

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS

BEFORE THE

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case Number 01-15-0005-1738

Afilias Limited

Contact Information Redacted

BRS Media, Inc

Contact Information Redacted

Tin Dale, LLC

Contact Information Redacted

(Claimants)

- v -

Internet Corporation for Assigned Names and Numbers

12025 Waterfront Drive, Suite 300
Los Angeles, California, 90094-2536
USA

(Respondent)

I. INTRODUCTION

1. Afiliás Limited, BRS Media, Inc., and Tin Dale, LLC hereby submit a joint Request for Independent Review

II. PARTIES

A. Claimants

2. Claimants in these proceedings are:
 - a. Afiliás Limited, incorporated in Dublin, Ireland;
 - b. BRS Media, Inc., incorporated in San Francisco, CA, USA; and
 - c. Tin Dale, incorporated in Delaware, USA.
3. All Claimants are applicants for the .RADIO gTLD, and are represented in these proceedings by:

Bart Lieben
Contact Information Redacted

4. Claimants' preferred method of communication in these Proceedings is both via email and, if and when hardcopies need to be exchanged, by regular mail on the above address.

B. Respondent

5. The Respondent is the Internet Corporation for Assigned Names and Numbers. ICANN's contact details are:

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
Tel: +1 310 301 5800
Fax: +1 310 823 8649

III. BACKGROUND OF THE INTERESTED PARTIES

A. Claimants

6. As referred to above, all Claimants are applicants for the .RADIO gTLD, having submitted so-called “standard” applications for this extension in in the context of ICANN’s New gTLD Program.¹
7. Following publication of all applied-for new gTLD strings in the fall of 2012, it appears that the European Broadcasting Union (“EBU”) has submitted a so-called “community-based” application for the .RADIO gTLD. This application, bearing Application ID # 1-1083-39123, is referenced to herein as the “EBU Application”.²
8. Notwithstanding the various inconsistencies and factually incorrect information contained in the EBU Application, as well as the vast opposition by many, the Economist Intelligence Unit (“EIU”) – the firm appointed by ICANN to review whether applicants for new gTLDs who indicated to be subjected to “Community Priority Evaluation” – has determined on September 10, 2014 that the EBU Application met the conditions for being approved as a community-based gTLD (hereinafter: the “EIU Determination”).³ This EIU Determination was subsequently accepted by ICANN, apparently without ICANN further reviewing the contents of this EIU Determination, the information on which it was based and/or the process used by the EIU in this respect.
9. This Request is submitted pursuant to Article IV, Section 3 of the Bylaws for the Internet Corporation for Assigned Names and Numbers (“ICANN”), the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR Rules”)⁴ and the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process (the “Supplementary Procedures”).⁵ By way of this Request, Claimants seek relief from the harm they have suffered as a result of the actions, inaction and decisions of the ICANN Board of Directors, and more in particular ICANN’s Board Governance Committee (“BGC”) in violation of ICANN’s Articles of

¹ See **Annex 1**, which contains the application status for – amongst other extensions – the .RADIO gTLD.

² See <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1468>; **Annex 2A** and **Annex 2B**.

³ See **Annex 3**.

⁴ See **Annex 4A**.

⁵ See **Annex 4B**.

Incorporation,⁶ Bylaws,⁷ gTLD Applicant Guidebook (“AGB”),⁸ ICANN’s Top-Level Domain Application Terms and Conditions,⁹ and principles of international law.

10. Specifically, Claimants seek review of (i) ICANN’s decision to accept the findings contained in the EIU Determination; (ii) the BGC’s Determination to reject Claimants’ Request for Information submitted in accordance with ICANN’s Documentary Information Disclosure Policy and their Request for Reconsideration; and (iii) ICANN’s decision to award community-based status to the EBU Application, which may ultimately lead to resolving the .RADIO contention set and the EBU entering into a Registry Agreement for operating the .RADIO gTLD.

B. ICANN

11. The Internet Corporation for Assigned Names and Numbers, founded in 1998, has as its mission to ensure a stable and unified global Internet. One of its key responsibilities is introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system (DNS).

IV. PROCEDURAL ASPECTS

12. Claimants request that this IRP be considered by a three-member panel, composed of one arbitrator selected by each party and a presiding arbitrator selected by the parties either by mutual agreement or, in the event the parties are unable to reach an agreement, selected by the parties from a list of five potential presiding arbitrators chosen by the two party-appointed arbitrators.

V. SUMMARY OF RELEVANT FACTS

A. ICANN’s New gTLD Program

⁶ See <https://www.icann.org/resources/pages/governance/articles-en>; **Annex 5A.**

⁷ See <https://www.icann.org/resources/pages/governance/bylaws-en>; **Annex 5B.**

⁸ See <https://newgtlds.icann.org/en/applicants/agb>; **Annex 5C.**

⁹ See <https://newgtlds.icann.org/en/applicants/agb/terms>; **Annex 5D.**

13. For over a decade, ICANN has been developing its so-called New gTLD Program in order to increase competition in domain name registrations, and increase consumer choice.

14. In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet.

15. The policy development process included detailed and lengthy consultations with the many constituencies of ICANN's global Internet community, including governments, civil society, business and intellectual property stakeholders, and technologists.

16. In 2008, the ICANN Board adopted 19 specific policy principles, recommendations and implementation guidelines developed by ICANN's Generic Names Supporting Organization (GNSO) for implementing new gTLDs, with certain allocation criteria and contractual conditions.¹⁰

B. Development and Finalization of the Applicant Guidebook

17. After approval of the GNSO's policy principles, recommendations and implementation guidelines, ICANN undertook an open, inclusive, and transparent implementation process to address stakeholder concerns, such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work included public consultations, review, and input on multiple draft versions of the Applicant Guidebook, as provided for in ICANN's operating principles.

18. In June 2011, ICANN's Board of Directors approved the Guidebook and authorized the launch of the New gTLD Program. The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains.

¹⁰ See <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>; **Annex 6.**

19. The application window opened on January 12, 2012, and ICANN received 1,930 applications for new gTLDs.
20. On 17 December 2012, ICANN held a prioritization draw to determine the order in which applications would be processed during Initial Evaluation and subsequent phases of the program. These applications were processed by ICANN staff and evaluated by expert, independent third-party evaluators according to priority numbers.
21. ICANN published the final version of the Applicant Guidebook on June 4, 2012, which is almost two months after the closing of the application round for new gTLDs (which was on April 12, 2012).¹¹

C. About Community Priority Evaluation

22. Community Priority Evaluation (“CPE”) is a method to resolve string contention, described in full detail in section 4.2 of the Applicant Guidebook (AGB). According to the AGB, Community Priority Evaluation will only occur if a so-called “community-based application” is both in contention and elects to pursue CPE.
23. In order to qualify as a community-based application, the applicant must (i) have answered specific questions in the application form put at the disposal by ICANN during the application round, and (ii) have indicated to ICANN that the application should be subject to CPE. Additional fees of up to USD 22,000 are due for participating in CPE.
24. According to the AGB, a community-based application must receive a score of at least 14 out of 16 points in order to be confirmed by ICANN as being community-based. The direct effect of such acknowledgement is that such application prevails over any standard application for the same or confusingly similar gTLD application.
25. The evaluation itself, which includes the scoring of the application as explained above, is an independent analysis conducted by a panel selected by ICANN.

¹¹ See <https://newgtlds.icann.org/en/applicants/agb>.

D. The EIU Was Selected As The Sole Community Priority Evaluator For Community-Based Applications

26. On July 31, 2009, ICANN published on its website a “Call for Expressions of Interest (EOIs) for a New gTLD Community Priority Evaluation Panel – formerly Comparative Evaluation Panel”, inviting providers to submit their proposals on how to “conduct the comparative evaluation of applications in contention”.¹²

27. The selection criteria for independent evaluators have been published included, amongst other criteria, the following:

Criterion 4: *“Considering the comparative evaluation criteria defined in Module 4 of the Applicant Guidebook and described in Section 3 of this document, the provider must propose a panel that is capable of:*

- a. *exercising consistent and somewhat subjective judgment in making its evaluations, (the Guidebook criteria seeks to make the judgment as objective as possible)*
- b. *reaching conclusions that are compelling and defensible, and documenting the way in which it has done so in each case.”*

Criterion 7: *“The evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.”*¹³

28. Furthermore, in its response to the requirements set out in the EOI, the applicant had to provide *“A statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”*¹⁴

29. Later on, ICANN awarded the contract for performing Community Priority Evaluations to the Economist Intelligence Unit (“EIU”). The EIU was selected for this role because it offers premier business intelligence services, providing political, economic, and public policy analysis to businesses, governments, and organizations across the globe.¹⁵

¹² See <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>; **Annex 8.**

¹³ <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>, page 5; **ibid.**

¹⁴ <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>, page 6, Requirement 5; **ibid.**

¹⁵ See <https://newgtlds.icann.org/en/applicants/cpe>.

30. On August 16, 2013, the EIU published a set of draft Guidelines that panelists will use to score Community-based applicants.¹⁶

E. ICANN Received Four Applications for the .RADIO gTLD

31. In the context of ICANN's New gTLD Program, ICANN has received the following applications for the .RADIO gTLD:

the European Broadcasting Union's (hereinafter referred to as the "EBU") "community-based" application (Application ID 1-1083-39123) (hereinafter referred to as the "EBU Application");
Afilias Limited's "standard" application (Application ID 1-868-75631);
BRS Media, Inc.'s "standard" application (Application ID 1-994-75477);
Tin Dale's "standard" application (Application ID 1-1593-8224).¹⁷

F. The European Broadcasting Union Became a Member of ICANN's Governmental Advisory Committee

32. The European Broadcasting Union is a not-for-profit organization that has been established by an alliance of mostly public service media entities / broadcasters. According to the EBU's website, the EBU has 73 active members in 56 countries, and 34 associate members in 20 countries.^{18 19}

33. The full name of the EBU clearly states that they are (i) a European-centric entity, and (ii) an association that is focused on broadcasting. Broadcasting is defined as "the distribution of audio and/or video content to a dispersed audience via any electronic mass communications medium, but typically one using the electromagnetic spectrum (radio waves), in a one-to-many model".²⁰

34. On June 28, 2012, ICANN's Governmental Advisory Committee (GAC) granted the EBU an "Observer" status, making it one of the very few applicants for new gTLDs who have access to the GAC meetings and the Committee as a

¹⁶ See <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>; **Annex 7.**

¹⁷ See **Annex 1.**

¹⁸ <http://www3.ebu.ch/about/members>.

¹⁹ <http://www3.ebu.ch/about/members?type=associate>.

²⁰ See: <http://dictionary.reference.com/browse/broadcasting>;
<http://www.thefreedictionary.com/broadcasting>; <https://en.wikipedia.org/wiki/Broadcasting>;
<http://www.merriam-webster.com/dictionary/broadcast>.

whole.²¹ This appointment was considered by many a conflict of interest, especially in the light of the the GAC publishing on April 11 of 2013 its so-called “Beijing Communiqué”, in which specific safeguards have been demanded from ICANN in relation to a number of new gTLDs, including the .RADIO gTLD.²²

G. The EIU Awarded a Passing Score to the Community-Based Application Submitted by the European Broadcasting Union

35. Following the On September 10, 2014, ICANN’s Community Priority Evaluation panel published its Determination stating that the EBU’s Application for the .RADIO gTLD obtained a passing score of 14 out of 16 points, and hence prevailed in Community Priority Evaluation. This determination was posted on ICANN’s website under URL

<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf> (hereinafter referred to as the “EIU Determination”, a copy whereof has been attached to this Reconsideration Request as **Annex 10**).

36. The immediate effect of this EIU Determination seems to be that each of the Claimants’ applications for the .RADIO gTLD will no longer be considered by ICANN. This is demonstrated by the fact that ICANN changed the status of each of their applications has been changed to “Will Not Proceed”, as is reflected on their respective Application Status pages published by ICANN.²³

H. Claimants Invoked ICANN’s Transparency And Accountability Mechanisms, To No Avail

37. Being directly affected by the EIU Determination, for the reasons set out below, Claimants invoked two of ICANN’s Transparency and Accountability Mechanisms, by submitting in parallel a Request for Information under ICANN’s Documentary Information Disclosure Policy and a Request for Reconsideration.

38. ICANN's Documentary Information Disclosure Policy (DIDP) *“is intended to ensure that information contained in documents concerning ICANN's operational*

²¹ See **Annex 11**.

²² See <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>;

Annex 9.

²³ **Ibid**.

activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”²⁴

39. Furthermore, the Request for Reconsideration process is a mechanism provided by Article IV, Section 2 of the ICANN Bylaws, *“by which any person or entity materially affected by an action (or inaction) of ICANN may request review or reconsideration of that action by the Board. According to the criteria developed for this process, “any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that the person or entity has 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.”²⁵*

40. Claimants’ Request for Information, with reference number 20140926-01, was submitted by Claimants on September 26, 2014.²⁶

41. Considering the fact that Claimants did not have access to certain information relating to the EIU Determination, they requested ICANN in their Initial Request for Reconsideration to suspend this process in view of the possibility or even likelihood of ICANN providing additional information they requested in the context their Request for Information under the Documentary Information Disclosure Process.²⁷

42. However, ICANN rejected all of Claimants’ Requests for Information, referring mainly to the fact that the information requested by Complainants

²⁴ <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁵ <https://www.icann.org/resources/pages/mechanisms-2014-03-20-en>.

²⁶ See **Annex 12**.

²⁷ See **Annex 13**.

could not be disclosed since such information met ICANN's Standards for Nondisclosure.²⁸

43. Claimants filed their Revised Request for Reconsideration on November 10, 2014.²⁹

44. ICANN's Board Governance Committee also rejected Claimants' Request for Reconsideration on January 20, 2015, for the reasons set out below.³⁰

CLAIMANTS' ARGUMENTS IN LIGHT OF THE BGC DETERMINATION OF

I. The CPE Did Not Adhere To Applicable Policies And Procedures In Rendering The CPE Report

45. The first reason for the BGC to reject Claimants' Reconsideration Request is that *"[t]he Requesters' arguments regarding the CPE Panel's Report reflect only their disagreement with the CPE Panel's conclusions and scoring. The fact that the Requesters would have liked the CPE Panel to reach a different conclusion is not, however, a proper basis for reconsideration. As discussed below, the CPE Panel adhered to the applicable policies and procedures in rendering The CPE Panel's Report."*

46. Claimants disagree with this analysis, and this for the following reasons:

47. First, according to Section 6 of ICANN's Top-Level Domain Application Terms and Conditions, *"[...] APPLICANT 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. [...]"*³¹

48. Claimants submit that these Terms and Conditions form the basis of the legal agreement between ICANN on the one hand and the Claimants on the other hand with respect to their respective applications for the .RADIO gTLD.

49. It is clear from the wording of this provision which has been unilaterally drafted by ICANN and was not negotiable that every applicant shall be entitled

²⁸ See <https://www.icann.org/en/system/files/files/lieben-response-24oct14-en.pdf>; **Annex 14**;

²⁹ See <https://www.icann.org/resources/pages/14-41-2014-09-29-en>; the revised request was published on ICANN's website at <https://www.icann.org/en/system/files/files/request-afiliast-et-al-with-annexes-10nov14-en.pdf>; **Annex 15**;

³⁰ <https://www.icann.org/en/system/files/files/determination-afiliast-et-al-20jan15-en.pdf>; **Annex 16**;

³¹ <https://newgtlds.icann.org/en/applicants/agb/terms>.

to challenge *any* final decision made by ICANN in this respect. Claimants therefore state that these Terms and Conditions are clear, and that no support can be found for the limited interpretation given by the BGC.

50. Second, according to Article IV, Section 2 (c) of the ICANN Bylaws, “*any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that the person or entity has been adversely affected by “[...] 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.”*”

51. As Claimants have clearly indicated in their Initial and Revised Requests for Reconsideration, as well as their submissions in context of the Cooperative Engagement Process, the EIU has developed the EIU Determination on the basis of false or inaccurate material information. In particular, by way of summary, Claimants refer to:

- a. contradictions between the Community Definition provided for by the EBU in its application, and the definition provided for by the North American Industrial Classification System (NAICS);
- b. the EIU’s determination that the term “radio” “*does not have any other meaning beyond identifying the community described in the application*”, whereas numerous other examples can be found that this is not the case, including, for instance, the fact that the radio “device” or “receiver” has nothing to do with the “radio community” as purported by the EBU;
- c. the fact that the EBU does not have the support from the vast majority of community members, given its limited European focus;
- d. the fact that the EBU’s application did receive opposition from various “relevant” parties, including Webcaster Alliance, Inc., the International Radio Emergency Support Coalition (IRESC), and Claimants.³²

³² See **Annexes 21 to 22**.

J. ICANN / The EIU Did Not Perform Due Diligence In Evaluating The EBU's Application

52. On the basis of the information contained in the EIU Determination, the Community Priority Evaluation Panel demonstrates that it has taken into account certain information that is either in the public domain or has been communicated to the EIU in the context of the Community Priority Evaluation process. The AGB indeed authorizes CEP panels to *“perform independent research, if deemed necessary to reach informed scoring decisions”*.³³

53. Upon information and belief, based upon the contents of the EIU Determination, it is clear that the information relied upon by the EIU were false, incomplete or materially incorrect. Claimants therefore believe that, if the EIU would have taken into account accurate and up-to-date information, it would have come to a different conclusion, as stated in the Reconsideration Request and the submissions made in the context of the Cooperative Engagement Process.

K. The EIU Was Not Authorized To Follow The CPE Guidelines

54. In its Determination, the BGC refers to the fact that the CPE Panel 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”*. (BGC Determination, page 6). In the Determination, the BGC refers on various occasions that the CPE Panel has *“applied the Guidebook scoring guidelines”* apparently as opposed to the *“standards governing CPE”* that are *“set forth in Section 4.2 of the Guidebook”* (BGC Determination, pages 6, 10, 12, 14, 15 and 18) (emphasis added).

55. Requesters are of the opinion that the CPE Panel did not have the authority under ICANN Policy and in particular under the Applicant Guidebook to publish such additional *“CPE Guidelines”*. Furthermore, the rules and processes for developing *“ICANN Policy”* have not been followed in defining these *“CPE Guidelines”*.

³³ AGB, §4.2.3.

56. For these two reasons alone, the CPE Guidelines cannot be considered “ICANN Policy”, and should therefore have been disregarded by the EIU in developing the CPE Report and by ICANN in making the Determinations.

57. In Claimants’ views, the only reference point to be used by the CPE Panel is the Applicant Guidebook.

58. In this respect, Claimants also point out to the fact that these CPE Guidelines have been published about one year and a half after the closing of the application window in April / May of 2012.³⁴ Claimants hereby refer to Recommendation 9 contained in the GNSO’s Principles, Recommendations & Implementation Guidelines, according to which ICANN had to implement “[...] a clear and pre-published application process using objective and measurable criteria” for new gTLDs.³⁵ According to Resolution 2008.06.26.02 of the ICANN Board, dated June 26, 2008, “[...] the Board [adopted] the GNSO policy recommendations for the introduction of new gTLDs <<http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>>.”³⁶

59. In conclusion: by expressly referring to the fact that the CPE Panel has utilized its own CPE Guidelines, which do not form part of the Applicant Guidebook, nor are to be considered ICANN Policy, the CPE Panel has not applied ICANN’s policies and procedures in accordance with its Bylaws. Since the BGC has expressly confirmed in the Determination that the CPE Panel has applied “*the (Applicant) Guidebook scoring guidelines and the CPE Guidelines*”, the BGC has in fact acknowledged that guidelines other than what has to be considered ICANN Policy have been followed ...

60. Given the obscurity of the evaluation and scoring process, and in the absence of further information relating to the EBU Application, Claimants are unable to determine or demonstrate that the scoring provided by the CPE Panel would have been different if these CPE Guidelines would not have been applied. In order to do this, additional factual information and documentation would be

³⁴ Reference is made to <http://newgtlds.icann.org/en/applicants/cpe> - CPE Resources.

³⁵ <http://gns0.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf> and <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

³⁶ See ICANN Board Resolution 2008.06.26.02, available at https://www.icann.org/resources/board-material/resolutions-2008-06-26-en#_Toc76113171, which expressly refers to the GNSO’s Principles, Recommendations and Implementation Guidelines.

required, which ICANN refused to disclose within the context of Claimants' DIDP and Reconsideration Requests.

L. The BGC Determined That ICANN Staff Adhered to the DIDP and DIDP Response Process in Finding Certain Requested Documents Subject to DIDP Nondisclosure Conditions³⁷

61. This Determination and the arguments set forth therein are factually incorrect, and are contradicted by both the fact that ICANN decided to publish information requested by Claimants in the context of their Request for Information well after the timeframe for filing a Reconsideration Request, and more importantly the criteria and processes provided for in the Expressions of Interest for Community Priority Evaluation Panels expressly provided for the possibility

62. Claimants note that on April 8, 2015 so well after having received ICANN's Response to their Request for Information and the BGC's Determination on Claimants' Reconsideration Request ICANN has published (redacted) information on its website to which it has denied access to Claimants in the context of their Request under ICANN's Documentary Information Disclosure Policy.³⁸

63. It is clear that, by obstructing access to information requested in connection with Claimants' Request for Information, and only releasing such information after the expiry of the timeframe within which Claimants could finalize their Reconsideration Request, ICANN has clearly and undisputedly taken decisions that are not transparent and have thereby treated Claimants unfair as required by ICANN's Bylaws.

64. Therefore, by publishing the information requested, ICANN confirmed that this information was not meeting the Standards for Nondisclosure that have been published in the context of the Documentary Information Disclosure Policy, which clearly contradicts the BGC Determination.

65. Secondly, by referring to the selection criteria for independent evaluators, it is clear that ICANN initially intended to develop a transparent process, by

³⁷ BGC Determination, page 19; **Annex 16**.

³⁸ See <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>.

requiring independent evaluators in the context of Community Priority Evaluation to take decisions that are “defensible”, “reaching conclusions that are compelling and defensible, and documenting the way in which it has done so in each case” and, in general “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination”.

66. Therefore, by invoking the Standards for Nondisclosure, Claimants are of the opinion that ICANN did not adhere to the principles of transparency that have been set forth in the ICANN Bylaws, and in particular have not applied documented policies neutrally and objectively, with integrity and fairness, as ICANN demonstrated by eventually publishing information requested by Claimants in the context of their Request for Information.

67. Consequently, Claimants have been treated unfairly and were put at a disadvantage in preparing and filing their Revised Reconsideration Request on November 11, 2014. Claimants therefore submit that ICANN has not applied documented policies neutrally and objectively, with integrity and fairness, as required by Article I, Section 2(8) of its Bylaws.

M. The BGC Determined That ICANN Staff Adhered to the DIDP in Finding that Certain Requested Documents Were Not in ICANN’s Possession

68. Requesters find it hard to believe that the information on which the Community Priority Evaluation Panel based itself in developing the EIU Determination was not available to ICANN. Indeed, various documents and information published by ICANN well after the date of the BGC Determination prove otherwise:³⁹

69. First and foremost, the EOI criteria laid down in the “Call for Expressions of Interest (EOIs) for a New gTLD Community Priority Evaluation Panel formerly Comparative Evaluation Panel” published by ICANN clearly state that Community Priority Evaluators are expected to come to “conclusions that are compelling and defensible, and documenting the way in which it has done so in each case”.⁴⁰

³⁹ See **Annexes 17 to 20**.

⁴⁰ See EOI Criterion #4.

70. Statement of Work #2, attached to the Economist Intelligence Unit (EIU) Consulting Agreement, contains the following arrangement between the EIU and ICANN on page 5:

“As part of the overall panel evaluation approach, Panel Firm will document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result [...] or a score, for Community Priority applicants by question or area in the application. Documentation of the evaluation activities and results will be prepared and a summary of the rationale for each score will be documented in the TLD Application System (TAS) according to guidelines established by the Program Office and agreed on by Panel Firm.

The detailed activities to document and summarize the Community Priority evaluation and analysis are as follows:

- 1. Document the evaluation and analysis for each question to demonstrate how the Panellist determined a score for each question based on the established criteria.*
- 2. Provide a summary of the rationale and recommended score for each question.” (emphasis added)”*

71. Furthermore, the EIU committed to *“provide ad-hoc support and documentation as requested by ICANN’s Quality Control function as part of the overall gTLD evaluation quality control process” (emphasis added).*⁴¹

72. Within this Quality Control function, ICANN and the EIU have agreed *“to provide support to on-going gTLD evaluation process Quality Control requirements”,* which include *“Access to work papers as required verifying Panel Firm’s compliance”.*⁴²

73. When referring to the “Panel Evaluation Key Deliverables” to be provided by the EIU, it is clear that a distinction needs to be made between, on the one hand, the *“completed Evaluator Template”* and the *“summary of the rationale and recommended score”* and, on the other hand, the “documentation” referred to on Pages 5 and 6. Therefore, Claimants believe that additional documentation has

⁴¹ See page 12 of the Economist Intelligence Unit (EIU) Consulting Agreement Statement of Work #2 – Application Evaluation Services 12MAR2012.pdf.

⁴² See page 12 of said Statement of Work.

been prepared by the EIU in the context of its Consulting Agreement that can be made available to ICANN upon the latter's request.

74. Therefore, in so far and to the extent ICANN Staff did not have certain documents requested by Claimants' in the context of their Request for Information, ICANN had undisputedly the possibility to request access to this information. Bearing in mind the above, Claimants are of the opinion that ICANN (i) was in the possession of documentary information relating to the EBU Application, or (ii) at least had the opportunity to obtain further information from the EIU, but (iii) deliberately and intentionally refused to provide such information to Claimants.

75. For these reasons, Claimants are of the opinion that the BGC erred in determining that ICANN did not have access to relevant information requested by Claimants in the context of their Request for Information, as they could have easily obtained access under the terms of the Consulting Agreement ICANN entered into with the Economist Intelligence Unit. This information, if and when not available, could have easily been obtained by ICANN in accordance with the processes and procedures contained in this Consulting Agreement.

76. In any case, Claimants submit that by expressly confirming that ICANN did not have access to certain deliverables, ICANN Staff, the ICANN Board and the BGC only prove that they were not in the position to take an informed decision on the basis of the EIU Determination, or even to independently verify whether or not their decision to acknowledge the community-based character of the EBY Application was based on correct, false or inaccurate material information ...

77. For these reasons, Claimants are of the opinion that ICANN has not applied documented policies neutrally and objectively, with integrity and fairness, as required by Article I, Section 2(8) of its Bylaws. Any statement to the contrary by ICANN should in any case be reviewed in light of this same Bylaws provision.

N. Claimants Engaged In The Cooperative Engagement Process, To No Avail

78. On February 6, 2015, Claimants initiated the Cooperative Engagement Process, in advance of filing a Request for Independent Review (IRP).

79. Claimants have submitted various discussion papers to ICANN, attempting to seek a solution that was appropriate for all parties involved. Furthermore, conference calls have been organized in order to discuss the issues put forward by Complainants in order to attempt in finding a workable solution for all parties involved. However, in the course of this process, it became clear that ICANN provided little cooperation in order to avoid Claimants initiating an Independent Review Process.

80. ICANN unilaterally concluded the Cooperative Engagement Process on September 17, 2015.

O. ICANN Was Inconsistent In Evaluating and Scoring

81. Finally, Claimants refer to the contents of their Initial Reconsideration Request, their Revised Reconsideration Request and the various submissions made in the context of the Cooperative Engagement Process. For ease of reference, these can be summarized as follows:

- a. the EIU Determination was unclear and imprecise in various ways (use of vague language, providing a limited number of examples, brief arguments and assumptions, ...) on how the scoring mechanisms provided for in the Applicant Guidebook had been applied by the CPE Panel;
- b. when comparing the CPE Report for the .RADIO gTLD with other reports drawn up by the Economist Intelligence Unit, it is obvious that different standards have been used by the different CPE Panels;
- c. the EIU clearly treated similar applications in a dissimilar manner, which clearly confirms our previous statements that the EIU was not consistent in its approach. For instance, the EIU has used the Oxford English Dictionary as a yardstick in various determinations.⁴³ The EIU did, however, not refer to the Oxford English Dictionary in the .RADIO determination. If it would have

⁴³ See, for instance: .SHOP (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf> and <https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); .MUSIC (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

done so, it would have been clear as will be stated below that the term “radio” has no unique meaning, and that the “community” as concocted by the EBU implies at maximum a “commonality of interests”, rather than “of cohesion”.

- d. The EBU Application for the .RADIO gTLD has received substantial opposition from various sources, including but not limited to: the Webcaster Alliance, Inc.; the International Radio Emergency Support Coalition (IRESC);⁴⁴ and the Claimants, who underline that that BRS Media, Inc. operates both the .AM and .FM TLDs, which are specifically focused on providing domain names to individuals, organizations and companies who are active in the radio industry.

VI. STANDING, SUMMARY OF BREACHES BY ICANN OF ITS BY-LAWS, THE TERMS AND CONDITIONS, AND APPLICABLE LAW

82. Claimants have standing to initiate these Proceedings in accordance with Section 6 of ICANN’s Top-Level Domain Application Terms and Conditions, which state:

*“[...] APPLICANT 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. [...]”*⁴⁵

83. Given the fact that ICANN decided, on the basis of the EIU Determination, that none of the Claimants’ applications for the .RADIO gTLD will proceed to the contracting phase with ICANN, this may likely result in ICANN not awarding the .RADIO gTLD to any of the Claimants.

84. It is therefore clear that the EIU Determination, ICANN’s acceptance thereof and the BGC’s Determination in relation to Claimants’ Reconsideration Request materially affect each of the Claimants’ respective applications and may cause them irreparable harm, considering the fact that each of them has invested more than USD 185,000 in application fees to be paid to ICANN, as well as significant

⁴⁴ <https://gtldcomment.icann.org/applicationcomment/commentdetails/6609>; and <https://www.icann.org/en/system/files/correspondence/dedier-to-chehade-et-al-24sep14-en.pdf>.

⁴⁵ <https://newgtlds.icann.org/en/applicants/agb/terms>.

consulting and attorney fees in the context of developing, submitting and managing each of their respective applications.

85. According to Claimants, ICANN committed numerous breaches of its Articles of Incorporation, its Bylaws, the AGB, the Top-Level Domain Application Terms and Conditions, as well as principles of international and local law in its handling and treatment of the Community Priority Evaluation of the EBU Application, the applications for the .RADIO gTLD submitted by Claimants, their Request for Information under ICANN's Documentary Information Disclosure Policy, their Reconsideration Requests, and the Cooperative Engagement Process.

86. Under its Articles of Incorporation, ICANN is required to "operate for the benefit of the community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law."⁴⁶

87. Furthermore, ICANN's Bylaws require it to act in an open, transparent and non-discriminatory manner, remaining accountable to the Internet community and parties that are affected by ICANN's actions, and consistent with procedures designed to ensure fairness.

88. Based on the factual elements described herein, it is obvious that ICANN, the ICANN Board and the BGC violated their obligations to comply with this framework, in particular its obligations of fairness, transparency, openness, and accountability, which is demonstrated by:

- a. altering and finalizing the legal framework and requirements to be satisfied by applicants for new gTLDs after the period for submitting applications for new gTLDs closed;
- b. creating a framework that made it (virtually) impossible (i) for interested parties to review the information on which certain decisions of the ICANN Board were based, by entering into confidentiality undertakings with organizations that perform an essential role in the context of performing evaluations of

⁴⁶ Articles of Incorporation, Section 4.

- applications for new gTLDs, and (ii) to be held accountable for its actions, decisions, or inactions in the context of the evaluation of applications;
- c. deliberately obstructing access to material information on which decisions by the ICANN Board have been based, although it had the opportunity to have access to and disclose such information.
89. Furthermore, the ICANN Board failed to ensure that adequate safeguards were put in place in order to implement policies (such as the AGB) accurately, transparently and in an unbiased manner.
90. More specifically, Claimants refer to ICANN's breaches of:
- a. Sections 3 and 4 of ICANN's Articles of Incorporation;
 - b. Article I, Section 2(7) and (8) of ICANN's Bylaws;
 - c. Article III, Sections 1 and 6 of ICANN's Bylaws;
 - d. Section 3 of the Affirmation of Commitments;⁴⁷
 - e. Section 7 of the Affirmation of Commitments;
 - f. Sections 9(1) and 9(3) of the Affirmation of Commitments.

VII. CONCLUSIONS AND RELIEF REQUESTED

91. For all of the reasons set out above, Claimants request the Panel appointed by the ICDR to:

- (1) determine that, in light of the above facts and circumstances, which may be further elaborated and supplemented in the context of this Independent Review Proceedings, the ICANN Board, and more in particular the BGC, has breached its Articles of Association, its Bylaws, the criteria and procedures set forth in the AGB, ICANN's Top-Level Domain Application Terms and Conditions, and principles of international law;
- (2) determine that the CPE Guidelines have been developed outside of the policy context provided for by the GNSO in 2007, which has been adopted by the ICANN Board in 2008, and should hence be disregarded in the context of Community Priority Evaluation;

⁴⁷ See **Annex 23**.

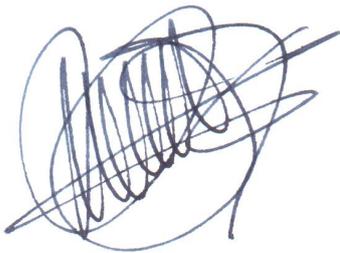
- (3) determine that the EIU erred in reviewing and scoring the EBU Application;
- (4) determine that the review and scoring of the EBU Application was done on the basis of false or inaccurate material information as is proven by the submissions made by the Claimant to ICANN and in the context of these Independent Review Proceedings, and that they have not performed due diligence by independently verifying the information available to them;
- (5) determine that, by not reviewing the contents of the EIU Determination, the information relied upon by the EIU, their work papers and additional documentation developed by the EIU, the ICANN Board has taken an action or inaction by relying on false or inaccurate material information;
- (6) restore the "Application Status" of the Claimants' applications, as well as the Application submitted by the EBU, to "Evaluation Complete", their respective "Contention Resolution Statuses" to "Active", and their "Contention Resolution Result" to "In Contention";
- (7) revise ICANN's respective decisions whereby each of the Claimants' applications for the .RADIO gTLD "Will Not Proceed" to contracting;
- (8) instruct ICANN to provide the information requested in the context of Claimants' Documentary Information Disclosure Request to Claimants;
- (9) provide Claimants a timeframe of at least thirty (30) days to review the information received from ICANN and provide for additional submissions in the context of these proceedings;
- (10) if and when Claimants will have submitted additional arguments within this timeframe, resume these proceedings on the basis of the final arguments and evidence submitted by Claimants;
- (11) if no additional arguments have been submitted by Claimants within this timeframe:
 - a. determine that the EBU Application, and in particular the responses given by the EIU to the community-based questions (especially Questions 18 to 20), did not meet the Community Priority Evaluation Criteria set forth in the AGB;

- b. review the EBU Application on the basis of the information contained in such EBU Application and documented and independently verified public information, including the information provided by Claimants to ICANN as well as in the context of these Independent Review Proceedings;
- c. perform a community-based evaluation of the EBU Application on the basis of such information, taking into account the criteria and standards laid down in the Applicant Guidebook.

VIII. RESERVATION OF RIGHTS

92. In any case, each individual Claimant reserves all of its rights to seek emergency relief or interim measures of protection and to supplement or amend its arguments, claims and requested relief during these Independent Review proceedings, including but not limited to its rights to further elaborate upon, substantiate and supplement the factual and legal positions and arguments set out herein within the context of the ICDR Rules.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Bart Lieben', enclosed within a circular scribble.

Bart Lieben
Attorney-at-Law

October 1st, 2015