

ARIF HYDER ALI

Contact Information
Redacted

March 7, 2018

VIA E-MAIL

Kate Wallace, Esq.
Jones Day
100 High Street, 21st Floor
Boston, Massachusetts 02110-181

Re: ICANN's 5 March 2018 Letter Regarding the CPE Process Review

Dear Ms. Wallace:

We write on behalf of our client, dotgay LLC (“dotgay”), regarding your 5 March 2018 letter in which you “respond” and “immediately address[]” “certain baseless and offensive statements” in our 31 January 2018 letter and accompanying Second Expert Opinion of Professor William N. Eskridge, Jr. to the ICANN Board.

Specifically, your letter hyperbolically claims there is no evidence that (1) FTI Consulting, Inc. (“FTI”) “undertook its investigation” of the CPE Review Process “with a pre-determined outcome in mind”; and that (2) “FTI would blatantly violate best investigative practices and compromise its integrity.” This bombastic and nonsensical rhetoric is based on a selective reading of dotgay’s 31 January submission and made in obvious ignorance of the arguments made by Professor Eskridge in his two expert reports and the Council of Europe’s report, titled “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective.” It is a blatant, feigned attempt to mask FTI’s failure to undertake an “*independent review*” and “*full look*” of the CPE Review Process.¹

¹ This is despite ICANN’s assurances to the CPE applicants that it would undertake an independent review of the CPE Review Process. *See, e.g.*, Adopted Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en> ([T]he Board intends this review to help gather additional facts and information that may be helpful in addressing uncertainty about staff interaction with the CPE provider.”); *see also* John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (stating that (1) FTI will be “digging in very deeply;” (2) there will be “a full look at the community priority evaluation, as opposed to a very limited approach of how staff was involved;” and (3) ICANN instruction 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

As the ICANN Board “is in the process of considering the issues raised in [dotgay’s] letter and accompanying Second Expert Opinion,” we urge the Board to review Professor Eskridge’s first legal opinion and the Council of Europe’s report. The Board will find that FTI astonishingly gives a clean chit to the CPE process, standing at odds with several independent expert opinions and opinions expressed by ICANN Board members, such as Cherine Chalaby.² In light of FTI’s failure to even acknowledge—let alone address—their arguments, its finding that the “CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE”³ is superficial and unreliable.

It is clear that FTI failed to perform an “independent review” of the CPE process, including re-evaluation of the CPE applications, examination of the substance of the reference material cited in its own reports, assessment of the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants—including dotgay. Nonetheless, based on self-serving materials provided only by ICANN and interviews of two employees of the CPE Provider, FTI reaches sweeping conclusions that (1) “there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process;”⁴ (2) “the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook ([“AGB”]) and the CPE Guidelines throughout each CPE;”⁵ and (3) “the CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).”⁶ FTI’s findings are

deeply and ... trying to understand the complex process of the new gTLD program and the community priority evaluation process”).

² Cherine Chalaby, Chairman of the ICANN Board, stated that “I have observed inconsistencies applying the (AGB) scoring criteria for (CPE)’s and that’s a personal observation and there was an objective of producing adequate rational for all scoring decisions but I understand from feedback that this has not been achieved in all cases.” ICANN, Transcript of Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_cwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

³ Scope 2 Report, p. 21.

⁴ Scope 1 Report, p. 17.

⁵ Scope 2 Report, p. 3.

⁶ Scope 3 Report, p. 4.

incredulous and as argued by Professor Eskridge at length in his legal opinion, they must be rejected.

Furthermore, your letter claims that the “Board initiated the CPE Process Review in its oversight role of the New gtLD Program to provide *greater transparency* into the CPE Process.” That is false. In fact, the entire “independent review” of the CPE Review Process was cloaked in secrecy. After the Board announced in September 2016 that it would conduct an “independent review” of the CPE review process, ICANN dragged its feet in completing the review for nearly *13 months*⁷ while continually concealing FTI’s true mandate and evaluation methodology from the CPE applicants. During that period, dotgay asked ICANN *five* times for information related to the review.⁸ It was only on 13 December 2017, *after* FTI completed its investigation of the CPE process without interviewing a single CPE applicant, that ICANN published any substantive information on FTI’s evaluation—FTI’s three-report conclusion on the CPE process.

Moreover, we even attempted to obtain further supporting evidence from ICANN by submitting *three* document requests pursuant to ICANN’s Documentary Information Disclosure Policy⁹ for materials related to FTI’s review—such as FTI’s investigative plan, FTI’s terms of engagement, and communications regarding the scope of FTI’s independent review.¹⁰ ICANN has continuously refused to disclose any documents regarding FTI’s review,¹¹ and now criticizes us for lacking evidence. If ICANN wanted to provide “greater

⁷ Adopted Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁸ See Letter from A. Ali to ICANN Board (30 Jan. 2017) (“dotgay has not received *any* communication from ICANN regarding the status of the Independent Review or Request for Information from the CPE Provider.”); Letter from A. Ali to ICANN Board (12 March 2017) (“ICANN’s continued lack of responsiveness to dotgay’s inquiries about the status of its request [is] troubling, particularly in light of ICANN’s commitments to transparency.”); Email from Jamie Baxter to Steve Crocker (17 April 2017) (“reiterat[ing] our ongoing concerns with the lack of transparency that affected parties are receiving on” the CPE review); Letter from A. Ali to Chris Disspain and Jeffrey A. LeVeé (10 June 2017) (“ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.”); Letter from A. Ali to ICANN Board (8 Aug. 2017) (highlighting dotgay’s “concern with and seek[ing] remedy with respect to the ongoing delays in the Board Governance Committee’s CPE investigation”).

⁹ Request No. 20170518-1 (18 May 2017); Request No. 20170610-1 (10 Jun. 2017); Request No. 20180115-1 (18 Jan. 18).

¹⁰ Request No. 20180115-1 (18 Jan. 18).

¹¹ Request No. 20170518-1, ICANN DIDP Response (18 June 2017); Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017); Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018).

transparency into the CPE Process,” then it must disclose the documents underlying the FTI Reports.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif Hyder Ali', with a long horizontal flourish extending to the right.

Arif Hyder Ali

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