

**DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)**

**RECONSIDERATION REQUEST 14-12**

**29 APRIL 2014**

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The Requester, Tennis Australia, seeks reconsideration of the Community Priority Panel's Evaluation Report, and ICANN's acceptance of that Report, finding that the Requester did not prevail in the Community Priority Evaluation for .TENNIS.

**I. Brief Summary.**

The Requester accepted an invitation to participate in a Community Priority Evaluation ("CPE") for .TENNIS. The Requester did not prevail in the CPE. The Requester now claims that the Community Priority Panel ("Panel") failed to comply with established ICANN policies and process in rendering its CPE Report. Specifically, the Requester contends that the Panel: (i) improperly interpreted and applied the CPE criteria set forth in the New gTLD Applicant Guidebook ("Guidebook"); and (ii) failed to seek clarifying responses from the Requester. (Request, § 8, Pg. 3-5.)

The Requester's claims are unsupported. First, the Requester does not identify any process or policy or standard that the Panel misapplied when evaluating the CPE criteria. Instead, the Requester simply objects to the Panel's substantive conclusion, which is not a basis for reconsideration. Second, no provision in the Applicant Guidebook (or otherwise) requires CPE panels to ask clarifying questions. Because the Requester has failed to demonstrate that the Panel acted in contravention of established policy or procedure, the BGC concludes that Request 14-12 be denied.

## **II. Facts.**

### **A. Background Facts.**

The Requester Tennis Australia (“Requester”) applied for .TENNIS.

On 6 November 2013, the Requester was invited to participate in the CPE process.

The Requester elected to participate in the process, and its .TENNIS application (“Application”) was forwarded to the community priority panel assembled by the Economist Intelligence Unit (“EIU”).

On 17 March 2014, the Panel issued its report on the Requester’s application (“Report”). The Panel determined that the application did not meet the requirements specified in the Guidebook and therefore concluded that the application did not prevail in the CPE.

On 17 March 2014, ICANN posted the CPE results on its microsite.

On 19 March 2014, the Requester was notified of the Panel’s Report.

On 3 April 2013, the Requester filed Request 14-12, requesting reconsideration of the Panel’s determination that the Requester’s Application did not prevail in CPE.

### **B. The Requester’s Claims.**

The Requester contends that the Panel failed to comply with ICANN policies and processes in two ways. First, the Requester claims that the Panel “misinterpreted the application” of the CPE criteria set forth in the Guidebook and the CPE Guidelines. (Request, § 8, Pg. 3.) Second, the Requester claims that the Panel failed to “fundamentally understand the application” and should have sought “clarifying responses” from the Requester. (*Id.*, § 8, Pg. 5 and § 10, Pg. 5.)

### **C. Relief Requested.**

The Requester seeks reconsideration from a “new and qualified evaluation panel for the .tennis community priority application inclusive of all information, which the [new] panel can and should request via the channels available to them via the submitted answers, and any relevant clarification questions.” (Request, § 9, Pg. 5.)

### **III. Issues.**

In view of the claims set forth in Request 14-12, the issues are whether the Panel acted in contravention of established policy or process by:

- A.** Improperly applying the Guideline criteria in determining that the Requester’s application did not prevail in CPE; and
- B.** Failing to ask clarifying questions when evaluating the application.

### **IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Priority Evaluation.**

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>1</sup> (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC<sup>2</sup> agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the

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<sup>1</sup> Article IV, § 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it 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.

<sup>2</sup> New gTLD Program Committee.

Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party service providers, such as the EIU, where it can be stated that the Panel failed to follow the established policies or processes in reaching its determination, or that staff failed to follow its policies or processes in accepting that determination.<sup>3</sup>

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE reports. Accordingly, the BGC does not evaluate the Panel's substantive conclusion that the Application did not prevail in the CPE. Rather, the BGC's review is limited to whether the Panel violated any established policy or process, which the Requester suggests was accomplished when the Panel: (i) purportedly misapplied the CPE criteria set out in the Guidebook; and (ii) failed to ask clarifying questions regarding the Application. (Request, § 8, Pg. 3; *Id.* § 10, Pg. 5.)

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – 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.<sup>4</sup>

CPE will occur only if a community-based applicant selects this option and after all applications in the contention set have completed all previous stages of the process. (Guidebook, § 4.2.) Community priority evaluations will be performed by an

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<sup>3</sup> See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

<sup>4</sup> The CPE Guidelines may be found here: <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

independent community priority panel appointed by EIU to review these applications. (Guidebook, § 4.2.2.) The panel’s role is to determine whether any of the community-based applicants fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in a CPE, an applicant must receive a minimum of 14 points on the scoring of foregoing four criteria, each of which is worth a maximum of four points (for a total of 16 points).

## **V. Analysis and Rationale**

The Requester has failed to demonstrate that the Panel violated any established policy or process in rendering the Report.

### **1. The Panel Did Not Improperly Apply the CPE Criteria.**

The Requester objects to the Panel’s determination to award only 11 of the possible 16 points to the Requester’s application. The Requester first claims that the Panel improperly awarded the Requester’s application zero out of four points on the second criterion, which assesses the nexus between the proposed string and the community. (Guidebook, § 4.2.3.) This criterion evaluates “the relevance of the string to the specific community that it claims to represent” through the scoring of two elements—2-A, nexus (worth three points), and 2-B, uniqueness (worth one point). (Guidebook, § 4.2.3.) Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the nexus element, the applied-for string must “match[ ] the name of the community or is a well-known short-form or abbreviation of the community name.” (Guidebook, § 4.2.3.) Section 4.2.3 further sets forth guidelines for determining nexus.

In awarding zero out of three points for element 2-A (nexus), the Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory question listed the CPE Guidelines. (Report at 4.) In particular, the Panel stated that:

The applied-for string (.Tennis) identified a wider or related community of which the applicant, Tennis Australia, is a part, but is not specific to the applicant’s community (the Australian tennis community) . . . Tennis refers to the sport and the global community of people/groups associated with it, and therefore does not refer specifically to the Tennis Australia community. Therefore, there is a substantial over-reach between the proposed string and the definition of the community . . . .”

(*Id.*)

In challenging the Panel’s Report, the Requester does not identify any process or policy or standard that the Panel misapplied in scoring element 2-A. Instead, the Requester simply objects to the Panel’s substantive conclusion, arguing that “[t]he community as defined [in the Application] specifically includes the global tennis community.” (Request at 4.) Such substantive disagreement with the Panel’s findings is not a proper basis for reconsideration.<sup>5</sup>

The Requester next objects to the Panel having awarded the application zero out of one point on element 2-B (uniqueness). To fulfill the requirements for element 2-B,

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<sup>5</sup> It is nevertheless worth noting that the Requester fails to point to any portion of its Application that defines its community as the global tennis community. In fact, the Application explicitly states that the Requester “commits to serve the *Australian* tennis community, which is comprised of the eight Australian state- and territory-based Member Associations . . . .” (Application, § 20(a), Pg. 15) (emphasis added.) Nowhere in its two-page response to the gTLD application prompt requesting a “full description of the community that the applicant is committing to serve” does the Requester mention the global tennis community. (*Id.* § 20(a), Pgs. 15-16.) The application also described the “community-based purpose of the applied-for gTLD” as “provid[ing] a dedicated, distinctive namespace that enhances the *Australian* tennis community’s online presence and supports interactivity, engagement, the availability of authoritative information and promotion of the activities of the *Australian* tennis community.” (*Id.* §20(c), Pg. 19) (emphasis added.) The Requester also attaches for the first time letters of endorsement from several international tennis organizations. However, contrary to what Requester implies, none of those organizations is mentioned in its Application. (Request, § 8, Pg. 4.) The Application only refers generally to the fact that “[c]orporate entities who meet [the Requester’s] guidelines such that they are included on the list of official Corporate Partners are eligible to register domain names which are an exact match or reasonable derivative of their operating name.” (Application, § 20(e), Pg. 22.)

the string must have “no other significant meaning beyond identifying the community described in the application.” (Guidebook, § 4.2.3.) Section 4.2.3 sets forth the guidelines for determining uniqueness.

Here, the Panel concluded that “[t]he string as defined in the [A]pplication does not demonstrate uniqueness as the string does not score a 2 or 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness.” (Report at 4.) The Panel’s conclusion was consistent with the guidelines set out in Section 4.2.3 of the Guidebook, which states that a “score of 1 for ‘uniqueness’ implies a requirement that the string does identify a community, i.e. scores 2 or 3 for ‘Nexus,’ [element 2-A] in order to be eligible for a score of 1 for ‘Uniqueness’ [element 2-B].” (Guidebook, § 4.2.3.) Again, the Requester does not identify any process or policy or standard that the Panel misapplied in scoring element 2-B. Instead, the Request argues – albeit without supporting citation – that because it “believes it represents the global tennis community . . . there is only one tennis community, allowing the [Application] to be eligible for full points on criterion 2b . . . .” (Request, § 8, Pg. 4.) While the Requester may disagree with the Panel’s substantive determination, that is not a proper basis for reconsideration.

**2. The Panel did not Improperly Fail to Ask Clarifying Questions.**

The Requester claims that the Panel failed to ask clarifying questions of the Requester concerning the Requester’s registration policies, “which resulted in fundamental misinterpretations of key components of Tennis Australia’s application” and therefore supports reconsideration. (Request, § 8, Pg. 5.) Specifically, the Requester challenges the Panel’s decision to award the application zero out of one point on element

3-D of the third CPE criterion, which assesses a potential registry’s provisions with regards to breaches of conditions by registrants (i.e., Enforcement).

As noted by the Panel, and consistent with Section 4.2.3 of the Guidebook, two conditions must be met to fulfill the requirements for Enforcement: (i) the registration policies must include specific enforcement measures constituting a coherent set; and (ii) there must be appropriate appeals mechanisms. (Guidebook, § 4.2.3.) In awarding the Requester’s application zero out of one point on Enforcement, the Panel specifically addressed this criterion, noting that “the application did not outline an appeals process” and therefore did not satisfy one of the two conditions for a score of one point, “appropriate appeal mechanisms.” (Report, Pg. 5.)

The Requester argues that the “Tennis Australia Member Protection Policy” “adequately speaks to the issues raised by the evaluation panel as regards a dispute process,” and that the Panel improperly failed to consider this Policy when analyzing whether the application properly outlined an appeals process. (Request § 8, Pg. 4.)<sup>6</sup> Specifically, the Requester claims that the Panel should have asked clarifying questions regarding the Requester’s proposed appeals process.

The Requester’s “Tennis Australia Member Protection Policy,” however, was not attached to its application and therefore was not before the Panel. There is nothing in the Guidebook or CPE Guidelines that required the Panel to seek out additional information concerning the Requester’s proposed policies. The Guidebook provides that CPE scoring is based on “information provided in the application plus other relevant information

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<sup>6</sup> The policy to which the Requester cites is explicitly aimed at “protect[ing] the health, safety, and well-being of those who participate in the activities of Tennis Australia, Member Associations, Affiliated Organizations, Member Affiliated Organization, Regional Associations and Affiliated Clubs.” As such, its applicability to registry enforcement is unclear.

available . . . . The panel *may* also perform independent research, if deemed necessary to reach informed scoring decisions.” (Guidebook § 4.2.3) (emphasis added.) As such, while a Panel is permitted to perform independent research, including asking clarifying questions of the applicant, the decision to do so is entirely within the Panel’s discretion. The Panel’s discretion is further emphasized in the CPE Frequently Asked Questions posted on ICANN’s website, which state that the Panel “may, *but is not obligated to* request additional information from applicants if the Panel feels that additional information is required to evaluate the application.”<sup>7</sup> In declining to ask clarifying questions, the Panel was acting within its discretion and not contrary to established policy or process. As such, its decision is not a proper basis for reconsideration.

## **VI. Decision**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-12. Given that there is no indication that the Panel violated any policy or process in reaching, or staff in accepting, the conclusions in the Panel’s Report, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, § 2.15 of the Bylaws, the BGC’s determination on Request 14-12 shall be final and does not require Board consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BCG’s determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-12

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<sup>7</sup> CPE Frequently Asked Questions v. 1.1, Pg. 3, *available at* <http://newgtlds.icann.org/en/applicants/cpe#resources>

seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.