

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOT REGISTRY LLC, ) ICDR CASE NO. 01-14-0001-5004  
 )  
Claimant, )  
 )  
and )  
 )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S RESPONSE TO CLAIMANT DOT REGISTRY LLC'S  
REQUEST FOR INDEPENDENT REVIEW PROCESS**

Jeffrey A. LeVee  
Rachel Zernik  
JONES DAY  
555 South Flower Street  
50<sup>th</sup> Floor  
Los Angeles, CA 90071  
Tel: +1 213-489-3939  
Fax: +1 213-243-2539

Counsel to Respondent  
The Internet Corporation  
For Assigned Names and Numbers

## TABLE OF CONTENTS

	Page
INTRODUCTION .....	1
BACKGROUND FACTS .....	4
STANDARD OF REVIEW .....	8
ARGUMENT .....	9
I.    THERE IS NO BOARD OR ANY OTHER ACTION THAT VIOLATED ANY PROVISION OF THE ARTICLES OR BYLAWS WITH RESPECT TO THE SELECTION OF THE EIU .....	10
II.   THERE IS NO BOARD OR ANY OTHER ACTION THAT VIOLATED ANY PROVISION OF THE ARTICLES OR BYLAWS WITH RESPECT TO THE PROMULGATION OF THE CPE GUIDELINES .....	11
III.  ICANN’S BOARD DID NOT VIOLATE ANY PROVISION OF THE ARTICLES OR BYLAWS IN ACCEPTING THE GAC’S ADVICE REGARDING .LLC, .INC, AND .LLP .....	13
IV.   THERE IS NO BOARD ACTION OR ANY OTHER ACTION THAT VIOLATED ANY PROVISION OF THE ARTICLES OR BYLAWS WITH RESPECT TO THE EIU’S ALLEGED CONFLICT OF INTEREST .....	15
V.    THE BGC DID NOT VIOLATE ANY PROVISION OF ICANN’S ARTICLES OR BYLAWS IN DENYING DOT REGISTRY’S RECONSIDERATION REQUEST .....	16
1.    The EIU’S Purported Failure To Verify Letters Of Support And Opposition Did Not Support Reconsideration. ....	17
2.    The EIU’s Purported Failure to Independently Evaluate the Applications Did Not Support Reconsideration. ....	19
3.    Dot Registry’s Argument that the Panels Engaged in “Double Counting” Did Not Support Reconsideration.....	19
4.    Dot Registry’s Argument that the Panels Did Not Cite Their Independent Research Did Not Support Reconsideration.....	20
5.    Dot Registry’s Argument that the Panels Incorrectly Applied the CPE Criteria Did Not Support Reconsideration.....	20
VI.   ICANN AND DOT REGISTRY HAVE COMPLETED THE COOPERATIVE ENGAGEMENT PROCESS.....	21
VII.  RESPONSE TO DOT REGISTRY’S REQUESTED RELIEF .....	21
CONCLUSION.....	22

## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Request for Independent Review Process (“IRP Request”) submitted by claimant Dot Registry, LLC (“Dot Registry”) on 22 September 2014.

1. Dot Registry has applied to ICANN for the opportunity to operate the new generic top level domains .LLC, .INC, and .LLP. Dot Registry is not the only applicant for these generic top level domains (“gTLDs”); there are eight other applicants for .LLC, ten other applicants for .INC, and three other applicants for .LLP. Dot Registry, however, is the only applicant that submitted “community applications” for these gTLDs, proposing that each of the gTLDs be operated “for the benefit of a clearly delineated community.”

2. Where, as here, a community-based application is in “contention” with other applications for the same proposed new gTLD, the community-based applicant is invited to participate in Community Priority Evaluation (“CPE”). If the applicant prevails in CPE, only that applicant (and any other community-based applicants for the same string that have prevailed in CPE) is permitted to proceed. The New gTLD Applicant Guidebook (“Guidebook”) that ICANN and the community adopted in order to evaluate new gTLD applications specifically notes that the requirements to prevail in CPE are “very stringent” because a qualifying community-based application “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”<sup>1</sup> In other words, it is intentionally difficult for applications to prevail in CPE and the rules have had the desired effect: of the sixteen applications that have thus far undergone CPE, four have prevailed, including applications for .OSAKA (for the benefit of the Osaka community) and .ECO (for the benefit of the global

---

<sup>1</sup> New gTLD Applicant Guidebook (“Guidebook”), § 4.2.3.

environmental community).

3. The CPE Panels evaluating Dot Registry's applications determined that the applications did not meet the criteria required to prevail in CPE. Although Dot Registry's IRP filing implies that the applications were on the cusp of prevailing, each of Dot Registry's applications received only five of the sixteen available points on the CPE criteria, and each needed a minimum of fourteen points in order to prevail. Because Dot Registry's applications did not prevail in CPE, now all of the applications for .LLC, .INC, and .LLP will proceed, including Dot Registry's applications for those strings. In other words, Dot Registry is still very much in contention for these new gTLDs; it simply failed to convince the CPE Panel that its applications for these proposed new gTLDs identified communities sufficiently to warrant the privilege of prevailing over all other applications for the same gTLDs.

4. Dissatisfied with the fact that it will have to be in contention with the other applications for .LLC, .INC, and .LLP, Dot Registry asked ICANN's Board Governance Committee ("BGC") to reconsider the CPE Panels' determinations. The BGC denied Dot Registry's requests for reconsideration because Dot Registry did not state a proper basis for reconsideration as defined in ICANN's Bylaws. Dot Registry now challenges in this independent review process ("IRP") the BGC's denial of the reconsideration requests, 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 ("GAC") regarding .LLC, .INC, and .LLP.

5. IRPs are conducted pursuant to Article IV, Section 3 of ICANN's Bylaws, which

provide for a non-binding method of evaluating certain actions of ICANN’s Board of Directors.<sup>2</sup> This IRP Panel has one (and only one) responsibility: to provide its views as to “whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”<sup>3</sup>

6. As explained herein, Dot Registry’s IRP should be summarily denied because the ICANN Board has not taken any action that violates any provision of ICANN’s Articles or Bylaws. Most importantly, IRPs are not a vehicle to challenge third-party expert reports; the Board is not involved in the creation of such reports and has no obligation to review (substantively or otherwise) any such report. Dot Registry, knowing better, essentially proposes that the ICANN Board should have conducted a substantive review of the all of CPE expert determinations – or perhaps a substantive review of all expert determinations that have occurred in conjunction with the new gTLD program. But the Board and the ICANN community, in adopting the Guidebook, made clear that the Board would not undertake such a responsibility, and nothing in the Articles or Bylaws requires the Board to do so.

7. Accordingly, neither the creation nor the acceptance of the CPE Panel Reports regarding Dot Registry’s Applications for .INC, .LLC, or .LLP constitutes ICANN Board action; nor does the appointment of the EIU by ICANN staff – not the ICANN Board – following a public request for applications from interested firms. When the Board did act, in responding to GAC advice and denying Dot Registry’s Reconsideration Requests, it followed ICANN policies and processes at every turn.

---

<sup>2</sup> ICANN’s Bylaws (“Bylaws”), Ex. C-001 and *available at* <http://www.icann.org/en/about/governance/bylaws>. Citations to exhibits beginning with the prefix “C” refer to exhibits submitted with Dot Registry’s IRP Request; citations to exhibits beginning with the prefix “R” refer to exhibits submitted with ICANN’s Response.

<sup>3</sup> Bylaws, Art. IV, § 3.4.

## BACKGROUND FACTS

### Background Information On ICANN

8. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” including the domain name system (“DNS”).<sup>4</sup>

9. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors, approximately 300 staff members, and an Ombudsman. ICANN is much more than just the corporation—it is a community of participants. In addition to the Board, the staff, and the Ombudsman,<sup>5</sup> the ICANN community includes a Nominating Committee,<sup>6</sup> three Supporting Organizations,<sup>7</sup> four Advisory Committees,<sup>8</sup> a group of technical expert advisors,<sup>9</sup> and a large, globally distributed group of community members who participate in ICANN’s processes.

10. In its early years, and in accordance with its Core Values, ICANN focused on increasing the number of companies that could sell domain name registrations to consumers (“registrars”). ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs (“registries”). In 2000, ICANN approved seven gTLDs in a “proof of concept” phase that was designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet. In 2004 and 2005, ICANN approved a

---

<sup>4</sup> Bylaws, Art. I, § 1.

<sup>5</sup> *Id.*, Art. V.

<sup>6</sup> *Id.*, Art. VII.

<sup>7</sup> *Id.*, Arts. VIII-X.

<sup>8</sup> *Id.*, Art. XI.

<sup>9</sup> *Id.*, Art. XI-A, § 2.

handful of additional TLDs.

### **Background Information On The New gTLD Program**

11. The New gTLD Program (“Program”) constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. 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 gTLDs and new non-ASCII, internationalized domain name (“IDN”) gTLDs.<sup>10</sup> In developing the Program with the ICANN community, numerous versions of the Guidebook were prepared and distributed throughout the ICANN community. Ultimately, ICANN went forward with the Program based on the version of the Guidebook published on 4 June 2012, which provides detailed instructions to gTLD applicants and sets forth the procedures for ICANN’s evaluation of new gTLD applications.

12. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community-based, *i.e.*, “operated for the benefit of a clearly delineated community.”<sup>11</sup> Applicants for community-based gTLDs are expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have applied for a gTLD string strongly and specifically related to the community named in [their] application.”<sup>12</sup> The Guidebook provides that “community-based applications are intended to be a narrow category, for applications where there are unambiguous associations among the applicant, the community served, and the applied-for gTLD string.”<sup>13</sup>

13. If two or more applicants apply for identical or “confusingly similar” new gTLDs

---

<sup>10</sup> IDN gTLDs are gTLDs that include characters not within the US-ASCII (American Standard Code for Information Exchange) or Latin alphabets.

<sup>11</sup> Guidebook, § 1.2.3.1, Ex. C-005.

<sup>12</sup> *Id.*, § 1.2.3.1.

<sup>13</sup> *Id.*, § 1.2.3.2.

and complete all preliminary stages of evaluation, they are placed in a contention set.<sup>14</sup> A community-based applicant that is placed in a contention set may elect to proceed with Community Priority Evaluation.<sup>15</sup> If the applicant elects to proceed with CPE, its application is forwarded to an independent, third-party provider, the EIU for review.<sup>16</sup>

14. A panel constituted of EIU panelists (“CPE Panel”) then evaluates the application.<sup>17</sup> If the applicant is found to meet the CPE criteria—*i.e.*, if the CPE Panel awards the application at least 14 out of 16 possible points on those criteria—the applicant will prevail in CPE.<sup>18</sup> ICANN selected the EIU to handle CPEs following a public request for applications from firms interested in performing the various third party evaluations of new gTLD applications.<sup>19</sup> ICANN’s Board has no role whatsoever in selecting the EIU (much less the individual EIU panelists), in the analysis of each of the criterion by the Panels, or in the scoring of the applications conducted by the Panels.

15. If the applicant prevails in CPE, it (and any other community-based applications in the contention set that prevail in CPE) will proceed to the next stage of evaluation.<sup>20</sup> Other standard applications in the contention set will not proceed because the community-based applications will have achieved priority.

16. The Guidebook specifically cautions that, because “a qualified community application eliminates all directly contending standard applications, regardless of how well

---

<sup>14</sup> *Id.*, § 4.1.

<sup>15</sup> *Id.*, § 4.2.

<sup>16</sup> See <http://newgtlds.icann.org/en/applicants/cpe>.

<sup>17</sup> CPE Panel Process Document, Ex. C-016.

<sup>18</sup> Guidebook, § 4.2.2. The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of four points. *Id.* § 4.2.3.

<sup>19</sup> See “Preparing Evaluators for the New gTLD Application Process,” *available at* <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>.

<sup>20</sup> Guidebook, § 4.2.2.

qualified [they] may be, . . . [the community priority criteria impose] very stringent requirements for qualification of a community-based application.”<sup>21</sup> As noted above, of the sixteen applications that have undergone CPE thus far, only four have prevailed.<sup>22</sup> Thus, by way of example only, applications for .TAXI and .MLS have been denied community priority.

### **Relevant Facts Regarding Dot Registry’s New gTLD Applications**

17. Dot Registry filed community-based applications for .LLC, .INC, and .LLP.<sup>23</sup> Dot Registry’s applications were placed in contention sets with other applicants for .LLC, .INC, and .LLP, respectively. As noted above, there are eight other applicants for .LLC, ten other applicants for .INC, and three other applicants for .LLP; none of the other applications sought community-based treatment.

18. On 19 February 2014, Dot Registry was invited to participate in CPEs for .LLC, .INC, and .LLP, and Dot Registry’s applications were forwarded to the EIU for evaluation. On 11 June 2014, the CPE Panels issued their reports (“Reports”). The applications each received only five out of sixteen possible points on the CPE criteria, not coming anywhere close to the fourteen points necessary to prevail in the respective CPEs.<sup>24</sup>

19. On 25 June 2014, Dot Registry filed Reconsideration Requests 14-30, 14-32, and 14-33, seeking reconsideration of the Reports.<sup>25</sup> On 24 July 2014, the BGC denied the Reconsideration Requests, finding that Dot Registry had “failed to demonstrate that the Panels

---

<sup>21</sup> Guidebook, § 4.2.3 (emphasis added).

<sup>22</sup> See <http://newgtlds.icann.org/en/applicants/cpe>.

<sup>23</sup> Dot Registry alleges that technical difficulties with the gTLD application process, including with ICANN’s TLD Application System, resulted in “damage to the investments Dot Registry undertook in furtherance of its gTLD applications.” (IRP Request at 9 n.35.) Such technical issues are addressed by ICANN staff, and plainly do not involve any action by ICANN’s Board.

<sup>24</sup> .LLC Report, Ex. C-018; .INC Report, Ex. C-020; .LLP Report, Ex. C-019.

<sup>25</sup> The National Association of Secretaries of State (“NASS”) joined in Dot Registry’s Reconsideration Requests. The BGC inadvertently failed to list the NASS as a co-Requester in its determination on the Requests. This omission had no effect on the substance of the BGC’s Determination.

acted in contravention of established policy or procedure in rendering their respective CPE Reports. . . .”<sup>26</sup> Dissatisfied with that outcome, Dot Registry ultimately filed this IRP.

20. Because Dot Registry’s applications did not prevail in CPE, all applications for .LLC, .INC, and .LLP, including Dot Registry’s, will proceed, and the respective contention sets will have to be resolved through other means. The contention sets could be resolved by voluntary agreement between Dot Registry and the competing applicants.<sup>27</sup> If such voluntary agreement does not occur, the Guidebook provides that the strings will proceed to auction, which is the last resort “tie-breaker method for resolving string contention among the applications within a contention set.”<sup>28</sup>

### STANDARD OF REVIEW

21. The IRP is a unique, non-binding process available under ICANN’s Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with ICANN’s Articles or Bylaws.<sup>29</sup> The IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN’s Articles or Bylaws.<sup>30</sup> ICANN’s Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. Did the Board members exercise independent judgment in taking the

---

<sup>26</sup> Determination on Requests 14-30, 14-32, and 14-33 (“Determination”) at 2, Ex. C-004.

<sup>27</sup> Guidebook, § 4.3.

<sup>28</sup> *Id.*

<sup>29</sup> Bylaws, Art. IV, §§ 3.1, 3.2.

<sup>30</sup> *See id.* Art. IV, §§ 3.2, 3.4.

decision, believed to be in the best interests of the company?<sup>31</sup>

The IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.<sup>32</sup>

22. ICANN has appointed the ICDR as ICANN’s IRP Provider. ICANN’s Bylaws and the Supplementary Procedures that the ICDR has adopted specifically for ICANN IRP proceedings apply here.<sup>33</sup> The Bylaws provide that the IRP be conducted via “email and otherwise via the Internet to the maximum extent feasible.”<sup>34</sup> The IRP Panel may also hold meetings via telephone where necessary, and “[i]n the unlikely event that a telephone or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.”<sup>35</sup>

23. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written declaration designating, among other things, the prevailing party.<sup>36</sup> The Board will give serious consideration to the IRP Panel’s opinion and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.<sup>37</sup>

## ARGUMENT

24. Dot Registry’s requested relief—that the IRP Panel “[f]ind[] that Dot Registry’s applications . . . satisfied the CPE criteria set forth in the [Guidebook]”—demonstrates that Dot Registry is challenging the Reports’ substantive determinations that Dot Registry’s applications

---

<sup>31</sup> *Id.*, Art. IV, § 3.4.

<sup>32</sup> *See id.*

<sup>33</sup> Absent a governing provision in ICANN’s Bylaws or the ICDR’s Supplemental Procedures, the ICDR Rules apply. In the event of any inconsistency between the Supplementary Procedures and the ICDR’s Rules, the Supplementary Procedures shall govern. *Id.*, Art. IV, § 3.8; *see also* ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process (“Supplementary Procedures”), § 2, Ex. C-003, *also available at* <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

<sup>34</sup> Bylaws, Art. IV, § 3.12.

<sup>35</sup> *Id.*, Art. IV, § 3.12; Supplementary Procedures ¶ 10.

<sup>36</sup> *Id.*, Art. IV, § 3.18.

<sup>37</sup> *Id.*, Art. IV, § 3.21.

did not prevail in their respective CPEs.<sup>38</sup> IRPs, however, are not a forum for challenging third party expert reports, which involve no Board action whatsoever.

25. In the course of its argument, Dot Registry identifies only two Board actions—ICANN’s response to GAC advice and the denial of Dot Registry’s Reconsideration Requests—but in each instance, the Board’s actions were consistent with and in accordance with ICANN’s Articles and Bylaws. As such, Dot Registry has not demonstrated a basis for Independent Review.

**I. THERE IS NO BOARD OR ANY OTHER ACTION THAT VIOLATED ANY PROVISION OF THE ARTICLES OR BYLAWS WITH RESPECT TO THE SELECTION OF THE EIU.**

26. Dot Registry argues that Independent Review is warranted because the Board “appointe[d] the EIU to conduct reviews for which the EIU lacked the requisite skill and expertise.”<sup>39</sup> However, the Board was not involved in the selection of the EIU; ICANN staff selected third-party providers, including the EIU, via a public solicitation of Expressions of Interest.<sup>40</sup> As such, the selection of the EIU is not a basis for Independent Review.<sup>41</sup>

27. Nevertheless, even if the selection of EIU could be deemed Board action (which it is not) the only evidence that Dot Registry points to in support of its argument that the EIU

---

<sup>38</sup> The IRP Panel has no authority to grant affirmative relief. Rather, the IRP Panel is limited to stating its opinion by “declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and *recommending* that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. Bylaws, Art. IV, §§ 3.4, 3.11(c-d).

<sup>39</sup> IRP Request ¶ 62.

<sup>40</sup> <https://www.icann.org/news/announcement-2009-02-25-en>.

<sup>41</sup> The fact that the Board has the theoretical power to appoint vendors for the New gTLD Program, or asked ICANN staff to select the vendor, does not mean that the staff’s selection of EIU is reviewable in an IRP. Further, Dot Registry’s argument that the appointment of a sole provider is contrary to an ICANN “policy” is wrong. Dot Registry’s only support for this argument is a 22 November 2011 post announcing the various evaluation firms and explaining that “where feasible” more than one firm may be appointed for certain evaluations. <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>.

lacked expertise is Dot Registry’s substantive disagreement with the CPE Panels’ conclusions.<sup>42</sup> For example, Dot Registry believes that the Panels “misinterpret[ed] the motivation and effects of structuring businesses according to particular legal formats” when the Panels determined that businesses “are typically organized around specific industries, locales, and other criteria not related to the entities’ structure” (i.e., limited liability company, corporation, or limited liability partnership).<sup>43</sup> Similarly, Dot Registry disagrees with the Panels’ characterization of the role of individual Secretaries of State from certain states in the United States.<sup>44</sup> However, the fact that the CPE Panels came to different conclusions than Dot Registry does not indicate that the Panels lacked the requisite skill and expertise to evaluate Dot Registry’s applications. In all events, Dot Registry has not demonstrated that this selection process somehow violated ICANN’s Articles or Bylaws.

**II. THERE IS NO BOARD OR ANY OTHER ACTION THAT VIOLATED ANY PROVISION OF THE ARTICLES OR BYLAWS WITH RESPECT TO THE PROMULGATION OF THE CPE GUIDELINES.**

28. Dot Registry argues that it is entitled to Independent Review because the Board “allow[ed] the EIU to promulgate new policies and procedures that created additional requirements for applicants undergoing CPE *after* the application period closed,” namely the “Community Priority Evaluation Guidelines” (“CPE Guidelines”).<sup>45</sup> As a preliminary matter, there again was no Board action involved in the promulgation of the CPE Guidelines; ICANN staff (not the Board) “published the CPE Guidelines produced by the [EIU] after considering

---

<sup>42</sup> IRP Request ¶¶ 32-34.

<sup>43</sup> IRP Request ¶ 32; .LLC Report at 2, Ex. C-018; .INC Report at 2, Ex. C-020; .LLP Report at 2, Ex. C-019.

<sup>44</sup> IRP Request ¶ 34.

<sup>45</sup> IRP Request ¶ 62; *see also id.* ¶ 28.

ICANN community feedback on the first draft.”<sup>46</sup>

29. Even if the Board had the “power” to promulgate guidelines, the Board did not exercise that power nor should it have exercised that power. Rather, the Board, in accordance with the Guidebook, adopted the new gTLD policies and overall program, while properly leaving implementation to ICANN staff. This is particularly appropriate with respect to the New gTLD Program, which involved over 1,900 applications and thousands of evaluation decisions that had to be performed with respect to those applications. The notion that the Board should have injected itself into each aspect of the New gTLD Program and the promulgation of guidelines – much less the result of the application of those guidelines – is without merit and not supported by a single fact.

30. Based on the above alone, Dot Registry’s argument fails. Even so, to be clear, the CPE Guidelines do not, as Dot Registry argues, subject Dot Registry to “standards that did not exist when it prepared and submitted its applications.”<sup>47</sup> The CPE Guidelines expressly state that they “do not modify the [Guidebook] framework [or] change the intent or standards laid out in the [Guidebook].”<sup>48</sup> Rather, they are “an accompanying document to the [Guidebook] and are meant to provide additional clarity around the scoring principles outlined in the [Guidebook] . . . [and to] increase transparency, fairness, and consistency in the evaluation process.”<sup>49</sup> Moreover, the terms and conditions of the new gTLD applications submitted by Dot Registry provide that “ICANN reserves the right to make reasonable updates and changes to [the Guidebook] and to

---

<sup>46</sup> See <http://newgtlds.icann.org/en/applicants/cpe>.

<sup>47</sup> IRP Request ¶ 28.

<sup>48</sup> CPE Guidelines, p. 2 (emphasis added), Ex. R-1. Dot Registry has attached a draft copy of the CPE Guidelines as Exhibit C-015. That copy was published online on 16 August 2013 for public comment; it does not contain the above-quoted language. The final copy of the CPE Guidelines, which reflects community input and which contains the quoted language, is attached as Exhibit R-1 to this Response.

<sup>49</sup> *Id.*

the application process,” and that new gTLD applications “will be subject to any such updates and changes.”<sup>50</sup>

**III. ICANN’S BOARD DID NOT VIOLATE ANY PROVISION OF THE ARTICLES OR BYLAWS IN ACCEPTING THE GAC’S ADVICE REGARDING .LLC, .INC, AND .LLP.**

31. ICANN’s Governmental Advisory Committee (“GAC”) is an advisory committee whose membership is open to national governments and select multinational governmental and treaty organizations. Pursuant to ICANN’s Bylaws, ICANN’s Board is required to consider the GAC’s advice on public policy matters.<sup>51</sup>

32. On 11 April 2013, after Dot Registry had submitted its Applications, the GAC advised ICANN’s Board that certain applied-for gTLDs were “likely to involve a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm.”<sup>52</sup> The GAC advised that applicants for those strings, which included .LLC, .INC, and .LLP, should be required to put in place additional safeguards to mitigate the risk of consumer harm.<sup>53</sup> In response to the GAC’s advice, ICANN’s New gTLD Program Committee classified .LLC, .INC, and .LLP, as well as various other strings, as involving “highly regulated sectors” and required that applicants for those strings agree to implement certain additional safeguards.<sup>54</sup> Contrary to what Dot Registry suggests, these additional safeguards are not voluntary; rather, they will be included as non-negotiable terms in the binding Registry Agreements signed by successful

---

<sup>50</sup> New gTLD Application Terms and Conditions ¶ 14, Ex. R-2, *also available online at* <http://newgtlds.icann.org/en/applicants/agb/terms>.

<sup>51</sup> Bylaws, Art. XI, § 2(j).

<sup>52</sup> GAC Beijing Communiqué at 8-10, Ex. C-010, *also available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> NGPC Resolution No. 2014.02.05.NG01 and Annex 2 to NGPC Resolution No. 2014.02.05.NG01, Ex. R-3, *also available online at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en> and <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>.

applicants for those strings.<sup>55</sup> Applicants were also allowed to incorporate additional, voluntary safeguards into their Registry Agreements.<sup>56</sup>

33. Dot Registry makes two conflicting arguments with respect to the Board’s response to the GAC’s advice. On the one hand, Dot Registry argues that the Board’s response “fail[ed] to adequately address [the GAC’s advice] that delegating corporate identifier strings . . . under ICANN’s standard registry agreement would risk an unprecedented level of fraud on consumers and businesses.”<sup>57</sup> This issue has no bearing on Dot Registry’s contested CPEs. Dot Registry has not demonstrated how it has been materially affected by any failure to “adequately address” the GAC’s advice—the only harm Dot Registry identifies is a speculative harm to other consumers and businesses, a harm that does not give rise to standing on Dot Registry’s part to pursue an IRP.<sup>58</sup> Further, the Board did address the GAC’s advice by requiring that strings subject to the advice will not be delegated pursuant to ICANN’s “standard registry agreement” but, instead, pursuant to registry agreements containing mandatory additional terms regarding public interest safeguards.

34. On the other hand, Dot Registry appears to argue that the Board should have rejected the GAC’s advice because, Dot Registry states, in accepting the GAC’s advice and providing for additional mandatory and voluntary safeguards, the Board “allow[ed] [other applicants for .LLC, .INC, and .LLP] to make material amendments to their applications after the application period closed . . . which had the effect of making their Standard Applications more

---

<sup>55</sup> *See id.*

<sup>56</sup> *See* <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>.

<sup>57</sup> IRP Request ¶ 63.

<sup>58</sup> Bylaws, Art. IV, § 3.2 (Requiring that the person seeking Independent Review have suffered an injury or harm that is “directly and causally connected to the Board’s alleged violation of the Bylaws or the Articles of Incorporation.”) Similarly, Dot Registry has no standing to seek Independent Review of actions that allegedly affect a third party, the NASS. *See* IRP Request ¶¶ 63.

competitive with Community Applications.”<sup>59</sup> Whether or not this is true, nothing in any other application, whether Standard or Community, affected or affects the CPE results of Dot Registry’s applications. Further, the Board’s requirement that applicants include additional safeguards in registry agreements hardly constitutes a violation of any Bylaw or Article, and to the extent those applications are now consistent with GAC advice, there is no conceivable harm to Dot Registry that could support an IRP. In all events, as noted above, the terms and conditions of the new gTLD applications signed and submitted by Dot Registry provide that “ICANN reserves the right to make reasonable updates and changes . . . to the application process.”<sup>60</sup> It was clearly within ICANN’s discretion to modify certain requirements in response to GAC advice—advice that ICANN’s Board is required to consider pursuant to its Bylaws and the Guidebook.<sup>61</sup> Again, however, the acceptance of this advice affected neither the outcome of the CPEs nor the evaluation of Dot Registry’s applications.

**IV. THERE IS NO BOARD ACTION OR ANY OTHER ACTION THAT VIOLATED ANY PROVISION OF THE ARTICLES OR BYLAWS WITH RESPECT TO THE EIU’S ALLEGED CONFLICT OF INTEREST.**

35. Dot Registry contends that the EIU “appears to have a conflict of interest” with respect to Dot Registry’s Applications because Google has submitted applications for .LLC, .INC, and .LLP, and Eric Schmidt, the current executive Chairman of Google, is a member of the Board of Directors of The Economist Group.<sup>62</sup> Dot Registry argues that this alleged conflict supports Independent Review because the Board “fail[ed] to address [the alleged conflict] which arose after the EIU was appointed and . . . even after it was brought to the

---

<sup>59</sup> IRP Request ¶ 65.

<sup>60</sup> New gTLD Application Terms and Conditions ¶ 14.

<sup>61</sup> Bylaws, Art. XI, § 2(j).

<sup>62</sup> IRP Request ¶ 47.

Board's attention."<sup>63</sup> Dot Registry, however, fails to provide any evidence of when, if ever, this alleged conflict was brought to the Board's attention or what action the Board took (or failed to take) once the alleged conflict was brought to its attention.

36. By design, the third party expert providers were required to address alleged conflicts of interest; not the ICANN Board or the ICANN staff. Section 2.4.3.1 of the Guidebook sets forth the "Conflict of Interest Guidelines for Panelists," which detail the procedures that evaluation panelists must follow to ensure that no conflicts of interest exist.<sup>64</sup> An "evaluation panelist" is defined as "any individual associated with the review of an application."<sup>65</sup> The CPE Guidelines and the CPE Panel Process Document confirm that "[a]ll EIU evaluators must ensure that no conflicts of interest exist."<sup>66</sup>

37. Pursuant to those Guidelines, the EIU was required to confirm that none of the evaluation panelists had conflicts with respect to the community-based applications. Dot Registry presents no evidence that the EIU failed to do so. Dot Registry does not allege that Eric Schmidt was an evaluation panelist, or that he had any influence on, or even knowledge of, the CPE Reports. Likewise, Dot Registry does not allege that Mr. Schmidt has any involvement whatsoever with the EIU, which is a single division within The Economist Group. Finally, Dot Registry does not allege what, if any, effect the alleged conflict had on the evaluation of its applications.

38. In short, Dot Registry offers no evidence that ICANN's Board was informed of this alleged conflict, no reason why the ICANN Board should have reviewed (or did review) this particular alleged conflict, and no argument regarding how the Board's determination that its

---

<sup>63</sup> IRP Request ¶ 62.

<sup>64</sup> Guidebook § 2.4.3.1.

<sup>65</sup> *Id.*

<sup>66</sup> CPE Guidelines at 22.

expert panels should review conflicts on their own could possibly constitute a violation of the Bylaws or Articles. Certainly, an unsupported allegation that a conflict of interest might exist with respect to a high-level executive is not a basis for Independent Review.

**V. THE BGC DID NOT VIOLATE ANY PROVISION OF ICANN’S ARTICLES OR BYLAWS IN DENYING DOT REGISTRY’S RECONSIDERATION REQUEST.**

39. Dot Registry dedicates much of its IRP Request to renewing the arguments it made in its Reconsideration Requests. Dot Registry argues, as it did in its Reconsideration Requests, that the CPE Panels violated established processes or policies by:

- (a) Failing to validate letters of support and opposition;<sup>67</sup>
- (b) Failing to independently evaluate each of the Applications;<sup>68</sup>
- (c) Violating the Guidebook policy against “double counting” in scoring the CPE criteria;<sup>69</sup>
- (d) Failing to cite their independent research;<sup>70</sup> and
- (e) Failing to properly apply the CPE criteria in evaluating the

Applications.<sup>71</sup>

40. While Dot Registry disagrees with the BGC’s determination<sup>72</sup> denying reconsideration, Dot Registry fails to identify any provision of ICANN’s Articles or Bylaws that was allegedly violated by the BGC in making its determination on Dot Registry’s Reconsideration Requests. IRPs are proper only where a Requester complains that the Board has acted inconsistently with ICANN’s Articles or Bylaws. IRPs are not forums for Requesters to

---

<sup>67</sup> IRP Request at 14-15.

<sup>68</sup> *Id.* at 13.

<sup>69</sup> *Id.* at 16.

<sup>70</sup> *Id.* at 14.

<sup>71</sup> *Id.* at 15-16.

<sup>72</sup> See BGC Determination on Requests 14-30, 14-32, and 14-33 (“Determination”), Exhibit C-004.

appeal substantive decisions of the Board (absent a clear allegation that a substantive decision is contrary to the Articles or Bylaws), much less substantive decisions of a third party Panel.

41. While this Response could end here, for completeness ICANN briefly addresses why the BGC correctly determined that reconsideration was not warranted. But ICANN again notes that Dot Registry does not argue that the BGC’s evaluation and review of any of the points raised in the Reconsideration Requests itself violated the Articles or Bylaws.

**1. The EIU’S Purported Failure To Verify Letters Of Support And Opposition Did Not Support Reconsideration.**

42. Dot Registry claimed in its Reconsideration Requests, as it does here, that the CPE Panel evaluating its application for .LLC failed to validate five letters of support from individual LLCs.<sup>73</sup> Dot Registry acknowledged that the CPE Panel had contacted those five LLCs but complained that the Panel had mistakenly identified the letters of support as being for the “.INC Community Application.”<sup>74</sup> The BGC determined that Dot Registry “had not demonstrated that the [Panel’s] typographical error materially affected [it] in any way” because “the CPE Panel expressly found that the letters of support [that Dot Registry] claim[ed] were not validated actually justified the award of one point” on the “support” element of the fourth CPE criterion, “community endorsement.”<sup>75</sup>

43. Dot Registry also claimed that the CPE Panels failed to validate a later-rescinded

---

<sup>73</sup> Request 14-30 at 4-5, Ex. C-017. Dot Registry also argues that the CPE Panels “harassed” its supporters by doing exactly what Dot Registry acknowledges the Panels were required to do, namely contact supporters to validate letters of support.

<sup>74</sup> *Id.* at 5.

<sup>75</sup> Determination at 9. To achieve two points (the maximum available) on the “support” element, Dot Registry would have needed to “ha[ve] documented support from, the recognized community institution(s)/organization(s) or ha[ve] otherwise documented authority to represent the community.” Guidebook, § 3.2.1. Dot Registry did not claim that the LLCs that submitted letters in support of its application constituted “recognized community institutions” or “member organizations,” such that their support would have entitled Dot Registry to more than one point on the “support” criterion. Determination at 10.

letter of opposition from the European Commission (“EC”).<sup>76</sup> The BGC determined that Dot Registry provided no evidence that the CPE Panel had failed to contact the EC.<sup>77</sup> The BGC further determined that, even if the CPE Panel had relied on the later-rescinded letter, and had failed to award the only other available point for this evaluation criterion, Dot Registry did not demonstrate that it was adversely affected.<sup>78</sup> Notably, given that Dot Registry’s applications each received only five of the necessary fourteen points needed to prevail in CPE, one additional point would still leave Dot Registry’s applications eight points short of prevailing in CPE.

## **2. The EIU’s Purported Failure to Independently Evaluate the Applications Did Not Support Reconsideration.**

44. Dot Registry claimed, as it does here, that the CPE Panels failed to independently evaluate each of its applications. But as the BGC noted, Dot Registry cited no policy or procedure (of either ICANN or of the EIU) prohibiting CPE Panels from consulting with each other and sharing resources.<sup>79</sup> The BGC further noted that, because the purported communities in Dot Registry’s applications for .LLC, .INC, and .LLP were defined in identical terms—as those businesses registered as, respectively, limited liability corporations, corporations, and limited liability partnerships—“it [was] not surprising that the community definitions in the [] Applications raised similar issues, and that the Panels might collaborate in researching and addressing those issues.”<sup>80</sup> Finally, the BGC noted that Dot Registry had acknowledged that

---

<sup>76</sup> See, e.g., LLC Request at 5-6, C-17. In its IRP Request, Dot Registry also raises the issue of a purported letter of opposition from the Secretary of State of Delaware. IRP Request ¶ 44. However, the CPE Reports make clear that that letter was not the basis for the Panels’ scores on the “opposition” element of the “community endorsement” criterion. See, e.g., LLC Report at 7 (noting that the relevant opposition came from a group concerned that “limiting registration to US registered corporations would unfairly exclude non-US businesses.”)

<sup>77</sup> Determination at 10.

<sup>78</sup> *Id.* at 11.

<sup>79</sup> *Id.* at 14.

<sup>80</sup> *Id.*

each CPE Report contained factual details unique to the particular application being evaluated.<sup>81</sup>

### **3. Dot Registry’s Argument that the Panels Engaged in “Double Counting” Did Not Support Reconsideration.**

45. In its Reconsideration Request, Dot Registry made the frivolous argument—repeated here in its IRP Request—that by applying the CPE criteria as set forth in the Guidebook, the CPE Panels improperly engaged in “double counting.” As the BGC pointed out, however, Dot Registry was not alleging that the Panels violated any established policy or procedure, but rather that “the Panels *did* adhere to established policy and procedure, namely by applying the CPE criteria as the Guidebook required.”<sup>82</sup> The BGC further noted that the Guidebook’s policy against “double counting” states that “any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria.”<sup>83</sup> In this case, the alleged “double counting” that Dot Registry complains about consisted of the Panels’ use of the same negative aspect in scoring subparts of a single criterion, not in scoring a different criterion.<sup>84</sup> As such, Dot Registry’s argument did not support reconsideration.

### **4. Dot Registry’s Argument that the Panels Did Not Cite Their Independent Research Did Not Support Reconsideration.**

46. Dot Registry argued in its Reconsideration Requests, as it does here, that the CPE Panels failed to cite the sources of the independent research referenced in their Reports.<sup>85</sup> The BGC determined that Dot Registry’s argument did not support reconsideration because “the

---

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 12.

<sup>83</sup> *Id.* at 13 (quoting Guidebook § 4.2.3) (emphasis added).

<sup>84</sup> Dot Registry objects to the Panels’ use of the phrase “as previously stated.” IRP Request ¶ 46. That phrase was also used to refer to a discussion of a different element of the same criterion, and is not evidence of “double counting.”

<sup>85</sup> IRP Request ¶ 35.

Guidebook expressly authorize[d] CPE Panels to ‘perform independent research, if deemed necessary to reach informed scoring decisions,’” and Dot Registry “cite[d] to no established policy or procedure (because there [was] none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research.”<sup>86</sup>

**5. Dot Registry’s Argument that the Panels Incorrectly Applied the CPE Criteria Did Not Support Reconsideration.**

47. Dot Registry’s Reconsideration Requests challenged the substance of the CPE Reports with which Dot Registry disagreed. Dot Registry argued, as it does in its IRP Request, that the CPE Panels incorrectly applied the CPE criteria in determining that Dot Registry’s applications did not prevail in CPE. However, as the BGC pointed out in its Determination, “the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports.”<sup>87</sup> The BGC addressed each of Dot Registry’s complaints with the CPE Panels’ scoring of Dot Registry’s applications, noting that in each case, Dot Registry’s complaint was that the number of points awarded by the Panels was “wrong,” not that the Panels had violated any policy or procedure in scoring the applications.<sup>88</sup>

48. ICANN understands that Dot Registry is disappointed with the outcome of the CPEs. However, it is neither the role of the BGC or this IRP Panel to second-guess the substantive determinations of independent, third-party evaluators. The decision not to have ICANN (much less ICANN’s Board) perform substantive reviews of third party evaluators’ reports reflects a considered decision of ICANN’s Board, made after significant public input and comment, that third party experts (and not ICANN) should be resolving these types of issues with respect to the hundreds of gTLD applications that were expected and the 1900+ applications

---

<sup>86</sup> Determination at 11.

<sup>87</sup> *Id.* at 7.

<sup>88</sup> *Id.* at 15-22.

that ICANN in fact received.

**VI. ICANN AND DOT REGISTRY HAVE COMPLETED THE COOPERATIVE ENGAGEMENT PROCESS.**

49. ICANN inadvertently failed to respond to Dot Registry’s initial request for Cooperative Engagement. ICANN has apologized for this oversight, and subsequent to Dot Registry’s filing of its IRP Request, the parties completed the Cooperative Engagement Process but failed to resolve their disputes.

**VII. RESPONSE TO DOT REGISTRY’S REQUESTED RELIEF.**

50. Dot Registry’s request should be denied in its entirety, including its request for relief. Dot Registry requests that this IRP Panel issue a declaration “[r]equiring ICANN to reject the [CPE Panels’ Reports]” and “[f]inding that Dot Registry’s applications . . . satisfied the CPE criteria set forth in the [Guidebook] or, in the alternative, ordering ICANN to permit each of Dot Registry’s applications for CPE to be reevaluated by newly constituted panels not under the direction of the EIU.”<sup>89</sup> An IRP Panel is limited to stating its opinion by “declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and *recommending*, if requested, that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.<sup>90</sup> Even if there were a basis for some kind of relief here (which there is not), neither this Panel nor any IRP Panel has the authority to award affirmative relief.<sup>91</sup> Dot Registry also asks that it be awarded

---

<sup>89</sup> See IRP Request ¶ 65.

<sup>90</sup> Bylaws, Art. IV, §§ 3.4, 3.11(c-d).

<sup>91</sup> Indeed, the IRP Panel in the first ever IRP found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See Advisory Declaration of IRP Panel, ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, ¶ 133, Ex. R-4, *also available at* <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

“its costs in this proceeding, including, without limitation, all legal fees and expenses.”<sup>92</sup> This request directly contradicts ICANN’s Bylaws, which provide that “[e]ach party to the IRP Proceeding shall bear its own expenses.”<sup>93</sup>

### CONCLUSION

51. As to the majority of Dot Registry’s IRP filing, there simply is no ICANN Board conduct that could result in a finding that the Board violated its Articles of Incorporation of Bylaws. The fact that Dot Registry disagrees with the CPE Panels’ Reports does not properly give rise to an IRP because the ICANN Board does not perform substantive reviews of such reports, and ICANN’s Bylaws and Articles do not so require. ICANN’s conduct with respect to its evaluation of Dot Registry’s Reconsideration Requests was fully consistent with ICANN’s Articles and Bylaws, and Dot Registry provides no argument otherwise. For these reasons, ICANN urges the Panel to declare that there is no basis for any finding of ICANN Board conduct that was inconsistent with ICANN’s Articles or Bylaws.

Respectfully submitted,

JONES DAY

Dated: October 27, 2014

By: Jeffrey A. LeVee IRH Z  
Jeffrey A. LeVee  
Counsel for Respondent ICANN

---

<sup>92</sup> See IRP Request ¶ 65.

<sup>93</sup> Bylaws, Art. IV, § 3.18.