# Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information.  Note: This is a brief summary of the relevant Bylaws provisions.  For more information about ICANN's reconsideration process, please visit http://www.icann.org/en/general/bylaws.htm#IV and http://www.icann.org/en/committees/board-governance/.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request.  This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered.  However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to reconsideration@icann.org.


## 1.      Requester Information

**Name: EFLUX.ART, LLC ("E-Flux")**

**Address: 311 East Broadway, 3rd fl. New York, New York 10002, USA**
**Email:**

**Phone Number (optional):**

(Note: ICANN will post the Requester's name on the Reconsideration Request page at http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm.  Requestors address, email and phone number will be removed from the posting.)


## 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.**

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc.  You may provide documents.  All documentation provided will be made part of the public record.)

On July 2, 2015 E-Flux submitted a change request for our .art application to remove the community designation from our application and convert it into a standard application. Through a case in the Customer Portal on July 7, 2015, we were informed that our request was rejected. Full communication below:

Dear Anton Vidokle,

We have reviewed the application change request that you have submitted. The request seeks to change the application from a community application to a standard application. As per section 1.2.3.3 of the AGB, "An applicant may not change its designation as standard or community-based once it has submitted a gTLD application for processing." As such, the requested change to question 19 is not permitted. The remaining changes seem to be in support of the removal of the community designation. Please let us know if you intend to still request the remaining changes to the application without being able to change the application designation. If you do, please submit an updated redline document without the change to question 19 and include any other changes to the application that you'd like to request. Please note that a resubmission does not guarantee that the change request will be approved. All change requests are evaluated against the published criteria. ICANN will inform you of the determination after our review of the request.

Regards,

Lauren Israel

GDD Operations

**4.      Date of action/inaction:**

(Note:  If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

July 7, 2015

**5.** **On what date did you became aware of the action or that action would not be taken?**

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

July 7, 2015

**6.** **Describe how you believe you are materially affected by the action or inaction:**

E-Flux is currently in contention with seven other applicants for the .art top-level domain. Most of these other applicants are not designated as community applicants and so E-flux is at a significant disadvantage against these applicants.

If E-Flux is not allowed to change its designation before it signs its contract for .art, it will be forced to change the designation after signing its contract. This would be a far lengthier process when compared to the change request process and would delay the launch of the .art top-level domain. This has a significant economic impact on E-Flux.

**7.** **Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Other applicants for .art that have community designations are also adversely affected by this by ICANN's refusal to accept our change request to change our .art application into a standard application.

ICANN would be adversely affected by its own refusal to accept our change request because ICANN would then be forced to go through the more lengthy and costly RSEP process to remove the community designation from the top-level domain.

**8.** **Detail of Board or Staff Action – Required Information**

**Staff Action:** If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent.

The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

**Provide the Required Detailed Explanation here:**

> On July 2, 2015 E-Flux submitted a change request for our .art application to remove the community designation from our application and turn it into a standard application. Through a case in the Customer Portal on July 7, 2015, we were informed that our request would not be allowed. Full communication below:
>
> Dear Anton Vidokle,
>
> We have reviewed the application change request that you have submitted. The request seeks to change the application from a community application to a standard application. As per section 1.2.3.3 of the AGB, "An applicant may not change its designation as standard or community-based once it has submitted a gTLD application for processing." As such, the requested change to question 19 is not permitted. The remaining changes seem to be in support of the removal of the community designation. Please let us know if you intend to still request the remaining changes to the application without being able to change the application designation. If you do, please submit an updated redline document without the change to question 19 and include any other changes to the application that you'd like to request. Please note that a resubmission does not guarantee that the change request will be approved. All change requests are evaluated against the published criteria. ICANN will inform you of the determination after our review of the request.
>
> Regards,
>
> Lauren Israel
>
> GDD Operation

## 9.     What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

E-Flux is asking ICANN to reverse the action and to accept E-Flux's change request to turn its application into a standard application.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

A. E-Flux's loss or injury suffered

As described above in our answer to question 6, E-Flux is currently in contention with seven other applicants for the .art top-level domain. Most of these other applicants are not designated as community applicants and so E-flux is at a significant disadvantage against these applicants. Additionally, If E-Flux is not allowed to change its designation before it signs its contract for .art, it will be forced to change the designation after signing its contract. This would be a far lengthier process when compared to the change request process and would delay the launch of the .art top-level domain. This has a significant economic impact on E-Flux.

If ICANN reverses its decision to refuse E-flux's change request to remove its designation as a community application, all of these harms will be reversed.

B. Grounds supporting E-Flux's request for reconsideration

In its refusal to accept E-Flux's change request for .art, ICANN cited section 1.2.3.3 of the Applicant Guidebook, which states, "An applicant may not change its designation as standard or community-based once it has submitted a gTLD application for processing." ICANN appears

to be interpreting this provision to mean that once an application is designated as community-based is cannot be changed under any circumstances. However, this is an incorrect interpretation of the provision. The provision is drafted to cover the period between when an application is submitted and when it is done being processed. So, the proper interpretation of the provision is to provide that an applicant cannot change its designation until after processing of the application has completed. Here, processing has completed for E-Flux's .art application and so the community designation can and should be changed using ICANN's change request process.

Other sections of the applicant guidebook imply that our interpretation of the 1.2.3.3 is correct. For example, Section 1.2.3.1 states "Designation or non-designation of an application as community-based is entirely at the discretion of the applicant." This clause is in direct contradiction with the interpretation of section 1.2.3.3 used by ICANN.

Further, even assuming arguendo that ICANN's interpretation of 1.2.3.3 is correct, it would mean that section 1.2.3.3 and section 1.2.3.1 are in direct contradiction of one another. Under accepted rules of contract interpretation, in the case of contradictory provisions the more specific provision will control over the more general. Here both ICANN's quote provision and our quotes provision are specific. Therefore, in interpreting the provisions we must look to the doctrine of Contra Proferentem also known as "interpretation against the draftsman," which dictates that where a provision of an agreement ambiguous, as in the case where there are contradictory provisions, the preferred meaning should be the one that works against the interests of the party who provided the wording. In this case the party that provided the wording was ICANN. Therefore, the AGB should be interpreted in favor of the E-flux – specifically the provision from 1.2.3.1 should govern and designation or non-designation of an application as community-based should be entirely "at the discretion of the applicant."

Additionally, E-flux feels that general fairness and common sense dictates that ICANN should ICANN should reverse its decision to refuse E-Flux's change request to remove its designation as a community application. After accepting E-flux application as a community applicant the Economist Intelligence Unit rejected E-flux's Community Priority Evaluation. Because of this, E-flux is now unable to operate the .art top-level domain in a manner consistent with its intentions when it paid ICANN the $185,000 application fee and submitted its application. It is only fair and logical that ICANN should allow community applicants with Community Priority Evaluations that were not accepted to change how they will operate their top-level domains.  There is no reason for ICANN to keep this designation on the application.

ICANN's refusal to accept E-Flux's change request is also in

contradiction with the seven criteria ICANN uses to evaluate change requests. These criteria are: (1) Explanation, (2) Evidence that original submission was in error, (3) Other third parties affected, (4) Precedents, (5) Fairness to applicants, and (6) Materiality Timing. ICANN's stated reason for rejecting E-Flux's request – section 1.2.3.3 of the Applicant Guidebook – is not relevant to any of the criteria.

C. Conclusion

For the above reasons, E-flux strongly urges ICANN to reverse its decision to reject E-flux's change request.

**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.**

**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.

N/A

**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.

07/09/2015

_____          _____

Signature                                                    Date