPE Report at 1.

¹¹ BGC Determination on Request 15-21, at Pg. 1, https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf.

 $^{^{12}}$ *Id*.

 $^{^{13}}$ *Id*.

¹⁴ *Id*.

¹⁵ DIDP Request No. 20151022-1, at Pg. 2-5, https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf.

¹⁶ *Id.* at Pg. 2. The Requestor made an identical request in a 2014 DIDP Request. *See* DIDP Request No. 20141022-2 (2014 DIDP Request), at Pg. 2, https://www.icann.org/en/system/files/files/lieben-request-22oct14-en.pdf. ICANN organization responded that to the extent it had documents responsive to that request, the documents were subject to certain identified Nondisclosure Conditions. Response to 2014 DIDP Request, https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf.

available, explaining that it did not possess documents responsive to several of the requests, and explaining that certain requested documents were not appropriate for disclosure pursuant to the Nondisclosure Conditions.¹⁷ On 4 December 2015, the Requestor revised Request 15-21 to challenge the response to the 2015 DIDP Request in addition to the Second CPE report.¹⁸

On 1 February 2016, the BGC denied Request 15-21.¹⁹ On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.²⁰ On 26 June 2016, the BGC recommended that the Board deny Request 16-3.²¹ The Board was scheduled to consider Request 16-3 on 17 September 2016. On 13 September 2016, the Requestor submitted an independent expert report for the Board's consideration as part of its evaluation of Request 16-3.²² Accordingly, the Board deferred consideration of Request 16-3 to provide time for review of the report.²³

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Specifically, the Board has discussed certain concerns that some applicants have raised with the CPE process, including concerns raised by

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 $^{^{17} \} Response\ to\ DIDP\ Request\ No.\ 20151022-1, https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf,$

¹⁸ Amended Request 15-21, https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf.

¹⁹ BGC Determination on Request 15-21, at Pg. 1

²⁰ Request 16-3, https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf.

²¹ BGC Recommendation on Request 16-3, https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf.

Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf

²³ Minutes of ICANN Board, 15 September 2016, https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.g.

the Requestor on 15 May 2016 during its presentation to the BGC regarding Request 16-3, as well as issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²⁴ As a result, on 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake the CPE Process Review, regarding the process by which ICANN organization interacted with the CPE provider.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to 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 their evaluations of the community applications.²⁵ The BGC placed on hold the following reconsideration requests pending completion of the CPE Process Review: 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).²⁶

On 18 May 2017, the Requestor submitted the DIDP Request seeking the disclosure of the following categories of documentary information relating to the CPE Process Review:²⁷

- 1. All documents relating to ICANN's request to "the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
- 2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their

²⁴ Dot Registry IRP Final Declaration, https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

²⁵ 18 October 2016 Minutes of BGC Meeting, at Item 2, https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en; 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 1,

https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf. ²⁶ 26 April 2017 letter from Chris Disspain, Chair, ICANN BGC, at Pg. 2,

https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf. ²⁷ DIDP Request at Pg. 4, https://www.icann.org/en/system/files/files/didp-20170518-1-ali-request-18may17-en.pdf.

- determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request;
- 3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
- 4. The identity of the individual or firm undertaking the CPE Process Review;
- 5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
- 6. The date of appointment of the evaluator;
- 7. The terms of instructions provided to the evaluator;
- 8. The materials provided to the evaluator by the EIU;
- 9. The materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board;
- 10. The materials submitted by affected parties provided to the evaluator;
- 11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
- 12. The most recent estimates provided by the evaluator for the completion of the investigation; and
- 13. All materials provided to ICANN by the evaluator concerning the CPE Process Review.²⁸

Items No. 4-13 of the DIDP Request sought the same documents, in verbatim requests, as those requested in a DIDP Request filed by DotMusic Limited on 5 May 2017.²⁹ DotMusic Limited and the Requestor are represented by the same law firm, and that firm filed both DIDP Requests and filed Reconsideration Requests challenging the DIDP Requests.³⁰

²⁸ *Id*. at Pg. 5-6.

²⁹ Compare DIDP Request No. 20170505-1, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-request-05may17-en.pdf, with the DIDP Request.

³⁰ See Reconsideration Request 17-2, https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf; Request 17-3.

On 2 June 2017, ICANN organization published a status update on the CPE Process Review (Status Update).³¹ The Status Update noted, among other things, that FTI Consulting Inc.'s Global Risk and Investigations Practice and Technology Practice (FTI) is conducting the CPE Process Review.³² The Status Update explained that the CPE Process Review is occurring on two parallel tracks--the first track focuses on gathering information and materials from ICANN organization, including interviews and document collection, which was completed in March 2017; and the second track focuses on gathering information and materials from the CPE provider, and is ongoing.³³

On 18 June 2017, ICANN organization responded to the DIDP Request.³⁴ As discussed below, the DIDP Response explained that, with the exception of certain documents that were subject to Nondisclosure Conditions, all the remaining documents responsive to eight (Items No. 4-7 and 9-12) of the 13 categories have already been published. The DIDP Response identified and provided hyperlinks to those publicly available responsive documents.³⁵ The DIDP Response further explained that all the documents responsive to Items No. 1-3, 8, and 13, and certain documents responsive to Item No. 9, were subject to Nondisclosure Conditions and were not appropriate for disclosure.³⁶ Additionally, the DIDP Response explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure, and

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³¹ Status Update, https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf.

 $^{^{32}}$ *Id*.

³³ *Id*

³⁴ DIDP Response, https://www.icann.org/en/system/files/files/didp-20170518-1-ali-response-18jun17-en.pdf ³⁵ See generally id.

³⁶ *Id*. at Pg. 3-7.

determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.³⁷

On 30 June 2017, the Requestor filed Request 17-3, seeking reconsideration of ICANN organization's determination not to produce certain documents responsive to Item No. 9 and all documents responsive to Items. No. 1-3, 8, and 13 because they were subject to Nondisclosure Conditions.³⁸ The Requestor asserts that withholding the materials "has negatively impacted the timely, predictable, and fair resolution of the .GAY gTLD, while raising serious questions about the consistency, transparency[,] and fairness of the CPE process." The Requestor also argues that denial of the DIDP is inappropriate because it "increases the likelihood of [community members] resorting to" IRP, which is "expensive and time-consuming."³⁹

On 19 July 2017, the BGC concluded that Request 17-3 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.⁴⁰

On 19 July 2017, ICANN organization transmitted Request 17-3 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. The Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.⁴¹ Accordingly, the BAMC reviews Request 17-3 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

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³⁷ DIDP Response at Pg. 7.

³⁸ The BAMC notes that the Requestor does not seek reconsideration of the response to Items No. 5, 7, or 11, although DotMusic, represented by the same counsel as the Requestor here, challenged ICANN organization's response to identical requests (to which ICANN organization provided an identical response to the one provided to the Requestor here) in Request 17-2. *See* Request 17-2, § 3, Pg. 9-10 (incorrectly marked 8-9).

³⁹ Request 17-3, § 6, at Pg. 6-8.

⁴⁰ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii). As noted in footnote 4, ICANN's Bylaws were amended while Request 17-3 was pending. The BGC was tasked with reviewing Request 17-3 to determine if it was sufficiently stated, and it did so on 7 July 2017. Since that time, the BAMC is responsible for reviewing reconsideration requests, including Request 17-3.

⁴¹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-3, Pg. 1, https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-response-ombudsman-19jul17-en.pdf.

B. Relief Requested

The Requestor asks the BAMC to "disclose the documents requested under Request Nos. 1-3, 8, 9, and 13."⁴²

III. Issue.

The issues are as follows:

- Whether ICANN organization complied with established ICANN policies in responding to the DIDP Request.
- 2. Whether ICANN organization complied with its Core Values, Mission, and Commitments.⁴³

The BAMC notes that the Requestor indicated (by checking the corresponding box on the Reconsideration Request Form) that Request 17-3 seeks reconsideration of staff and Board action or inaction. 44 The only subsequent discussion of Board action is the Requestor's passing reference to its view that the BGC was required to provide materials it requested from CPE panels for use in its evaluation of pending reconsideration requests to the Requestor. 45 The Requestor makes no further arguments concerning the BGC's actions or inactions, and does not ask ICANN organization to take any action concerning this issue. Rather, the Requestor focuses on ICANN organization's response to the Requestor's DIDP request. 46 Accordingly, the BAMC understands Request 17-3 to seek reconsideration of ICANN organization's response to the Requestor's DIDP Request, and *not* reconsideration of BGC action or inaction. 47

⁴² Request 17-3, § 9, at Pg. 15.

⁴³ Request 17-3, § 3, at Pg. 3; *id*, §§ 6-7, Pg. 5-8.

⁴⁴ Request 17-3, § 2, at Pg. 1.

⁴⁵ Request 17-3, § 6, at Pg. 5.

⁴⁶ Request 17-3, §§ 8-9, at Pg. 9-15.

⁴⁷ Further, we note that the BAMC has not completed its consideration of Request 16-3, or the other reconsideration requests for which the CPE materials have been requested. Accordingly, the question of whether the BAMC has satisfied its obligations under the Bylaws in its review of those reconsideration requests is premature.

IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.

A. 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.⁴⁸

Pursuant to Article 4, Section 4.2(k) of the Bylaws that were in effect when Request 17-3 was filed, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁴⁹ That substantive provision did not change when ICANN's Bylaws regarding reconsideration were amended effective 22 July 2017, although the determination as to whether a reconsideration request is sufficiently stated now falls to the BAMC. Pursuant to the current 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.⁵⁰ Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC

⁴⁸ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

⁴⁹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1).

⁵⁰ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(1)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁵¹

On 19 July 2017, the BGC determined that Request 17-3 is sufficiently stated and sent Request 17-3 to the Ombudsman for review and consideration.⁵² The Ombudsman thereafter recused himself from this matter.⁵³ Accordingly, the BAMC has reviewed Request 17-3 and issues this Recommendation.

B. Documentary Information Disclosure Policy

ICANN organization considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN organization's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN organization's operational activities. In that regard, ICANN organization publishes many categories of documents on its website as a matter of due course. In addition to ICANN organization's practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN organization make public documentary information "concerning ICANN's operational activities, and within ICANN's possession, custody, or control," that is not already publicly available. The DIDP is intended to ensure that documentary information contained in documents concerning ICANN organization's operational activities, and within ICANN organization's

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⁵¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r). ⁵² Ombudsman Action Regarding Request 17-3, Pg. 1-2.

⁵³ Ombudsman Action Regarding Request 17-3, Pg. 1.

⁵⁴ See ICANN Documentary Information Disclosure Policy, https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁵⁵ *Id*.

possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality. The DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for unfettered information requests. As such, requests for information are not appropriate DIDP requests. Moreover, ICANN organization is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.⁵⁶

In responding to a request for documents submitted pursuant to the DIDP, ICANN organization adheres to the "Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests" (DIDP Response Process).⁵⁷ 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]."⁵⁸

Pursuant to the DIDP, ICANN organization reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others:

- 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;
- ii. 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

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⁵⁶ *Id*.

⁵⁷ See DIDP Response Process, https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.

⁵⁸ *Id.*; *see also*, "Nondisclosure Conditions," *available at* https://www.icann.org/resources/pages/didp-2012-02-25-en.

ICANN cooperates by inhibiting the candid exchange of ideas and communications;

- iii. Confidential business information and/or internal policies and procedures; and
- iv. 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.⁵⁹

Notwithstanding the above, information that falls within any of the Nondisclosure Conditions *may* still be made public if ICANN organization determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁶⁰

V. Analysis and Rationale.

- A. ICANN Organization Adhered To Established Policies And Procedures In Responding To The DIDP Request.
 - 1. The DIDP Response Complies With Applicable Policies And Procedures.

The DIDP Response identified documentary information responsive to nine of the 13 items. For Items No. 4 through 7 and 9 through 12, ICANN organization determined that most of the responsive documentary information had already been published on ICANN's website. Although the DIDP does not require ICANN organization to respond to requests seeking information that is already publicly available, ICANN organization identified and provided the hyperlinks to 18 publicly available categories of documents that contain information responsive to Items No. 4 through 7 and 9-12.

⁵⁹ DIDP.

⁶⁰ *Id*.

⁶¹ See generally DIDP Response.

⁶² DIDP https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁶³ DIDP Response at Pg. 4-7.

The DIDP Response also explained that some of the documents responsive to Item No. 9, as well as all documents responsive to Items No. 1-3, 8, and 13, were subject to certain identified Nondisclosure Conditions. The DIDP Response further explained that ICANN organization evaluated the documents subject to the Nondisclosure Conditions, as required, and determined that there were no circumstances for which the public interest in disclosing the information outweighed the potential harm of disclosing the documents.⁶⁴

The Requestor claims that ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 violated established policies and procedures. However, the Requestor provides nothing to demonstrate that ICANN organization violated any established policy or procedure. As demonstrated below, ICANN organization's responses to Items No. 1, 2, 3, 8, 9, and 13 adhered to established policies and procedures.

The DIDP Response Process provides that "[u]pon receipt of a DIDP Request, ICANN staff performs a review of the Request and identifies what documentary information is requested . . . , interviews . . . the relevant staff member(s) and performs a thorough search for documents responsive to the DIDP Request." Once the documents collected are reviewed for responsiveness, a review is conducted to determine if the documents identified as responsive to the Request are subject to any of the Nondisclosure Conditions. If so, a further review is conducted to determine whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.

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⁶⁴ DIDP Response at Pg. 7.

⁶⁵ Request 17-3, § 3, Pg. 3.

⁶⁶ DIDP Response Process, https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.

⁶⁷ *Id*.

⁶⁸ *Id*.

a. ICANN organization's response to Items No. 1, 2, 3, 8, and 13 adhered to established policies and procedures.

Items No. 1, 2, 3, 8, and 13 sought the disclosure of documents relating to the CPE Process Review, including:

- [D]ocuments relating to ICANN's request to "the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports" (Item. No. 1);
- All documents from the EIU to ICANN, including but not limited to: (a)
 ICANN's request for "the materials and research relied upon by the CPE panels in
 making their determinations with respect to certain pending CPE reports," and (b)
 all communications between the EIU and ICANN regarding the request (Item No.
 2);
- All documents relating to requests by ICANN staff or Board Members to access
 the research provided by the EIU or the ongoing evaluation or any comments on
 the research or evaluation (Item No. 3);
- The materials provided to the evaluator by [the CPE provider] (Item No. 8)
- The materials provided to ICANN by the evaluator concerning the review (Item No. 13) ⁶⁹

With respect to these Items, ICANN organization explained that documents responsive to the requests "are not appropriate for disclosure" based on certain Nondisclosure Conditions.⁷⁰ Consistent with the DIDP Response Process, ICANN organization searched for and identified documents responsive to Items No. 1, 2, 3, 8, and 13, then reviewed those materials and determined that they were subject to certain Nondisclosure Conditions discussed below.⁷¹ Notwithstanding those Nondisclosure Conditions, ICANN organization considered whether the public interest in disclosing the information outweighed the harm that may be caused by the

⁶⁹ Request 17-3, § 3, at Pg. 9 (marked 8).

⁷⁰ DIDP Response at Pg. 4.

⁷¹ DIDP Response Process.

disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm.⁷²

b. ICANN organization's response to Item No. 9 adhered to established policies and procedures.

Item No. 9 sought the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel, or ICANN's Board or any subcommittee of the Board.⁷³ In response to Item No. 9, the DIDP Response identified 16 categories of documents that ICANN organization provided to the evaluator. All but one of those categories had already been published. The DIDP Response provided the hyperlinks to the publicly available documents. The DIDP Response also disclosed that ICANN organization provided the evaluator with correspondence between ICANN organization and the CPE provider regarding the evaluations; however, said correspondence were subject to certain Nondisclosure Conditions and were not appropriate for the same reasons identified in ICANN organization's response to the 2015 DIDP Request, which sought the same documentary information.⁷⁴ The BGC previously denied the Requestor's Request 16-7, which challenged ICANN organization's response to the 2015 DIDP Request.⁷⁵

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⁷² DIDP Response at Pg. 7.

⁷³ DIDP Request at Pg. 5.

⁷⁴ DIDP Response at Pg. 5-6, *citing* Response to 2015 DIDP Request. The 2015 DIDP Request in turn cites the Response to the Requestor's 2014 DIDP Request. *See* Response to 2015 DIDP Request, at Pg. 5; *see also* Response to 2014 DIDP Request, at Pg. 4-5.

As noted in footnote 5, ICANN organization previously provided the same response to DotMusic Limited's DIDP request for the same documents. *See* DIDP Response to Request No. 20170505-1, https://www.icann.org/en/system/files/files/didp-20170505-1-ali-response-04jun17-en.pdf.

⁷⁵ BGC Determination on Request 15-21, at Pg. 29-32 (reviewing challenge to the 2015 DIDP Request).

2. ICANN Organization Adhered To Established Policy And Procedure In Finding Certain Requested Documents Subject To DIDP Nondisclosure Conditions.

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information. Information subject to these Nondisclosure Conditions are not appropriate for disclosure unless ICANN organization determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN organization must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply. In conformance with the DIDP Response Process, ICANN organization undertook such an analysis with respect to each Item, and articulated its conclusions in the DIDP Response.

In response to Item No. 9, ICANN organization determined that the internal correspondence between ICANN organization and the CPE provider regarding the evaluations were not appropriate for disclosure because, as ICANN organization previously explained in response to the 2014 and 2015 DIDP Requests, they comprised:

- 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;
- 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

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⁷⁶ DIDP.

⁷⁷ Id.

ICANN cooperates by inhibiting the candid exchange of ideas and communications;

- 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;
- Confidential business information and/or internal policies and procedures; or
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.⁷⁸

It is easy to see why these Nondisclosure Conditions apply to the materials responsive to Item No. 9. Those items request correspondence between ICANN organization and the CPE Provider. The Requestor previously challenged ICANN organization's determination that the correspondence between ICANN and the CPE provider were not appropriate for disclosure for the same reasons in Request 15-21 without success. The BAMC recommends that Request 17-3 be similarly denied. Equally important, the DIDP specifically carves out documents containing proprietary information and confidential information as exempt from disclosure pursuant to the Nondisclosure Conditions because the potential harm of disclosing that private information outweighs any potential benefit of disclosure.

Items No. 1, 2, 3, 8, and 13 seek materials shared between FTI, EIU, and ICANN organization concerning the CPE Process Review. In response to Items No. 1, 2, 3, 8, and 13, ICANN organization noted that it was in possession of requests for documents and information prepared by the evaluator to ICANN organization and the CPE provider, but that these documents were not appropriate for disclosure because they comprised:

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⁷⁸ DIDP Response at Pg. 6, citing Response to 2015 DIDP Request at Pg. 6, https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf.

⁷⁹ DIDP Request at Pg. 5.

⁸⁰ BGC Determination on Request 15-21, at Pg. 29-32, https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf.

- 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;
- 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;
- 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; and
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.⁸¹

These materials certainly comprise information that may "compromise the integrity of" ICANN organization's and FTI's "deliberative and decision-making process" with respect to the CPE Process Review.

The Requestor argues that the determinations as to the applicability of the specified Nondisclosure Conditions warrant reconsideration because "ICANN failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy." The Requestor's arguments fail because ICANN organization *did* identify compelling reasons in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling

⁸¹ DIDP Response at Pg. 4; *see also* ICANN Defined Conditions for Nondisclosure. https://www.icann.org/resources/pages/didp-2012-02-25-en.

⁸² Request 17-3, § 6, at Pg. 6.

reasons for not disclosing the materials.⁸³ There is no policy or procedure requiring that ICANN organization to provide *additional* justification for nondisclosure.

3. ICANN Organization Adhered To Established Policy And Procedure In Finding That The Harm In Disclosing The Requested Documents That Are Subject To Nondisclosure Conditions Outweighs The Public's Interest In Disclosing The Information.

The DIDP states that documents subject to 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." In accordance with the DIDP Response Process, ICANN organization conducted a review of the responsive documents that fell within the Nondisclosure Conditions and determined that the potential harm outweighed the public interest in the disclosure of those documents.⁸⁵

B. The Requestor's Unsupported References to ICANN Commitments and Core Values Do Not Support Reconsideration of the DIDP Response.

The Requestor argues that ICANN violated the following Commitments and Core Values in the DIDP Response:⁸⁶

- Operating in a manner consistent with the [] Bylaws for the benefit of the Internet community as a whole;⁸⁷
- Employing open and transparent policy development mechanisms;⁸⁸
- Applying documented policies neutrally and objectively, with integrity and fairness;⁸⁹

⁸³ DIDP Response at Pg. 4-6; 2016 DIDP Response at Pg. 4-7.

⁸⁴ See id.

⁸⁵ DIDP Response at Pg. 6; 2016 DIDP Response at Pg. 2.

⁸⁶ Request 17-3, § 6, at 5).

⁸⁷ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a).

⁸⁸ The Requestor cites ICANN Bylaws, 1 October 2016, Art. 3, Section 3.1 in support; that Bylaw states that ICANN "shall operate to the maximum extent feasible in an open and transparent manner . . . including implementing procedures to . . . "encourage fact-based policy development work."

⁸⁹ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(v).

• Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.⁹⁰

However, the Requestor provides no explanation for how these Commitments and Core Values relate to the DIDP Response at issue in Request 17-3 or how ICANN organization has violated these Commitments and Core Values.⁹¹ The Requestor has not established grounds for reconsideration through its list of Commitments and Core Values.

VI. Recommendation

The BAMC has considered the merits of Request 17-3, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) in its response to the DIDP Request. Accordingly, the BAMC recommends that the Board deny Request 17-3.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. Request 17-3 was submitted on 30 June 2017. To satisfy the thirty-day deadline, the BAMC would have to have acted by 30 July 2017. Due to scheduling, the first opportunity that the BAMC has to consider Request 17-3 is 23 August 2017, which is within the requisite 90 days of receiving Request 17-3.

⁹⁰ ICANN Bylaws, 1 October 2016, Art. 1, Section 1.2(a)(vi).

⁹¹ See generally Request 17-3, § 10, Pg. 13-14.

⁹² ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(q).

Exhibit 21

ICANN (Internet Corporation for Assigned Names and Numbers) Documentary Information Disclosure Policy

NOTE: With the exception of personal email addresses, phone numbers and mailing addresses, DIDP Requests are otherwise posted in full on ICANN (Internet Corporation for Assigned Names and Numbers)¹s website, unless there are exceptional circumstances requiring further redaction.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN (Internet Corporation for Assigned Names and Numbers)'s operational activities, and within ICANN (Internet Corporation for Assigned Names and Numbers)'s possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.

A principal element of ICANN (Internet Corporation for Assigned Names and Numbers)'s approach to transparency and information disclosure is the identification of a comprehensive set of materials that ICANN (Internet Corporation for Assigned Names and Numbers) makes available on its website as a matter of course.

Specifically, ICANN (Internet Corporation for Assigned Names and Numbers) has:

- Identified many of the categories of documents that are already made public as a matter of due course
- Developed a time frame for responding to requests for information not already publicly available
- Identified specific conditions for nondisclosure of information
- Described the mechanism under which requestors may appeal a denial of disclosure

Public Documents

ICANN (Internet Corporation for Assigned Names and Numbers) posts on its website at www.icann.org, numerous categories of documents in due course. A list of those categories follows:

- Annual Reports http://www.icann.org/en/about/annual-report
 (/en/about/annual-report)
- Articles of Incorporation http://www.icann.org/en/about/governance/articles
 (/en/about/governance/articles)

- Board Meeting Transcripts, Minutes and Resolutions –
 http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings)
- Budget http://www.icann.org/en/about/financials (/en/about/financials)
- Bylaws (current) http://www.icann.org/en/about/governance/bylaws
 (/en/about/governance/bylaws)
- Bylaws (archives) http://www.icann.org/en/about/governance/bylaws/archive
 (/en/about/governance/bylaws/archive)
- Correspondence http://www.icann.org/correspondence/ (/correspondence/)
- Financial Information http://www.icann.org/en/about/financials (/en/about/financials)
- Litigation documents http://www.icann.org/en/news/litigation
 (/en/news/litigation)
- Major agreements http://www.icann.org/en/about/agreements
 (/en/about/agreements)
- Monthly Registry reports http://www.icann.org/en/resources/registries/reports
 (/en/resources/registries/reports)
- Operating Plan http://www.icann.org/en/about/planning (/en/about/planning)
- Policy documents http://www.icann.org/en/general/policy.html
 (/en/general/policy.html)
- Speeches, Presentations & Publications http://www.icann.org/presentations
 (/presentations)
- Strategic Plan http://www.icann.org/en/about/planning (/en/about/planning)
- Material information relating to the Address Supporting Organization
 (Supporting Organization) (ASO (Address Supporting Organization)) –
 http://aso.icann.org/docs (http://aso.icann.org/docs/) including ASO (Address Supporting Organization) policy documents, Regional Internet Registry (RIR (Regional Internet Registry)) policy documents, guidelines and procedures, meeting agendas and minutes, presentations, routing statistics, and information regarding the RIRs
- Material information relating to the Generic Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) –
 http://gnso.icann.org (http://gnso.icann.org) including correspondence and presentations, council resolutions, requests for comments, draft documents, policies, reference documents (see http://gnso.icann.org/reference-documents.htm (http://gnso.icann.org/reference-documents.htm)), and council

- administration documents (see http://gnso.icann.org/council/docs.shtml).
- Material information relating to the country code Names <u>Supporting</u>
 Organization (Supporting Organization) (ccNSO (Country Code Names
 Supporting Organization)) http://ccnso.icann.org (http://ccnso.icann.org) –
 including meeting agendas, minutes, reports, and presentations
- Material information relating to the At Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) – http://atlarge.icann.org (http://atlarge.icann.org) – including correspondence, statements, and meeting minutes
- Material information relating to the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) –
 http://gac.icann.org/web/index.shtml (http://gac.icann.org/web/index.shtml) –
 including operating principles, gTLD (generic Top Level Domain) principles,
 ccTLD (Country Code Top Level Domain) principles, principles regarding gTLD
 (generic Top Level Domain) Whois issues, communiqués, and meeting
 transcripts, and agendas
- Material information relating to the Root Server Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) –
 http://www.icann.org/en/groups/rssac (/en/groups/rssac) including meeting minutes and information surrounding ongoing projects
- Material information relating to the Security (Security Security, Stability and Resiliency (SSR))and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) – http://www.icann.org/en/groups/ssac (/en/groups/ssac) – including its charter, various presentations, work plans, reports, and advisories

Responding to Information Requests

If a member of the public requests information not already publicly available, ICANN (Internet Corporation for Assigned Names and Numbers) will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request. If that time frame will not be met, ICANN (Internet Corporation for Assigned Names and Numbers) will inform the requester in writing as to when a response will be provided, setting forth the reasons necessary for the extension of time to respond. If ICANN (Internet Corporation for Assigned Names and Numbers) denies the information request, it will provide a written statement to the requestor identifying the reasons for the denial.

Defined Conditions for Nondisclosure

ICANN (Internet Corporation for Assigned Names and Numbers) has identified the following set of conditions for the nondisclosure of information:

- Information provided by or to a government or international organization, or any
 form of recitation of such information, in the expectation that the information will
 be kept confidential and/or would or likely would materially prejudice ICANN
 (Internet Corporation for Assigned Names and Numbers)'s relationship with that
 party.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN (Internet Corporation for Assigned Names and Numbers)'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 (Internet Corporation for Assigned Names and Numbers) Directors, ICANN (Internet Corporation for Assigned Names and Numbers) Directors' Advisors, ICANN (Internet Corporation for Assigned Names and Numbers) consultants, ICANN (Internet Corporation for Assigned Names and Numbers) contractors, and ICANN (Internet Corporation for Assigned Names and Numbers) agents.
- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN (Internet Corporation for Assigned Names and Numbers), its constituents, and/or other entities with which ICANN (Internet Corporation for Assigned Names and Numbers) cooperates by inhibiting the candid exchange of ideas and communications.
- 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.
- Information provided to ICANN (Internet Corporation for Assigned Names and Numbers) 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 (Internet Corporation for Assigned Names and Numbers) pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
- Confidential business information and/or internal policies and procedures.

- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.
- 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.
- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN (Internet Corporation for Assigned Names and Numbers).
- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Information that falls within any of the conditions set forth above may still be made public if ICANN (Internet Corporation for Assigned Names and Numbers) determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure. Further, ICANN (Internet Corporation for Assigned Names and Numbers) reserves the right to deny disclosure of information under conditions not designated above if ICANN (Internet Corporation for Assigned Names and Numbers) determines that the harm in disclosing the information outweighs the public interest in disclosing the information.

ICANN (Internet Corporation for Assigned Names and Numbers) shall not be required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.

Appeal of Denials

To the extent a requestor chooses to appeal a denial of information from ICANN (Internet Corporation for Assigned Names and Numbers), the requestor may follow the Reconsideration Request procedures or Independent Review procedures, to the extent either is applicable, as set forth in Article IV, Sections 2 and 3 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, which can be found at http://www.icann.org/en/about/governance/bylaws (/en/about/governance/bylaws).

DIDP Requests and Responses

Request submitted under the DIDP and ICANN (Internet Corporation for Assigned Names and Numbers) responses are available here: http://www.icann.org/en/about/transparency (/en/about/transparency)

Guidelines for the Posting of Board Briefing Materials

The posting of Board Briefing Materials on the Board Meeting Minutes page (at http://www.icann.org/en/groups/board/meetings (/en/groups/board/meetings)) is guided by the application of the DIDP. The Guidelines for the Posting of Board Briefing Materials are available at http://www.icann.org/en/groups/board/documents/briefing-materials-guidelines-21mar11-en.htm).

To submit a request, send an email to didp@icann.org (mailto:didp@icann.org)

Exhibit 22

Minutes | Board Governance Committee (BGC) Meeting

01 Aug 2017

BGC Attendees: Cherine Chalaby, Chris Disspain (Chair), Markus Kummer, Ram Mohan, and Mike Silber

BGC Member Apologies: Rinalia Abdul Rahim and Asha Hemrajani

Other Board Member Attendees: Becky Burr, Steve Crocker, and Ron da Silva

ICANN (Internet Corporation for Assigned Names and Numbers) Organization
Attendees: Michelle Bright (Board Content Senior Manager), John Jeffrey (General
Counsel and Secretary), Vinciane Koenigsfeld (Board Training & Content Senior
Manager), Elizabeth Le (Associate General Counsel), Wendy Profit (Manager, Board
Operations), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

- Update on Community Priority Evaluation Process Review (Review) The BGC received a briefing on the status of the CPE process review. The second track of the Review, which focuses on gathering information and materials from the CPE provider, is still ongoing. This is in large part because, despite repeated requests from ICANN (Internet Corporation for Assigned Names and Numbers) beginning in March 2017, the CPE provider failed to produce a single document until just very recently four months and numerous discussions after FTI's initial request. Thus far, not all documents requested have been produced. FTI is in the process of reviewing the documents that have been produced. The BGC discussed the importance of bring the work on the second track to a closure within a definitive time period so that the FTI can conclude their work.
 - Action:
 - ICANN (Internet Corporation for Assigned Names and Numbers)
 organization to follow up with FTI on what documents are outstanding
 from the CPE provider in response to FTI's document request.
 - ICANN (Internet Corporation for Assigned Names and Numbers)
 organization to continue providing the BGC with updates on the
 status of the review, and publish update(s) as appropriate.
- Board Committee and Leadership Selection Procedures The BGC reviewed and discussed proposed revisions to the Board Committee and Leadership Selection Procedures (Procedures). The BGC agreed that

Committee members should review revisions and provide further edits, if any, by the next BGC meeting, whereupon the Committee will revisit the issue.

- · Action:
 - BGC members to provide comments and further edits to the Procedures via email by the next BGC meeting.
- <u>Discussion of Board Committees and Working Groups Slate</u> The BGC discussed the Board Committees and Working Group slates based upon the preferences indicated by the Board members. The BGC also discussed standardizing the Committee charters to specify a minimum and maximum number of Committee members but allow flexibility for the composition of Committee within that range.
 - · Action:
 - ICANN (Internet Corporation for Assigned Names and Numbers)
 organization to revise the Committee charters in accordance with the
 discussion regarding composition of the Committees for
 consideration by the BGC at its next meeting.

Any Other Business

Nominating Committee (NomCom) 2018 Chair and Chair-Elect Leadership

 The BGC noted that it is anticipated that the interview process for the
 NomCom 2018 Chair and Chair-Elect Leadership will be completed by the
 next BGC meeting and that the BGC will discuss its recommendations at the meeting.

Published on 24 August 2017.

REFERENCE MATERIALS – BOARD PAPER NO. 2017.09.23.2b

TITLE: Consideration of Reconsideration Request 17-3

Document/Background Links

The following attachments are relevant to the Board's consideration of Reconsideration Request 17-3.

Attachment A is Reconsideration Request 17-3, submitted on 30 June 2017.

Attachment B are Exhibits 1 to 18 in support of Reconsideration Request 17-3, submitted on 30 June 2017.

Attachment C is the Ombudsman Action on Request 17-3, dated 19 July 2017.

Attachment D is the BAMC Recommendation on Request 17-3, issued 23 August 2017.

Attachment E is the <u>request</u> submitted by dotgay LLC pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), dated 18 May 2017.

Attachment F is the <u>response</u> to dotgay LLC's DIDP request, dated 18 June 2017.

Attachment G is the <u>Rebuttal</u> and <u>Exhibits 19 to 22</u> in support of Request 17-3, submitted on 8 September 2017.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 11 September 2017

Email: amy.stathos@icann.org