

ICANN BOARD SUBMISSION NO. 2016.08.09.2d.**REV1.CLEAN**

TITLE: **Consideration of the *Dot Registry, LLC v. ICANN Independent Review Process Final Declaration***

PROPOSED ACTION: **For Board Consideration and Approval**

EXECUTIVE SUMMARY:

On 29 July 2016, the Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRP filed by Dot Registry, LLC (Dot Registry) (see [Final Declaration](#), Attachment A to Reference Materials) (Final Declaration). The IRP challenged the Board Governance Committee’s (BGC’s) denial of Dot Registry’s Reconsideration Requests regarding the Community Priority Evaluation (CPE) reports finding that Dot Registry’s applications for .INC, .LLC, and .LLP, respectively, did not prevail in CPE.

In a 2-1 decision, the Panel majority declared Dot Registry to be the prevailing party, and determined that “the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.” (Final Declaration at ¶ 151.) Specifically, the Panel majority declared that “the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations.” (*Id.* at ¶ 151.) The Panel majority further declared that ICANN is to bear all the fees and expenses and “shall pay to Dot Registry, LLC [US]\$235,294.37” (*Id.* at ¶ 154.)

The Panel majority also stated 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 [Applicant Guidebook (Guidebook)].” (*Id.* at ¶ 152.) Further, “[t]he Panel majority decline[d] to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority.” (*Id.* at ¶ 153.)

The Panel majority considered and challenged the current standard of review employed by the BGC in reviewing Reconsideration Requests, stating that the standard to be applied by the BGC in “evaluating a Reconsideration Request” should be: “Is the action

taken consistent with the Articles, the Bylaws, and the [Guidebook]?” (*Id.* at ¶ 79.) The Panel majority further indicated that, in reviewing Reconsideration Requests, “the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and [Guidebook]” (*id.* at ¶ 88), and that third parties such as the EIU are “obligated to comply with ICANN’s Articles and Bylaws.” (*Id.* at ¶ 101.)

Since the Final Declaration was issued, the Board members have been sent a letter from Dot Registry, stating, among other things, that its “90 page expert report” is “sufficient and compelling to assist the Board with determining that Dot Registry’s applications should have passed CPE” and requesting that ICANN “proceed to contracting with Dot Registry for .INC, .LLC, and .LLP.” (See Attachment B to Reference Materials and [INSERT URL ONCE AVAILABLE.] The Board should take note that, in addition to the fact that the Panel majority declined to judge whether Dot Registry is entitled to community priority, there are numerous other applications pending for these gTLDs (nine for .INC, eight for .LLC, and three for .LLP), which should be taken into consideration in determining next steps.

Finally, it is also important to note that there have been online blogged reports about what the Final Declaration actually says, although many of the items reported on have been factual inaccuracies, which have been identified and corrected in Attachment C to the Reference Materials.

In accordance with Article IV, section 3.21, the Board is being asked to consider and adopt findings of the Panel’s Final Declaration in the Dot Registry v. ICANN IRP. (*See* <https://www.icann.org/resources/pages/governance/bylaws-en/#IV>.)

PROPOSED RESOLUTION:

Whereas, on 29 July 2016, an Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRP filed by Dot Registry, LLC (Dot Registry) against ICANN (Final Declaration).

Whereas, the Panel majority declared that “the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws” in that “the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations,” and that the evidence before the Panel did not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions. (*See* Final Declaration, ¶¶ 151-152.)

Whereas, the Panel majority further declared that “Dot Registry is the prevailing party” and that ICANN shall pay to Dot Registry US\$235,294.37 “upon demonstration that these incurred costs have been paid in full.” (*Id.* ¶ 154.)

Whereas, “[t]he Panel majority decline[d] to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority.” (*Id.* at ¶ 153.)

Whereas, the Panel majority did not make any recommendations to the Board as to what, if any, subsequent action the Board should take in furtherance of the Final Declaration.

Whereas, Dot Registry has that stated in a letter to the Board, among other things, that its “90 page expert report” is “sufficient and compelling to assist the Board with determining that Dot Registry’s applications should have passed CPE” and requesting that ICANN “proceed to contracting with Dot Registry for .INC, .LLC, and .LLP. (See letter – insert URL.)

Whereas, the Panel considered and challenged the current standard of review employed by the BGC in reviewing Reconsideration Requests.

Whereas, in accordance with Article IV, section 3.21 of ICANN’s Bylaws, the Board has considered the Final Declaration.

Resolved (2016.08.09.xx), in light of the recent letter received from Dot Registry and the factual inaccuracies that have been reported in online blogged reports, the Board directs the Secretary, or his designee(s), to post the Board briefing materials on this matter simultaneously with the resolutions.

PROPOSED RATIONALE:

Dot Registry, LLC (Dot Registry) initiated Independent Review Process (IRP) proceedings challenging the Board Governance Committee's (BGC's) denial of Dot Registry's Reconsideration Requests regarding the Community Priority Evaluation (CPE) reports finding that Dot Registry's applications for .INC, .LLC, and .LLP, respectively, did not prevail in CPE.

Dot Registry applied for the opportunity to operate the new top-level domains .LLC, .INC, and .LLP. Dot Registry is one of nine applicants for .LLC, one of eleven applicants for .INC, and one of four applicants for .LLP. Dot Registry, however, is the only applicant that submitted community-based applications for these gTLDs.

The CPE panels evaluating Dot Registry's applications (CPE Panels) determined that the applications did not meet the criteria required to prevail in CPE, awarding only five of the 14 points needed to prevail in CPE (CPE Reports). Dot Registry filed Reconsideration Requests 14-30, 14-32, and 14-33, seeking reconsideration of the CPE Reports. On 24 July 2014, the Board Governance Committee (BGC) denied the Reconsideration Requests, finding that Dot Registry had "failed to demonstrate that the Panels acted in

contravention of established policy or procedure in rendering their respective CPE Reports....”

Dot Registry initiated this IRP on 22 September 2014, challenging the BGC’s denial of Dot Registry’s Reconsideration Requests, as well as purportedly challenging ICANN’s appointment of the Economist Intelligence Unit (EIU) as the third party provider to conduct CPEs, and the Board’s response to advice from ICANN’s Governmental Advisory Committee regarding .LLC, .INC, and .LLP.

In a 2-1 decision, the Panel majority declared Dot Registry to be the prevailing party, and determined that “the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.” (Final Declaration at ¶ 151.) Specifically, the Panel majority declared that “the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations” and that there was not sufficient evidence to “support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.” (*Id.* at ¶¶ 151-152.) The Panel majority further declared that ICANN “shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon determination that these incurred costs have been paid in full.” (*Id.* at ¶ 154.)

The Board has noted that the Panel majority stated that “in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the [Applicant Guidebook (Guidebook)].” (*Id.* at ¶ 152.) Further, it is also noted that “[t]he Panel majority decline[d] to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority.” (*Id.* at ¶ 153.)

The Panel majority did consider and challenge the current standard of review employed by the BGC in reviewing Reconsideration Requests, stating that it thought the standard to be applied by the BGC in “evaluating a Reconsideration Request” should be: “Is the action taken consistent with the Articles, the Bylaws, and the [Guidebook]?” (*Id.* at ¶ 79.) The Panel majority further indicated that, in reviewing Reconsideration Requests,

“the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and [Guidebook]” (*id.* at ¶ 88), and that third parties such as the EUI are “obligated to comply with ICANN’s Articles and Bylaws.” (*Id.* at ¶ 101.)

The Board acknowledges the important statements by the Panel with respect to the standard of review for Reconsideration Requests, and has requested that the BGC provide the Board with guidance on this issue.

As required, the Board has considered the Final Declaration. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN’s long-standing accountability mechanisms. Accordingly, and for the reasons set forth in this Resolution and Rationale, the Board has accepted the Panel’s Final Declaration as indicated above.

The Board also notes that it has received a letter from Dot Registry, dated 6 August 2016, stating, among other things, that its “90 page expert report” is “sufficient and compelling to assist the Board with determining that Dot Registry’s applications should have passed CPE” and requesting that ICANN “proceed to contracting with Dot Registry for .INC, .LLC, and .LLP.” (See Attachment B to Reference Materials and [INSERT URL ONCE AVAILABLE.] The Board would like to reiterate that “[t]he Panel majority decline[d] to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority.” (*Id.* at ¶ 153.)

Further, the Board notes that there are numerous other applications pending for these gTLDs (nine for .INC, eight for .LLC, and three for .LLP), which also must be considered. Accordingly, the Board looks forward to the BGC’s input and guidance before taking any further action with respect to Dot Registry’s Reconsideration Requests, or the .INC, .LLC, or .LLP applications.

Finally, the Board also notes that there have been online blogged reports about what the Final Declaration actually says, yet many of the items reported on have been factual

inaccuracies, which have been identified and corrected in Attachment C to the Reference Materials related to this agenda item.

This action is not expected to have any direct financial impact on the organization, although there could be some indirect costs, such as analysis relating to the standard on Reconsideration Requests. This action will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Date Noted: 8 August 2016
Email: amy.stathos@icann.org