

## Reconsideration Request

### 1. Requester Information

**Name:** dotgay LLC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Counsel:** Bart Lieben – 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.

On October 8, 2015, ICANN published the Economist Intelligence Unit's ("EIU") second Community Priority Evaluation Panel's New gTLD Program Community Priority Evaluation Report for the .GAY gTLD application submitted by the Requester. Reference is made to <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> (hereinafter: the "Second CPE Report").

According to this Second CPE Report, the Community Priority Evaluation Panel concluded that:

*"After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation."*

Although the Disclaimer contained in the Second CPE Report states that "[...] these Community Priority Evaluation results do not necessarily determine the final result of the application", ICANN has changed the "Contention Resolution Result" into "Into Contention", apparently following the publication of the Second CPE Report.

This action by ICANN is hereinafter referred to as the "Determination", which Requester is seeking to have reconsidered.<sup>1</sup>

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<sup>1</sup> See Requester's Application Status Page at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>.

Following receipt of the Determination, Requester has also submitted a detailed Request for Information to ICANN under the latter's Documentary Information Disclosure Policy (DIDP).

**4. Date of action/inaction:**

October 8, 2015, in relation to the publication of the Second CPE Report and the Determination.

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

October 9, 2015.

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

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the "Application").

Requester has elected to participate in the Community Priority Evaluation ("CPE") in accordance with the provisions set out in the Applicant Guidebook.

On October 8, 2015 ICANN published the Second CPE Report that has been drawn up by the EIU, which states that the Requester's application for the .GAY gTLD *"did not prevail in Community Priority Evaluation"*.

Having experienced:

- (a) the process carried out by ICANN in approving the Application following Initial Evaluation;
- (b) the publication of the first CPE Report and the corresponding Determination on October 6, 2014 ("First CPE Report"), in which ICANN determined that Requester's Application did not prevail in Community Priority Evaluation;
- (c) not responding to Requester's Request for Information nor its allegations regarding spurious activity shortly after;
- (d) the Board Governance Committee's Determination in connection with Requester's Request for Reconsideration #14-44 of January 20, 2015,

in which the First CPE Report has been set aside, and a new evaluation by new evaluators has been decided;<sup>2</sup>

- (e) the publication of the Second CPE Report and the corresponding Determination on October 8, 2015, in which ICANN determined that Requester's Application did – again – not prevail in Community Priority Evaluation;

it has become clear to Requester that:

- (i) the EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook;
- (ii) the EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Second CPE Report and the corresponding Determination;
- (iii) the EIU has not taken into account prior Expert Determinations regarding the .GAY gTLD and Requester's supporters;
- (iv) the EIU has not taken into account relevant information provided to ICANN by Requester prior to and after the commencement of the second CPE process;
- (v) the CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU;
- (vi) the EIU has wilfully and knowingly disregarded the decision of the BGC to appoint two new evaluators in order to perform CPE, which demonstrates (a) that the EIU has a clear bias towards Requester's Application and (b) the EIU has treated Requester and Requester's Application unfairly when performing CPE.

Bearing in mind the above elements, Requester is convinced that the approach taken by ICANN in allowing the latter to define processes and criteria different from those reflected in the Applicant Guidebook, applying scores and scoring criteria that are flawed, in particular by not having conducted a "careful and extensive review" as they have stated in the CPE Report, and this based on the information, arguments and evidence provided herein.

Therefore, the Requester is now facing contention resolution with three 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

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<sup>2</sup> <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>.

contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in an auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the Determination had been developed in accordance with ICANN's standards, in particular those set out in the Applicant Guidebook.

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

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and not necessarily having the best interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group by the United Nations, the EU, the USA and in many other countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the self-awareness of this community and its members.

The fact that the gay community is affected by the CPE Report and the Determination is substantiated by the various letters of support for this Reconsideration Request that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce, which have all been communicated to ICANN.

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

**8.1. 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 Applicant Guidebook at various stages of the CPE process and thereafter, which has materially affected Requester's Application for the .GAY gTLD and more in particular Requester's position for operating such new gTLD in favor of the gay community.

Requester refers to the claims made in its response to the requirements set out in §6 hereof.

**8.2. Summary**

As will be outlined in further detail below, Requester has identified the following issues:

- (1) ICANN having allowed the EIU to develop processes and criteria outside of ICANN's policy development process and the Applicant Guidebook without providing the Requester with an opportunity to amend its Application, and hence discriminate community-based applicants in general, and Requester in particular (§8.3 below);
- (2) Various process errors in identifying, assessing, verifying and evaluating Requester's Application as well as information provided by third parties against the criteria set out in the Applicant Guidebook (§§8.4 – 8.8 below);
- (3) Various inconsistencies in the CPE evaluation processes when comparing the CPE Report with other reports developed by the EIU in the context of the CPE process (§8.9); and
- (4) Clear violations of ICANN's By-Laws, in particular in relation to ICANN's transparency and accountability mechanisms, by not providing clear answers to Requester's Request for Information under ICANN's Documentary Information Disclosure Policy (§8.10);
- (5) The fact that the EIU appointed the same evaluator during the second CPE as the one who has performed the first CPE, notwithstanding the clear and unambiguous instruction to the EIU to appoint new evaluators for performing the CPE after having set aside the First CPE Report.

### **8.3. The EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook**

Following ICANN's announcement that the EIU would be the sole evaluator for community-based applications having selected CPE, the EIU promulgated its own criteria for conducting such reviews, which included requirements in addition to those in the AGB.

According to the first Recommendation of the GNSO, which formed the basis of the New gTLD Program:

*"ICANN must implement a process that allows the introduction of new top-level domains.*

*The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.*

*All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the*

*applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.*<sup>3</sup>

The EIU has published four documents in the timeframe September 2013 – September 2014, being more than one and a half years, respectively two and a half years *after* the publication of the final version of the Applicant Guidebook, and more than a year / two years following the closing of the application window for new gTLDs, which are available on ICANN’s website:

- *CPE Panel Process Document*, published on August 6, 2014;
- *CPE Guidelines*, published on September 27, 2013;
- *Updated Frequently Asked Questions (FAQs)*, published on September 10, 2014; and
- *CPE Processing Timeline*, published on September 10, 2014 (jointly referred to as the “CPE Documents”).

Notwithstanding the fact that the BGC has confirmed that the latter documents are to be considered policy documents, Requester has not been invited to amend their applications bearing in mind these new or additional requirements when they submitted them in the beginning of 2012 ...<sup>4</sup>

In order to deal with similar situations – for instance in order to respond to concerns expressed by the Governmental Advisory Committee (“GAC”) or brand owners – ICANN has also created additional criteria or interpretations thereof, but these processes have been implemented by allowing affected applicants to clarify their position on an individual basis, or even make changes to their applications.

Requester points out in this respect to the policy development process that led to Specification 13 to the Registry Agreement.<sup>5</sup> In the context of this process, applicants of so-called brand-TLDs have had the opportunity to indicate in a separate document whether they complied with such new rules, processes and criteria, and have even been given the possibility to draft specific terms and conditions for the registration of domain names in their gTLDs.

Also, applicants for TLDs that have been earmarked by the GAC in 2013 as “Category 2 – Exclusive Access” gTLDs have been given the express opportunity to clarify their positions in relation to such qualification and have been given the opportunity to amend their applications accordingly. Specific response forms

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<sup>3</sup> This was in fact the first GNSO Recommendation, contained in its Principles, Recommendations & Implementation Guidelines, see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

<sup>4</sup> Requester points out to the fact that the final version of the Applicant Guidebook dates from June 2012, i.e. after the closing of the application window.

<sup>5</sup> Reference is made to <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>.

have been developed by ICANN to this end, which have been published on the ICANN website.

For community-based gTLDs, however, requests for dialogue expressed by the cTAG went ignored, no such outreach has taken place, no specific clarifying questions have been issued, and no opportunities were presented to clarify – on an individual basis – their position in relation to the CPE Documents that have been used by the EIU in order to prepare their CPE reports.

In Requester's view, ICANN has therefore clearly discriminated community-based gTLDs by changing or "interpreting" the processes and criteria set out in the Applicant Guidebook more than a year and a half after the closing of the application window, without providing applicants with the opportunity to amend their applications accordingly.

Therefore, Requester is of the opinion that:

- ICANN has not acted in compliance with the requirement set out by the GNSO and the ICANN community at large that applicants had to be evaluated against transparent and predictable criteria, since the processes and criteria contained in the CPE Documents are to be considered *"additional selection criteria used in the selection process"* that have not been made *"fully available to the applicants prior to the initiation of the process"*.
- ICANN has obviously discriminated community-based applicants by not providing each applicant, and Requester in particular, on an individual basis with the opportunity to clarify its position in relation thereto.

#### **8.4. The EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Determination**

According to the Applicant Guidebook: *"As part of the evaluation process, evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators."*

In the context of the Second CPE, the EIU has submitted Clarifying Questions to Requester, specifically in relation to Criterion #1 – Community Establishment.

As was the case in the First CPE, Requester received a full score of 4 out of 4 points on this Criterion.

However, Requester did not receive a Clarifying Question in relation to the Criteria where Requester did not receive a passing score, such as the "Nexus"

criterion.

Indeed, according to the EIU's own CPE Panel Process Document, they clearly had this option:

*"If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified."<sup>6</sup>*

According to the Frequently Asked Questions page relating to ICANN's Clarifying Questions process, it is clear that such questions may be sent from the following panels:

- Background screening
- Geographic name
- String similarity
- DNS stability
- Registry services
- Technical/Operational
- Financial
- Community priority evaluation (if applicable)

ICANN has consistently been sending clarifying questions throughout the Initial Evaluation phase if – according to the evaluation panels' – the applicant's answers to the evaluation questions did not qualify for a passing score. For instance, Requester received a clarifying question in relation to its response to Question 44.

When ICANN forwarded such clarifying question to Requester on March 4 of 2013, ICANN indicated that *"The evaluators will complete the evaluation based on the most current application information, which will include any new information you submit. If the new information introduces inconsistencies in the application, creates new issues, or is still insufficient for the evaluators to award a passing score, the application will be scored and results posted without further notice."* (emphasis added)

Requester did not receive any further questions relating to its answers to community-related Questions 20 *et seq.*, it rightfully assumed that ICANN had no further questions with respect to the answers provided by Requester to such

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<sup>6</sup> CPE Panel Process Document, page 3.

community-related questions.<sup>7</sup>

Since ICANN has nowhere and never indicated that Requester's answers to Questions 20 *et seq.* posed issues to the evaluators, ICANN has misguided and misled Requester by creating the impression that the answers to Questions 20 *et seq.* were sufficient for the evaluators to award a passing score.

#### **8.5. ICANN has not taken into account relevant information provided by Requester prior to the commencement of CPE**

According to the CPE Panel Process Document, the EIU's "core team" may carry out additional research *"to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures"*.<sup>8</sup>

Referring to the CPE Report, it is clear that such additional research has been carried out by the EIU. For instance, the EIU has referred to an organization within the communities explicitly addressed by the application, which has opposed to Requester's Application, however without disclosing who this organization was, making it impossible for Requester to verify whether the EIU's evaluation was accurate.

Requester is therefore of the opinion that:

- the EIU has not followed its own process, which enabled the EIU to issue clarifying questions to Requester when performing additional research;
- the EIU has not acted in a transparent way by not reaching out to Requester when analyzing additional information outside the context of Requester's Application;
- the EIU deliberately acted in an intransparent way in developing the CPE Report, which does not allow Requester to verify whether the CPE Report in general and the information relied upon by the EIU in particular meet the standards set out in the Applicant Guidebook; and
- ICANN has deliberately not provided access to the information relied upon by the EIU following Requester's Request for Information, which made it impossible for Requester to verify whether the Determination was founded.

#### **8.6. The EIU has not taken into account relevant information provided to ICANN by Requester during the CPE process**

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<sup>7</sup> Reference is made to ICANN Case #00022186, where ICANN has asked for additional information in relation to Requester's response to Question 44.

<sup>8</sup> CPE Panel Process Document, page 3.

Bearing in mind the fact that various incorrect allegations have been made with respect to Requester's Application (on public fora, in the context of objections that have been initiated against Requester's Application, etc.), Requester has reached out to ICANN on various occasions, providing proof of the fact that such allegations were false. Such information included clear and irrefutable evidence of the fact that Q Center, a community center from Portland, Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based – provided ICANN with false information with respect to Requester's intentions.

However, ICANN allowed misleading and untruthful documents to be presented by at least one other applicant for the .GAY gTLD to be used as evidence, without allowing Requester to provide for any context or challenge.<sup>9</sup>

On April 1<sup>st</sup>, 2015 Requester provided a letter from Q Center whereby Ms Antoinette Edwards, in her capacity of Q Center's Board of Directors, has provided notice of their "request to void the opposition letter bearing the Q Center name".<sup>10</sup>

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:*

- *one or more staff actions or inactions that contradict established ICANN policy(ies); or*
- *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*
- *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."*

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For these reasons alone, Requester is of the opinion that the EIU has relied on incorrect, at least biased, material information, considering the fact that the EIU has considered this letter of opposition to be sufficient to deduct one point in scoring Requester's Application in relation to the Opposition criterion.

Furthermore, Requester points out to the fact that Q Center is a member of

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<sup>9</sup> More in general, ICANN staff refused to hear comments from cTAG and multiple community applicants concerning vulnerability to spurious activity faced by community applicants when opposed by standard applicants.

<sup>10</sup> <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-14apr15-en.pdf>.

<sup>11</sup> <https://www.icann.org/resources/pages/mechanisms-2014-03-20-en>.

CenterLink, as is shown on the latter's website:

<http://www.lgbtcenters.org/Centers/Oregon/482/Q-Center.aspx>.

CenterLink, as a membership and support organization, has provided various letters of support for Requester's Application.<sup>12</sup>

As CenterLink stated in its endorsement letter that has been submitted to ICANN in connection with Requester's Application, "[its] goal is to develop and harness the power of over 200 LGBT community centers in small towns and big cities throughout the United States and abroad".

Requester therefore does not understand how the EIU could have determined that one letter – which has been declared void by the organization itself – from one LGBT community center can be considered "relevant" if the overarching membership organization of which Q Center forms part has repeatedly and consistently expressed support for Requester's Application. Furthermore, Requester does not understand how the EIU could consider a ratio of 1 to more than 200 would be "non negligible".

When reviewing other CPE reports prepared by the EIU, it is clear that the approach taken by the latter is inconsistent, bearing in mind the fact that – by way of example – the letter of opposition provided by the International Radio Emergency Support Coalition against the .RADIO community-based gTLD application has been disregarded by the EIU, notwithstanding the fact that this organization is internationally recognized and even has a Special Consultative Status with the Economic and Social Council of the United Nations (ECOSOC) ...

The EIU (and ICANN) have therefore in Requester's view not complied with their standards of due diligence and transparency, which makes Requester believe that there was a clear bias against Requester's Application. Hence, Requester's Application has been treated unfairly by the EIU.

On the basis of these arguments alone, Requester believes that it is entitled to request reconsideration of the Second CPE Report.

### **8.7. The EIU has not taken into account relevant expert opinions provided to and decisions taken by ICANN in relation to Requester's Application**

It is obvious that the EIU has not taken into account the various decisions taken in the context of Community Objections.<sup>13</sup>

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<sup>12</sup> See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>; <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadattachment/138830?t:ac=444>;

<sup>13</sup> See ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*; ICDR Case No. EXP/394/ICANN/11, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. United TLD Holdco Ltd*; ICDR Case No.

Requester hereby particularly refers to §22 of the Decision rendered by Prof. Dr. Bernhard Schlink, who was the Expert appointed by the International Chamber for Expertise of the International Chamber of Commerce *in re: The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited* (sic), and many other objections concerning applications relating to the “.gay” and “.lgbt” gTLDs. Indeed, Dr. Schlink recognized in multiple Expert Determinations, after having carefully examined the more stringent criteria and conditions required to initiate Community Objection proceedings that:

*“[t]he legitimate interests of the gay community can only legitimize a claim to a gTLD that is exclusively linked to the gay community. A community that represents the legitimate interests of its members can claim a safe and secure position in the society and on the market, and this holds particularly for a community that represents the legitimate interests of a minority. Its claim to a safe and secure position on the society and on the market includes a safe and secure position in the internet. Therefore, while the gay community cannot exclude competition, it could file and has filed its own application for a gTLD that is designed to serve the gay community and to operate accordingly: dotgay’s community application for the string .gay.”<sup>14</sup>*

And although Requester respects the fact that CPE and Community Objections are distinct processes, it does not understand the reasons why the EIU has simply and entirely disregarded any of these elements in developing the CPE Report, nor has it provided for any reasons why it did not agree with these unambiguous and unilateral decisions to the contrary. Indeed, not a single reference has been made to these Expert Determinations throughout the CPE Report.

Requester is therefore of the opinion that the EIU obviously did not rely on essential information publicly available to ICANN and the EIU that was directly relevant for Requester’s Application. Hence, the EIU (and ICANN) did not act in an open and transparent manner in rendering the CPE Report and the Determination, the outcome whereof is diametrically opposed to previous Expert Determinations endorsed by ICANN.

**8.8. The CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU**

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EXP/392/ICANN/9, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Design, LLC*; and ICDR Case No. EXP/393/ICANN/10, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Domain Holdings Limited*.

<sup>14</sup> See: ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*.

According to the EIU, “consistency of approach in scoring applications is of particular importance”.<sup>15</sup> This has also been a key criterion in selecting independent evaluators for performing Community Priority Evaluations, and has been an essential obligation in the context of the agreement that has been entered into by and between ICANN and the EIU.<sup>16</sup>

In order to verify whether the EIU has been consistent, a comparison needs to be made between the elements and arguments used by the EIU in this particular CPE with other CPE results.

### **8.8.1. The EIU is using different standards than the ones set out in the AGB**

According to the criteria for Community Priority Evaluation set out by the Applicant Guidebook, as well as the Community Priority Evaluation (CPE) Guidelines, the following question must be scored when evaluating the application:

*“Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.”*

*“Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.” “Others” refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.*

*“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community. “Match” is of a higher standard than “identify” and means ‘corresponds to’ or ‘is equal to’. “Identify” does not simply mean ‘describe’, but means ‘closely describes the community’. “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has”.*

As indicated above and set out in previous submissions, Requester has performed an Internet search, as suggested by the CPE Guidelines, and has found substantial evidence that proves that in common language, the words “gay”, “LGBT” and “LGBTQIA” are used as synonyms. Requester refers to

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<sup>15</sup> Community Priority Evaluation Panel Process, page 1.

<sup>16</sup> References to be included.

various references in quality press, including the Economist<sup>17</sup> and the New York Times,<sup>18</sup> where the word “gay” is being used as a “catch-all term”, synonym or *pars pro toto* term for LGBTQIAs.

Requester has not only obtained the official endorsement and support for its application for the .GAY gTLD from the Complainant in the case referred to above, namely the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA),<sup>19</sup> but is also recognized by the ICDR and ICANN as an established institution associated with a clearly delineated community.<sup>20</sup>

Considering the above, Requester does not understand why, on the one hand, ICANN recognizes the fact that Requester and one of its key supporters “*could file and have filed its own application for a gTLD that is designed to service the gay community and to operate accordingly*” as expressly confirmed by the ICDR, whilst, ICANN and the CPE Panel determining on the other hand that “*the string does not identify or match the name of the community as defined in the application*”.

Furthermore, Requester does not understand that although the ILGA has obtained the recognition from the ICDR – and hence also from ICANN – to be “*clearly recognized by the community members as representative of the community*” as required by the AGB in order to qualify for a score of 2 out of 2 points on the CPE criterion “Support”, the EIU has countered such argument without even having reached out to the ILGA nor the Requester in the context of the CPE process ...

Therefore, it is undisputedly so that the evaluation processes and procedures designed and followed by the EIU is flawed, at least has generated outcomes that are inconsistent with previous determinations made by or on behalf of ICANN.

### **8.8.2. Community definition not to include non-community members**

As regards the definition of the community contained in the various community-based applications, the EIU has considered whether or not the applicant has attempted to include certain “non-community members”. Rightfully so, registries of community-based gTLDs should restrict the registration of domain names to members of their respective community. Therefore, the EIU should indeed assess whether or not a particular applicant is basically not imposing any restrictions or requirements upon registrants of domain names in the proposed

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<sup>17</sup> <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;

<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;

<sup>18</sup> [http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all&_r=0).

<sup>19</sup> See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>;

<sup>20</sup> See ICDR Case No. EXP/390/ICANN/7, §13.

community-based gTLDs.

In the case of Requester's Application, the EIU has determined that:

*"The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus."*

The CPE Panel emphasizes the fact that Requester has included "allies" in its community definition, and appears to have found therein an argument for determining that Requester's community definition has been "overreaching substantially" beyond the "gay" concept.

According to Requester:

- the EIU has not taken into account Requester's specific arguments for including "allies" into its community definition;
- the EIU has in this context not considered the Requester's requirement for an "ally" to be verified by Authentication Partners prior to being eligible to register a domain name in the .GAY gTLD and, in general, has ignored endorsing organizations with defined roles for allies;
- the EIU has accepted in other CPE Reports similar concepts as eligibility requirement for a "community-based gTLD"; and
- no clarifying questions have been issued in this respect.

LGBTQIA stands for "Lesbian", "Gay", "Bisexual", "Transgender", "Queer", "Intersex", and "Allies" and is one of the commonly used terms to emphasize a diversity of sexuality and gender identity-based cultures.

As Requester has demonstrated throughout its Application, it has obtained the support from more than 240 organizations and companies from all over the world for its .gay gTLD application, all of which are supporting at least one of the cultures set out above. Given their membership, posture and outreach, it goes without saying that these sponsors will play an important moral, and – for Authentication Partners – even an operational role in the establishment and management of the .gay gTLD.

Now, since an organization or company in itself can impossibly be "lesbian" or "gay", Requester has been seeking for a way to also position these companies and organizations in this community definition. For this reason, Requester has referred to these organizations as "allies" in the context of the LGBTQIA definition.

Furthermore, as stated in the Application, LGBTQIAs are a vulnerable group in many countries and societies, and too often still the subject of prosecution for who they are. In order to put in place safeguards for those gay community members who do not wish to be directly associated with a domain name

registration, organizations and companies who in essence cannot be “non-heterosexual” should have the possibility to act as a proxy service, which is common practice in the domain name industry.

In any case, any such “ally” must be approved by an Authentication Partner in order to be able to register a domain name in its own name or in the name or on behalf of a third party who meets the LGBTQI requirements.

Irrespective of the fact that the EIU has clearly misunderstood the concept of “allies” in Requester’s Application, it is obvious that they have attempted to find herein an argument that Requester is over-reaching substantially beyond the community. Requester points out to the fact that the EIU does not seem to have issues with similar concepts in other CPE reports, which clearly shows that the EIU has not been consistently applying the policy requirements for community-based applications:

- the community definition contained in the .OSAKA gTLD application # 1-901-9391 states: *[m]embers of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following: [...] Entities, including natural persons who have a legitimate purpose in addressing the community.*” (emphasis added);<sup>21</sup>
- the community definition contained in the .HOTEL gTLD application #1-1032-95136 includes: *“Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2”*;

Request does not understand why, on the one hand, an “ally” who assumes a supporting role for a vulnerable individual or group of individuals and, on the other hand, “other organizations representing hotels” are treated differently in view of community membership criteria. Nor does it understand why someone who “self-identifies as having a tie to [the community]” or “entities or natural persons who have a legitimate purpose in addressing the community” can possibly be considered as have a closer connection to a community than an “ally”, especially when in the latter case such connection is verified by an independent Authentication Partner, and in the former case a self-identified “tie” to the community suffices ...

It is therefore clear to Requester that the EIU has used double standards in preparing the various CPE reports, and is discriminating between the various community-based applicants, since they have been evaluating similar definitions and criteria in a different way.

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<sup>21</sup> See the .OSAKA CPE Report, page 2.

### **8.8.3. The EIU has taken different approaches in other CPE reports, which clearly indicates that they have not applied the evaluation criteria in a consistent way**

As referred to above, the EIU has treated similar situations in dissimilar ways, for instance by:

- on the one hand, recognizing the letter of objection submitted by Q Center of Portland, Oregon as “relevant”, notwithstanding the fact that the organization notified that this letter was voided; and
- on the other hand, disregarding the letter of objection of an international organization that has a Special Consultative Status with the ECOSOC and is a member of the “radio” community as “not relevant” in the determination regarding the .RADIO gTLD application submitted by the European Broadcasting Union.

### **8.9. Support**

In relation to the criterion “Support”, the EIU concludes in the CPE Report that

*“There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists.”*

It does not appear to Requester that there is one single organization recognized by the “radio” community<sup>22</sup> or the “hotel” community<sup>23</sup>, who have both obtained a score of 2 out of 2 points on this criterion. Based on these CPE reports, it is clear that also these community-based applicants appear to have sought (and found) support from a number of national and international endorsers in a similar way than Requester, who only scored 1 out of 2 points.

### **8.10. The EIU has engaged the same evaluator, notwithstanding the BGCs clear instruction to appoint two different evaluators to perform the new CPE**

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<sup>22</sup> <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

<sup>23</sup> <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

In its Determination of January 20, 2015 regarding Requester's Request for Reconsideration 14-44, the BGC determined:

*"[...] that the CPE Panel Report shall be set aside, and that the EIU shall identify two different evaluators to perform a new CPE for the Application. Further, the BGC recommends that the EIU include new members of the core team that assesses the evaluation results."*<sup>24</sup>

However, according to the verification emails that have been sent by the EIU, it appears that both during the first and the second CPE, the EIU appointed the same evaluator for performing the new CPE. Indeed, according to the evidence attached hereto (containing verification emails sent by the EIU during the first and the second CPE), Mr Benjamin Parisi of the EIU was responsible for performing the CPE, which is a clear violation of the BGC Determination.

For this reason alone, the Second CPE Report should be set aside by ICANN.

### **8.11. Conclusion**

Requester has paid USD 22,000 in order to participate to the CPE Process, which is an amount that is far higher than the USD 10,000 estimate that has been referred to in the AGB. One would expect that for such an amount, ICANN and the CPE firm, under the delegated authority of ICANN, would act diligently when applying the standards set out in the AGB, follow the processes defined prior to the establishment of the New gTLD Program.

During the development of both CPE Reports and both EIU Determinations, it is clear that:

- criteria and standards have been used that have been developed outside of ICANN's policy development processes more than two years after the closing of the application window in May of 2012, without having given Requester the opportunity to amend its application;
- additional research has been performed without verifying and validating the outcome thereof with the Requester;
- undisputable process errors have been made by the EIU when verifying the identity and statements made by Requester's supporters, including but not limited to performing the CPE by the same evaluators, which shows that there is a clear bias against Requester's Application and that the latter has been treated unfairly;
- information that has been provided by Requester to ICANN in order to counter and put into context certain false information has been

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<sup>24</sup> See BGC Determination, pages 2 and 31-32.

disregarded despite multiple attempts to clarify any issues that have arisen;

- inconsistent standards have been used by the EIU in actually performing the evaluation, especially when comparing the arguments and information relied upon by the EIU in other CPEs.

Therefore, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester's Application in a discriminatory manner.

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

Considering the information and arguments included in this Reconsideration Request, Requester requests ICANN to:

- (i) acknowledge receipt of this initial Reconsideration Request;
- (ii) suspend this initial Reconsideration Request until ICANN has provided clear and detailed answers to Requester's new Request for Information, submitted in the context of ICANN's Documentary Information Disclosure Policy, on October 22, 2015 and allow Requester to submit a final Reconsideration Request within a 15-day timeframe following receipt of the requested information;
- (iii) review the Requester's requests referred to in §§8.2 to 8.11 above, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN, and hence to set aside the Determination as set out below;
- (iv) in the meantime, suspend the process for string contention resolution in relation to the .GAY gTLD;
- (v) set aside and disregard the Second CPE Report;
- (vi) request a third party other than the EIU to perform a new determination at ICANN's cost in view of the CPE criteria set out in the Applicant Guidebook;
- (vii) within a mutually to be agreed upon timeframe following the appointment of such third party evaluator, allow Requester to submit a written statement to such third party;
- (viii) following that, organize a telephonic or in-person hearing whereby the Requester can submit, present and discuss its arguments and relevant information before ICANN or such third party appointed by ICANN, in view of enabling the latter to take an informed decision on the issue;

(ix) if ICANN would decide not to award the remedies sought by Requester set out in (i) to (viii) above, Requester respectfully requests ICANN to determine that the Application meets the required criteria for eligibility under the Community Priority Evaluation criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein, and provide to the Application:

- a score of 4 out of 4 points in relation to Criterion #2: Nexus between Proposed String and Community; and
- a score of 4 out of 4 points in relation to Criterion #4: Community Endorsement,

whilst keeping the scores on the other criteria reflected in the CPE Report.

(x) In any case, given the issues encountered by Requester in the context of CPE, provide Requester with a full refund of the CPE fees paid by the latter to ICANN.

**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.**

As stated above, ICANN published on October 8, 2015 its Determination on the basis of the Second CPE Report, stating that Requester's application for the .GAY gTLD did not meet the criteria for community-based applications, as defined in the Applicant Guidebook.

**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?**

Additional evidence will be provided in the context of the final Reconsideration Request that will be submitted following ICANN's determination in the context of Requester's Request for Information under ICANN's Documentary Information Disclosure Policy.

### **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.

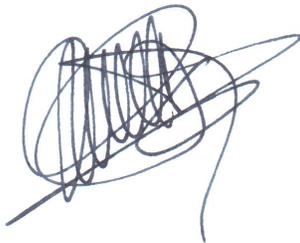
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

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,

A handwritten signature in blue ink, appearing to be 'Bart Lieben', with a stylized, scribbled appearance.

October 22, 2015

Bart Lieben

Date

Attorney-at-Law