

ARIF HYDER ALI

Contact Information Redacted

23 March 2018

VIA E-MAIL

Cherine Chalaby
Chair, ICANN Board
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Chris Disspain
Chair, Accountability Mechanisms
Committee of the Board
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: ICANN's 19 March 2018 Update on Reconsideration Requests 16-3 and 16-5

Dear Messrs. Chalaby and Disspain:

We write on behalf of our clients, DotMusic Limited ("DotMusic") and dotgay LLC ("dotgay"), in response to ICANN's 19 March 2018 e-mails regarding Reconsideration Requests 16-3 and 16-5.

We note with disappointment that, despite our repeated and well-substantiated objections, the ICANN Board ("Board") has accepted FTI Consulting, Inc.'s ("FTI") purported "independent"¹ findings on the Community Process Evaluation Process Review ("CPE Process Review"). We strenuously object to the Board's decision and reject the Board's self-serving justification that "this action is in the public interest and consistent with ICANN's Mission, Commitments and Core Values." Nothing could be further from the truth.

First, we requested the Board for "an opportunity to provide comments on the FTI Report and to be heard" *before* (not after) the Board accepted FTI's reports.² The Board kept silent for nearly two months since that request and then implicitly rejected our request by

¹ ICANN's 17 September 2016 Board Resolution.

² 15 January 2018 Letter from Arif Ali to ICANN ("we request that the ICANN Board take *no* action with respect to the conclusions reached by FTI, until dotgay, and indeed all concerned parties, have had an opportunity to provide comments on the FTI Report and to be heard").

proceeding to rubber stamp the BAMC's recommendation to accept FTI's findings concerning the CPE Process Review. In so doing, the Board not only denied both dotgay and DotMusic a meaningful opportunity to be heard on the numerous flaws in FTI's reports, it also failed to take in to proper consideration the considerable additional information submitted by DotMusic and dotgay demonstrating the process and substantive errors committed by FTI.

Specifically, it is impossible to accept that the Board did in fact seriously consider: (1) Professor Eskridge's 65-page expert report setting out FTI's substantive and process errors; or (2) the 66-page submission by DotMusic that did the same. Further, it is also clear that the Board turned a blind eye to: (1) the Council of Europe's Report on "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective;" (2) the First Expert Opinion of Professor William N. Eskridge of Yale Law School; (3) the ICANN Ombudsman Chris LaHatte's Report; (4) the ICC Expert's Determination regarding .LGBT; and (5) the Expert Opinion of Professor M.V. Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts.³ Had the Board actually exercised its independent judgment and reviewed these documents, the Board could not have rubber stamped BAMC's recommendation. By accepting FTI's unreliable and inaccurate findings and ignoring the numerous material flaws in FTI's reports as noted in our various submissions, the Board has failed to ensure that FTI performed an "independent review" of the CPE process.⁴ We question the legitimacy of the CPE Review Process and unequivocally reject the Board's decision that "no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary."

Second, the ICANN Board claims that the BAMC's belated invitation to dotgay and DotMusic to submit additional new arguments and make a telephonic presentation—*after* it has already accepted FTI's findings— is "in the public interest and consistent with ICANN's Mission, Commitments and Core Values as it will provide transparency and accountability regarding the CPE process and the CPE Process Review." ICANN's attempt

³ See 20 January 2018 Letter from Arif Ali to ICANN.

⁴ See *e.g.*, *In re AWTR Liquidation Inc.*, 548 B.R. 300, 314 (Bankr. C.D. Cal. 2016); *Palm Springs Villas II Homeowners Ass'n, Inc. v. Parth*, 248 Cal. App. 4th 268, 280 (2016); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

to manufacture accountability and transparency regarding the CPE Process Review *ex post facto* is – to put it simply and politely – ridiculous, especially when ICANN ensured that the entire CPE Review Process was undertaken in secrecy. For example, while FTI was undertaking its purported “independent review” of the CPE Process, we repeatedly reminded the ICANN Board of its commitments to operate transparently and fairly and requested to speak with FTI concerning the CPE Process.⁵ However, FTI declined to interview dotgay and DotMusic—which we learned about not from ICANN, but during our review of FTI’s reports *after* FTI had already completed its review—in connection with the CPE Process Review.⁶

We have even attempted to obtain documents concerning the CPE Review Process from ICANN by submitting multiple document requests pursuant to ICANN’s Documentary Information Disclosure Policy for materials related to FTI’s review.⁷ ICANN has continuously refused to disclose any documents regarding FTI’s review. Given that ICANN has trampled upon its Mission, Commitments and Core Values and denied dotgay’s and DotMusic’s basic rights during the CPE Review Process, such as non-discrimination, due process and fairness; undertaken the CPE Review Process in secrecy; and the Board has already accepted FTI’s findings, there is little left for the ICANN Board to provide “accountability and transparency concerning the CPE Review Process.” The Board’s actions can only be described as procedural posturing.

Third, we understand that the BAMC has invited dotgay and DotMusic to make “new” arguments and oral presentation limited to: (1) “how the CPE Process Review is relevant to their pending Reconsideration Requests;” and (2) “[a]ny specific claims that [we] might have relating to the FTI Reports with respect to [our] particular applications.” ICANN’s opaque processes for undertaking an “independent review” of the CPE Process,⁸ including

⁵ See *e.g.*, 10 June 2017 Letter from Arif Ali to ICANN, p. 1.

⁶ Page 8, FTI’s Scope 2 Report.

⁷ See *e.g.*, Request No. 20170518-1 (18 May 2017); Request No. 20170610-1 (10 Jun. 2017); Request No. 20180115-1 (18 Jan. 18).

⁸ Letter from A. Ali to ICANN Board (30 Jan. 2017) (“dotgay has not received any communication from ICANN regarding the status of the Independent Review or Request for Information from the CPE Provider.”); Letter from A. Ali to ICANN Board (12 March 2017) (“ICANN’s continued lack

its failure to provide accountability and transparency *during* the CPE Process Review,⁹ and its continuous arbitrary and discriminatory treatment of the various requests by dotgay and DotMusic concerning their respective applications by ICANN, its staff and the EIU, makes it impossible for us to accept BAMC's invitation in its current form.

If transparency and accountability are indeed the Board's objectives, then:

1. ICANN must disclose all of the underlying documents that we have requested concerning the CPE Review Process. A complete list of our document requests is enclosed in our January 2018 DIDP requests.¹⁰
2. ICANN must grant both dotgay and DotMusic sufficient time (at least 3 months following complete disclosure) to review the materials disclosed, taking in to consideration that FTI took nearly a year to review the underlying documents and conduct the CPE Review Process. We reject ICANN's attempt to impose an artificial two weeks deadline on dotgay and DotMusic.
3. ICANN must provide dotgay and DotMusic a meaningful opportunity to submit additional materials in support of their respective applications and their criticisms of FTI's reports, without artificial constraints (e.g., a 10-page limit).

of responsiveness to dotgay's inquiries about the status of its request [is] troubling, particularly in light of ICANN's commitments to transparency."); Email from Jamie Baxter to Steve Crocker (17 April 2017) ("reiterat[ing] our ongoing concerns with the lack of transparency that affected parties are receiving on" the CPE review); Letter from A. Ali to Chris Disspain and Jeffrey A. LeVee (10 June 2017) ("ICANN's CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws."); Letter from A. Ali to ICANN Board (8 Aug. 2017) (highlighting dotgay's "concern with and seek[ing] remedy with respect to the ongoing delays in the Board Governance Committee's CPE investigation").

⁹ For example, disclosure of FTI's investigative plan, terms of engagement, communications regarding the scope of FTI's "independent" review, failure to invite comments from CPE applicants or refusal to produce a *single* document relied upon by FTI.

¹⁰ See Request No. 20180115-1 and Request No. 20180110-1. To the extent that there are any concerns regarding confidentiality, both dotgay and DotMusic are willing to enter into confidential agreements with ICANN.

4. The BAMC must be required to identify specific concerns in writing that it may have regarding the applications subsequent to dotgay's and DotMusic's respective supplemental submissions.
5. The BAMC must be required to give dotgay and DotMusic an opportunity to make their respective oral presentations in person. We reject BAMC's invitation to make a telephonic presentation limited to 30 minutes.
6. ICANN must bear the necessary costs and expenses for dotgay and DotMusic to undertake the review of the documents and prepare additional submissions. It is frankly remarkable that ICANN is using part of the application fees paid by applicants to fund its so-called transparency and accountability processes.
7. The BAMC must agree to undertake a substantive review of the merits of .GAY's and .MUSIC's CPE reports, taking in to account all of the materials that have been and that will be submitted in support of the applications.

Absent the foregoing, the Board cannot claim to have discharged its duty to promote and protect transparency and accountability in good faith.

DotMusic and dotgay reserve their respective rights to pursue any and all claims, including based in equity and law, against ICANN in any forum worldwide.

Very truly yours,

/s/

Arif H. Ali

Counsel to DotMusic Limited and dotgay LLC