

ARIF HYDER ALI

arif.ali@dechert.com
+1 202 261 3307 Direct
+1 202 261 3079 Fax

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ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: FTI Consulting's Evaluation and Findings Regarding the Community Priority Evaluation Process

Dear Members of the ICANN Board:

We write on behalf of our client, dotgay LLC (“dotgay”), regarding FTI Consulting’s (“FTI”) recent reports addressing: (1) ICANN’s interactions with the Community Priority Evaluation (“CPE”) Provider;¹ (2) the CPE Provider’s consistency in applying the CPE criteria;² and (3) the reference materials relied upon by the CPE Provider for the eight evaluations with pending reconsideration requests.³ (We refer to FTI’s three reports collectively herein as the “Report.”)

To put it simply, the Report can only be described as a “whitewash.” We strongly urge the Board to review it with a skeptical eye and to not rely on the purported analyses it contains or its conclusions. Basic decency requires this; ICANN’s organizational integrity rests on it; and critical social, cultural, and economic rights that are vital to the gay community could be seriously impaired were the Board to proceed otherwise. Even a cursory review of the Report should lead the Board to conclude that the Report is methodologically flawed and substantively incomplete, and that the FTI personnel who conducted the review did

¹ FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017) (“Scope 1 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

² FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017) (“Scope 2 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

³ FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017) (“Scope 3 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

not have the requisite qualifications to perform certain parts of the review. The lack of transparency that shrouded the purported investigation is equally troubling.

We recall full well the circumstances (*i.e.*, the decision of the IRP Panel in *Dot Registry LLC v. ICANN*) that precipitated the Board's commissioning of the investigation, as well as the fanfare with which ICANN announced that it was conducting "an **independent review**" of the CPE Process.⁴ The following statements by ICANN's General Counsel during a public forum organized at ICANN's March 2017 meeting in Copenhagen are but a few examples of what ICANN stakeholders and affected parties like dotgay were led to believe by ICANN about the investigation:

- FTI will be "digging in very deeply" and that there will be "a full look at the community priority evaluation;"⁵
- ICANN instructed FTI "to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in very deeply and . . . trying to understand the complex process of the new gTLD program and the community priority evaluation process;"⁶ and
- "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."⁷

⁴ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁵ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁶ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁷ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

To put it bluntly: FTI did not “dig[] in very deeply,” or “try to understand the complex process” of the CPE process, or undertake a “full look” at it.

ICANN did not seek any input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation; did not reveal upfront the identity of the investigator so that, for example, the community could provide input on potential conflicts of interest; was not at all transparent about what information would be reviewed by FTI; did not instruct FTI to evaluate the substantive correctness or sufficiency of the research undertaken by the CPE Provider; and did not instruct the investigator to interact with the parties that would be impacted by the outcome of the investigation, or review the information that they provided.

FTI was tasked with performing a “full look” at the CPE Process as part of its independent review.⁸ Its investigative team was required to exercise “diligence, critical analysis, and professional skepticism in discharging professional responsibilities” and to ensure that its conclusions are “supported with evidence that is relevant, reliable and sufficient.”⁹ By any objective measure, this did not happen. Indeed, FTI itself states that it did not: (1) re-evaluate the CPE applications; (2) rely upon the substance of the reference material; (3) assess the propriety or reasonableness of the research undertaken by the CPE Provider; (4) interview the CPE applicants; or (5) take in to consideration the information and materials provided by applicants.

The report reveals that FTI’s investigation was cursory at best; its narrow mandate¹⁰ and evaluation methodology were designed to do little more than vindicate ICANN’s

⁸ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁹ Association of Certified Fraud Examiners, CFE Code of Professional Standards (10 Sep. 2014), p. 2, https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/Code-of-Standards-2014.pdf. FTI “followed the internal investigative methodology . . . codified by the Association of Certified Fraud Examiners (ACFE).” Scope 1 Report, p. 3.

¹⁰ FTI failed to address other significant issues with the CPE process, including that: (1) the CPE Provider, the Economist Intelligence Unit (“EIU”), improperly implemented and applied additional processes and CPE criteria *after* receiving the community applications; (2) the EIU acted contrary to the New gTLD Applicant Guidebook (“AGB”) when collecting and interpreting information for the CPE; (3) the EIU permitted third parties to perform substantive tasks in the CPE process for community applications, in contravention of the AGB and the EIU’s own additional processes; (4) the EIU implemented the CPE contrary to human rights principles; (5) the EIU and ICANN failed

administration of the CPE process. FTI received almost no input from the CPE Provider and made no effort to evaluate the substance of the research upon which the CPE Provider relied in drawing its conclusions. Mere cite counting and cite checking is not “digging deeply,” or by any stretch of the imagination a “full look.” Moreover, serious questions must be asked about the qualifications of the individual investigators who undertook the Scope 2 review.

It is evident that FTI engaged in a seemingly advocacy-driven investigation to reach conclusions that would absolve ICANN of the demonstrated and demonstrable problems that afflicted the CPE process.

Accordingly, we request that the ICANN Board take *no* action with respect to the conclusions reached by FTI, until dotgag, and indeed all concerned parties, have had an opportunity to provide comments on the FTI Report and to be heard.

dotgag reserves all of its rights and remedies all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali

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to properly consider documentation supporting community applications, including expert reports; (6) ICANN and the EIU permitted panelists with clear conflicts of interest to participate in the evaluation of community applications; (7) ICANN improperly accepted and adopted the EIU's determinations, with all of the aforementioned problems, without question and without possibility of appeal; (8) the CPE process developed and enforced by ICANN does not conform with ICANN's core principles; and (9) ICANN's actions related to the CPE process violated its own Bylaws.