

## Reconsideration Request

### 1. Requester Information

**Name:** Commercial Connect, LLC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

### 2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

### 3. Description of specific action you are seeking to have reconsidered.

Requester is an applicant for the .SHOP generic top-level domain (gTLD), and this by way of:

- An application that has been submitted to ICANN in 2000 during the first round of applications for new gTLDs;<sup>1</sup>
- An application for a so-called community-based gTLD, submitted to ICANN in the context of the New gTLD Program on April of 2012.

During the first round of applications for new gTLDs, ICANN received three (3) applications for the .SHOP gTLD; in the context of the New gTLD Program ("2012", or "3<sup>rd</sup> round"), ICANN received 9 applications in total for this string.

On 27 January 2016, Power Auctions LLC, ICANN's authorized auction service provider, conducted a New gTLD Program Auction to resolve the string contention for the new generic top-level domain (gTLD) .SHOP.

*According to ICANN, "[t]he applicants were unable to resolve contention among themselves; thus their contention set proceeded to auction, which is the method of last resort to resolve string contention as prescribed in Module 4 of the New gTLD Program Applicant Guidebook. Subject to payment of the winning price and meeting all other criteria for eligibility, the winner will enter ICANN's contracting process to sign a Registry Agreement to operate the gTLD."*<sup>2</sup>

### 4. Date of action/inaction:

<sup>1</sup> <http://archive.icann.org/en/tlds/mall1/>.

<sup>2</sup> <https://www.icann.org/news/announcement-2-2016-01-27-en>.

January 27, 2016.

**5. On what date did you become aware of the action or that action would not be taken?**

January 28, 2016.

**6. Describe how you believe you are materially affected by the action or inaction:**

Requester is the applicant for the .SHOP gTLD during the first round of new gTLD applications, organized by ICANN in 2000, as well as the applicant for the community-based gTLD .SHOP in the context of the New 2012 gTLD Program (Application ID: 1-1830-1672, Prioritization Number: 649; see <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/307> and <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/307?t:ac=307>) (hereinafter jointly referred to as the "Applications").

Therefore, the Requester is now facing contention resolution with various other applicants for the same string "*through the other methods as described in Module 4 of the Applicant Guidebook*", requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .SHOP gTLD. In this respect, ICANN has requested Requester to participate in an auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided they followed their own GNSO principles, recommendations and implementation guidelines outlined in their Final Report published on August 8, 20017 (<http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>) (hereinafter: the "GNSO Final Report") and if the Community Priority Evaluation Report and ICANN's Determination following the publication of such report not to accept Requester's community-based qualification of its application had been developed in accordance with ICANN's standards, in particular those set out in the GNSO's Final Report and the Applicant Guidebook.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Requester was the only applicant to fully qualify for the .SHOP gTLD during ICANN's first round of new gTLDs in 2000 (an application which is still active according to ICANN's own legal staff) and was promised by ICANN publically priority for delegation of the .SHOP gTLD.

## 8. Detail of Board or Staff Action – Required Information

### 1. Introduction

According to the Requester, the EIU and ICANN has not acted in compliance with a wide variety of processes, procedures, and rules, in particular ICANN's own By-Laws as well as the GNSO Final Report and the Applicant Guidebook in organizing and completing the "method of last resort auction" for the .SHOP gTLD in accordance with the processes defined for the New 2012 gTLD Program Auctions.

Reference is made to ICANN's "New gTLD Program Auctions" page, which is available at <https://newgtlds.icann.org/en/applicants/auctions>.

The paragraph describing the "Auction Eligibility" requirements that have been defined by ICANN in the context of the New gTLD Program Auctions" reads as follows:

#### ***"Auction Eligibility***

*A string contention set will be eligible to enter into a New gTLD Program Auction under the following circumstances only:*

- *All active applications in the contention set have:*
  - o *Passed evaluation*
  - o *Resolved any applicable GAC advice*
  - o *Resolved any objections*
  - o ***No pending ICANN Accountability Mechanisms***
- *Each applied-for gTLD in the contention set is:*
  - o *Not classified as "High-Risk" per the Name Collision Occurrence Management Plan" (emphasis added)*

In the case at hand, the "string contention set" relates to the applications for .SHOP (or any confusingly similar string).

The status of Requester's application for the .SHOP gTLD was "active" on January 27, 2016.

Requester has submitted on January 26, 2016 a Reconsideration Request, which has been published on the ICANN website at <https://www.icann.org/resources/pages/reconsideration-16-1-commercial-connect-request-2016-01-27-en>; the complete request can be retrieved at <https://www.icann.org/en/system/files/files/reconsideration-16-1-commercial-connect-request-redacted-26jan16-en.pdf>.

Therefore, ICANN received Reconsideration Request #16-1 prior to the scheduled auction date for resolving the .SHOP contention set, being January 27, 2016.

It is clear that the Reconsideration Request process is an ICANN Accountability Mechanism, as defined by Article IV: Accountability and Review of ICANN's By-Laws (see <https://www.icann.org/resources/pages/governance/bylaws-en/#IV>).

Bearing in mind the above elements, the .SHOP contention set was not eligible to a "New gTLD Program Auction" on January 27, 2016: indeed, Requester was a community applicant as described in the GNSO Final Report and was entitled to delegation of .shop and since the Requester invoked an ICANN Accountability Mechanism – being Reconsideration Request 16-1 – which should have disqualified the contention set for a New gTLD Program Auction.

By organizing the New gTLD Program Auction for the .SHOP contention set, ICANN ignored Requester's Reconsideration Request, and awarded the .SHOP gTLD to another member in the .SHOP contention set. By doing so, Requester's investments in time, money and efforts in applying for the .SHOP gTLD since and during the 2000 round of new gTLDs as well as the New 2012 gTLD Program are lost, notwithstanding the fact that Requester should:

- a) have been awarded the .SHOP gTLD in the context of the 2000 round or, at least, ICANN did not disqualify Requester's former application nor provided for any motivated decision in this respect; and/or
- b) have been awarded .SHOP gTLD in the context of the New gTLD Program since
  - (i) all qualifications and criteria were met for Community Priority Evaluation, bearing in mind the criteria defined by the GNSO Final Report; and
  - (ii) according to Recommendation 1 of the GNSO Final Report "*no subsequent, additional selection criteria should be used in the selection process*" should be used; and/or
- c) be given each and every opportunity to invoke all possible ICANN Accountability Mechanisms provided in ICANN's By-Laws in order to see its application for the community-based .SHOP gTLD qualify under the standards that have been defined in the GNSO's Final Report and the Applicant Guidebook in the context of Community Priority Evaluation; and/or
- d) had been able to formally invoke an objection to the CPE determination and been able to participate in an appeals mechanism which should have been in place as promised by the Final Report and mandated by .

## **9. What are you asking ICANN to do now?**

Considering the information and arguments included in this Reconsideration Request, Requesters request ICANN to:

- (i) acknowledge receipt of this Reconsideration Request;
- (ii) provide a full explanation of why ICANN has not approved Requester's application in the context of the 2000 round, in light of ICANN's Mission and Core Values;
- (iii) why ICANN has ignored Requester's initial application in making determinations in the context of the 2000 round and the New gTLD Program, and more in particular in the CPE and auction processes;
- (iv) set aside the results of the New gTLD Program Auction for the .SHOP contention set dated January 27, 2016 pending the outcome of Reconsideration Request 16-1 and any Accountability Mechanisms Requester may invoke following the determination by ICANN, unless Requester withdraws its claims;
- (v) in any event: suspend the process for entering into an agreement with any party having participated in the auction process for the .SHOP gTLD before any pending or future Accountability Mechanisms relating to applications for the .SHOP gTLD have been completed.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

Requester has standing in accordance with

- (1) the terms that have been published by ICANN in the context of the 2000 round of new gTLD applications;
- (2) ICANN's By-Laws, considering the fact that Requester has been adversely affected by the decision by ICANN to initiate and complete the New gTLD Program Auction for the .SHOP gTLD; and
- (3) ICANN's Top-Level Domain Application Terms and Conditions.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

N/A



**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

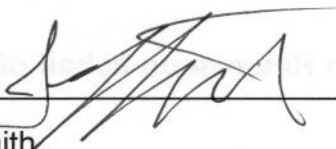
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Respectfully Submitted,

  
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Jeffrey Smith

President

Commercial Connect, LLC

February 10, 2016  
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Date