

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
ADDITIONAL SUBMISSION**

Jeffrey A. LeVee
Rachel Zernik
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
Contact Information Redacted

Counsel to Respondent
The Internet Corporation
For Assigned Names and Numbers

10 August 2015

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT.....	3
I. IRPS ARE A UNIQUE MECHANISM ESTABLISHED BY ICANN’S BYLAWS	3
A. IRPs Are Limited To Examination of Board Actions	3
B. IRP Panels Apply a Defined Standard of Review	4
II. THE ONLY BOARD ACTION IN THIS MATTER IS THE BGC’S REVIEW OF DOT REGISTRY’S RECONSIDERATION REQUESTS, AND THAT ACTION WAS COMPLETELY CONSISTENT WITH THE GUIDEBOOK AND ICANN’S BYLAWS.....	5
A. The BGC Exercised Diligence in Its Review of Dot Registry’s Reconsideration Requests.....	6
1. The BGC’s Review on Reconsideration Is Limited to Determining Whether There Was a Violation of Established Policy or Procedure.....	6
2. The BGC Examined Each of Dot Registry’s Claims on Reconsideration and Did Not Act Inconsistent With Any Article or Bylaws Provision in Determining that the CPE Panels Had Adhered to Established Policy and Procedure.....	9
3. The BGC’s Determination on Reconsideration Requests 14-30, 14-32 and 14-33 Was in No Way Affected Because NASS was Not Listed as a Co-Requester.....	10
4. The BGC Included the Information It Collected From the EIU in Its Determinations.....	11
B. The Board Took No Other Action with Respect to the CPE Reports and Was Not Required to Do So	12
III. THE ADDITIONAL “MATERIAL FACTS” DOT REGISTRY ADDRESSES DO NOT IMPLICATE BOARD ACTION, NOR DO THEY DEMONSTRATE THAT THE CPE PANELS ERRED OR THAT DOT REGISTRY’S APPLICATIONS WERE TREATED UNFAIRLY	13
A. Dot Registry’s Substantive Disagreement with the CPE Panels’ Conclusions Does Not Demonstrate that the CPE Panels Erred	13
B. The EIU Fairly and Competently Handled Dot Registry’s Applications, Although That Issue Is Not Before This Panel In Any Event Since No Board Conduct is Implicated	18
1. CPE Panels Have the Discretion to Determine What, if Any, Research Is Appropriate.	18

TABLE OF CONTENTS
(continued)

	Page
2. The CPE Panels' Consideration of the Later-Rescinded Opposition Letter from the EC Was Not Material to the Results of the CPE.....	19
MATERIAL FACTS IN DISPUTE	20
CONCLUSION	20

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Additional Submission submitted by claimant Dot Registry, LLC (“Dot Registry”) on 13 July 2015.

1. This IRP arises out of Dot Registry’s applications for three highly sought after new generic top level domains (“gTLDs”)—.LLC, .INC, and .LLP (“Applications”). There are collectively 21 other applications for these gTLDs, but Dot Registry is the only applicant that has applied to operate these gTLDs “for the benefit of a clearly delineated community.”

2. As plainly set forth in ICANN’s Bylaws, IRPs are meant only to assess whether actions of ICANN’s Board were in compliance with ICANN’s Articles of Incorporation (“Articles”) and Bylaws. Dot Registry, however, proposes to use this IRP to improperly challenge the outcome of the substantive evaluations by third-party panels determining that Dot Registry’s Applications did not qualify for community priority over the other applicants for the .LLC, .INC, and .LLP strings.

3. Although ICANN’s New gTLD Applicant Guidebook (“Guidebook”) permitted applications to be submitted on behalf of a “clearly delineated community,” the Guidebook contains predictable, transparent and strict rules that are intended to make it difficult to prevail as a “community applicant” because an application that is awarded “community” treatment will automatically trump all competing applications. Specifically, the Guidebook requires that in order to receive community priority, a community applicant must receive at least 14 out of 16 possible points in community priority evaluation (“CPE”). The Economist Intelligence Unit (“EIU”), a third-party, is the entity that ICANN selected to perform CPEs.

4. In submitting its community-based applications, Dot Registry was required to define the communities on whose behalf the gTLDs would be operated. Dot Registry defined the

communities for .LLC, .INC, and .LLP as consisting of, respectively, entities that are registered in the United States and its territories as limited liability companies, corporations, and limited liability partnerships. However, the CPE panels that evaluated Dot Registry's Applications ("CPE Panels") determined that the Applications did not meet the requirements for community priority; in fact, the CPE Panels awarded each application only five out of the 16 possible points.

5. Despite Dot Registry's protests to the contrary, there is nothing surprising in the CPE Panels' determinations that Dot Registry's Applications did not qualify for community priority. Fundamental to those determinations was that the members of the communities defined in Dot Registry's Applications did not, as required by the Guidebook, demonstrate "awareness and recognition of [being a] community." The CPE Panels determined that these types of corporate entities do not consider themselves to be part of a community with other entities based solely on a shared corporate form.

6. So, for example, the CPE Panels determined that a plumbing business that operated as an LLC would not necessarily feel itself to be part of a "community" with a bookstore, law firm, or children's daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.

7. Dot Registry disagrees with the conclusions made by the CPE Panels and filed requests for reconsideration seeking to have ICANN's Board Governance Committee ("BGC") overturn the results. When the BGC denied reconsideration because Dot Registry was unable to show that the CPE Panels failed to follow the rules and procedures, Dot Registry initiated this IRP. IRPs, however, are not a vehicle for challenging the substance of determinations made by

third-party experts in the context of the New gTLD Program. Instead, an IRP is an accountability mechanism intended solely to assess whether ICANN's Board acted in conformance with ICANN's Articles and Bylaws.

8. As discussed below, there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports ("Reconsideration Requests"). Dot Registry has not demonstrated that the BGC violated the Articles or Bylaws in denying the Reconsideration Requests, and its IRP Request should be denied for this reason alone. The myriad other issues that Dot Registry raises in its briefs and accompanying declarations are not material to this IRP and, in any event, do not demonstrate that Dot Registry's Applications were subject to unfair or incompetent treatment at the hands of either the ICANN staff or the EIU.

ARGUMENT

I. IRPS ARE A UNIQUE MECHANISM ESTABLISHED BY ICANN'S BYLAWS.

9. An IRP is a unique 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, to the extent that Board action is alleged to be inconsistent with ICANN's Articles or Bylaws. The scope of this IRP Panel's authority is derived directly from those Bylaws, which make clear that IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

A. IRPs Are Limited To Examination of Board Actions.

10. ICANN's Bylaws explicitly limit independent review to "decision[s] or action[s] by the Board" that a claimant asserts are "inconsistent with the Articles of Incorporation or

Bylaws.”¹ Dot Registry is generally correct that boards of corporations have ultimate legal responsibility for the actions of the corporation, including the actions of the corporation’s employees,² but this does not mean that the scope of an IRP – a process that ICANN uniquely adopted in its Bylaws and that does not exist in other corporate bylaws – is somehow expanded to include every decision that any person at ICANN makes. In addition, while Dot Registry is also correct that ICANN has ultimate authority for CPE results and the EIU acts as a contractor within the New gTLD Program,³ these facts have no bearing on whether independent review, an accountability mechanism created and defined by ICANN’s Bylaws, extends to actions of ICANN’s staff or third parties.⁴ Indeed, as the IRP panel in *Booking.com v. ICANN* (“*Booking.com* Panel”) found: “The jurisdiction and authority of an IRP panel is expressly prescribed—and expressly limited—by the ICANN Bylaws.”⁵ Accordingly, the only way in which the conduct of ICANN staff or third parties is reviewable is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.

B. IRP Panels Apply a Defined Standard of Review.

11. ICANN’s Bylaws set out a “defined standard of review” that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

¹ Bylaws, Art. IV, § 3.2.

² Additional Submission ¶¶ 12-14.

³ *Id.* ¶¶ 18-20.

⁴ Dot Registry argues that the fact that that litigation waiver signed by New gTLD applicants covers ICANN staff and third parties such as the EIU somehow converts the IRP into a mechanism for review of staff and third party actions. (Additional Submission ¶¶ 15-17.) This is wrong. No entity is entitled to or has the right to a new gTLD, and thus every entity that applies understands that it is bound by the rules set forth in the Applicant Guidebook. Applicants were aware of the scope of the litigation waiver at the time they applied, and they were also aware of the scope of ICANN’s accountability mechanisms.

⁵ *Booking.com* Final Determination ¶ 104, Ex. R-5.

- 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 decision, believed to be in the best interests of the company?⁶

The IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.⁷

12. As the *Booking.com* Panel found:

[T]here can be no question that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care it is entitled—indeed required—to exercise its independent judgment in acting in what it believes to be the best interest of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws—or, the parties agree, with the Guidebook.⁸

II. THE ONLY BOARD ACTION IN THIS MATTER IS THE BGC’S REVIEW OF DOT REGISTRY’S RECONSIDERATION REQUESTS, AND THAT ACTION WAS COMPLETELY CONSISTENT WITH THE GUIDEBOOK AND ICANN’S BYLAWS.

13. There is only one Board action at issue in this case—the BGC’s review of Dot Registry’s Reconsideration Requests.⁹ As such, the only material issue for this IRP Panel to address is whether the BGC’s review was in accordance with ICANN’s Articles and Bylaws. Dot Registry has presented no evidence that it was not. Instead, Dot Registry focuses on

⁶ Bylaws, Art. IV, § 3.4.

⁷ *See id.*

⁸ *Booking.com* Final Declaration ¶ 108, Ex. R-5.

⁹ In its initial IRP Request, Dot Registry also raised the issue of the NGPC’s acceptance of the GAC’s advice regarding additional safeguards for various strings, including .LLC, .INC, and .LLP. (IRP Request ¶¶ 63-65.) However, Dot Registry does not renew that argument in its Additional Submission, and does not list the NGPC’s action as a material fact in dispute. (Additional Submission ¶ 2.) In any event, as explained in ICANN’s Response to Dot Registry’s IRP Request, the NGPC’s acceptance of the GAC advice was in conformance with ICANN’s Articles and Bylaws. (IRP Response ¶¶ 31-34.)

challenging the CPE Panels' evaluation and scoring of Dot Registry's Applications, submitting a lengthy declaration in which a person who normally handles antitrust and other types of litigation matters opines that Dot Registry's Applications should have received 15 points instead of five. ICANN will briefly address that declaration below, but the fundamental point is that the analysis and scoring of CPEs is *not* a Board action and is *not* an appropriate matter for independent review. Therefore, any argument that proposes to re-evaluate the CPE Panels' analysis and scoring is not material to this IRP.

A. The BGC Exercised Diligence in Its Review of Dot Registry's Reconsideration Requests.

1. The BGC's Review on Reconsideration Is Limited to Determining Whether There Was a Violation of Established Policy or Procedure.

14. ICANN's Bylaws provide for review of "staff actions or inactions" to determine whether those actions or inactions "contradict[ed] established ICANN policy(ies)."¹⁰ In the specific context of the New gTLD Program, the BGC recommended—and the NGPC agreed—that reconsideration requests generally be permitted with respect to the actions of third-party experts and panels ("Third Party Providers").¹¹ However, even though ICANN's Board has extended reconsideration to Third Party Providers (since they are essentially acting in place of staff) in no way did it expand the scope of the review, which is still limited to whether the Third Party Providers' actions contradicted established policies. As the NGPC has explained:

Reconsideration is not, and never has been, a tool for requestors to seek the reevaluation of substantive decisions. . . . [T]he Board is not a mechanism for direct, de novo appeal of staff (or evaluation panel) decisions with which the requester disagrees. Seeking such relief from the

¹⁰ Bylaws, Art. IV, § 2.2.

¹¹ See BGC Determination on Requests 14-30, 14-32, and 14-33 (citing BGC Recommendation on Request 13-5, adopted by the NGPC in Resolution 2013.09.10.NG02).

Board is, in itself, in contravention of established processes and policies within ICANN.¹²

15. Dot Registry argues that there is no “considered decision” of the Board *preventing* it from performing a substantive review of CPE reports.¹³ To the contrary, the BGC has explained in detail the reasons for not conducting substantive reviews of expert determinations. In its recommendation on Reconsideration Request 13-5, which challenged the determination of a third-party vendor appointed to perform string similarity reviews on new gTLD applications, the BGC stated:

This Request challenges a substantive decision of the New gTLD Program and not the process by which that decision was taken. . . . *Reconsideration is not a mechanism for direct, de novo appeal of staff or panel decisions* with which the requester disagrees and seeking such relief is, in fact, in contravention of the established process within ICANN.

The BGC appreciates the impact to an applicant when placed in a contention set and does not take this recommendation lightly. It is important to recall that the applicant still has the opportunity to proceed through the New gTLD Program subject to the processes set forth in the Applicant Guidebook on contention. . . . However, . . . there is not—nor is it desirable to have—a process for the BGC or the Board (through the NGPC) to supplant its own determination . . . over the guidance of an expert panel formed for that particular purpose.¹⁴

16. The appropriateness of this determination is further supported by the fact that Dot Registry submitted a detailed, *ninety page* report in support of its Additional Submission in order to argue that the CPE Panels reviewing its Applications erred. This is one of the primary reasons that ICANN and the community ultimately determined that there would be no appeals process for third-party expert evaluations. Expert panels were appointed for their expertise that the ICANN Board does not have, should not have, and was not expected to have. Moreover,

¹² Rationale for NGPC Resolution 2013.05.18.NG04, Ex. R-6.

¹³ Additional Submission ¶ 2.

¹⁴ BGC Recommendation on Request 13-5 at 9-10 (emphasis added), Ex. C-36. The BGC’s recommendation was adopted by the NGPC. NGPC Resolution 2013.09.10.NG02, Ex. C-37.

evaluating the substance of the thousands of determinations issued by third-party experts in the context of the New gTLD Program would require an enormously costly and time-consuming process that neither the BGC nor ICANN's Board had the expertise or time to perform.

17. The Guidebook is clear that CPE “will be performed by a community priority panel appointed by ICANN;”¹⁵ there is *no procedure* for appealing the determinations of CPE panels on substantive grounds.¹⁶ The Guidebook further explains that: (1) it is “the panel’s role [] to determine whether [a] community-based application[] fulfills the community priority criteria”; (2) “[r]esults of each [CPE] will be posted when completed”; and (3) those results will determine the outcome of a contention set (assuming only one community-based applicant in that contention set prevails in CPE).¹⁷

18. As detailed in the Board’s Rationales for the Approval of the Launch of the New gTLD Program, issued in June 2011, the Guidebook procedures, including the community priority evaluation procedures, were adopted by ICANN only after years of rigorous policy development and implementation that included extensive review and analysis by ICANN, as well as input and comment from legal and arbitration experts, numerous ICANN constituents and Internet stakeholders, and community members from around the world, all in compliance with ICANN’s Articles and Bylaws.¹⁸

19. In sum, the BGC’s review was properly limited to whether the CPE Panels followed the appropriate policies and procedures in rendering the CPE Reports. Even if the CPE Panels allegedly “got it wrong,” this was not an issue for the BGC to review unless the BGC also

¹⁵ Guidebook, § 4.2.2.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (“ICANN Board Rationales”) at 93-105, Ex. R-7; *see also id.* at 5-6.

determined that the CPE Panels acted inconsistently with established ICANN policy or procedure in completing their work.

2. The BGC Examined Each of Dot Registry’s Claims on Reconsideration and Did Not Act Inconsistent With Any Article or Bylaws Provision in Determining that the CPE Panels Had Adhered to Established Policy and Procedure.

20. Dot Registry’s Reconsideration Requests raised a number of issues regarding the CPE Panels’ review of its Applications. As discussed in detail in ICANN’s initial IRP Response, the BGC properly determined that Dot Registry had not demonstrated that the CPE Panels acted in contravention of established policy in rendering the CPE Reports.¹⁹

21. Dot Registry’s Additional Submission addresses only two of the issues initially raised in its Reconsideration Requests—the CPE Panels’ alleged failure to independently review each of Dot Registry’s Applications, and the CPE Panels’ allegedly erroneous consideration of a later-retracted letter of opposition from the European Commission (“EC”).²⁰ However, Dot Registry does not provide *any* evidence demonstrating that the BGC acted inconsistent with ICANN’s Articles or Bylaws with respect to its determination on either of those issues.

22. First, Dot Registry relies on an email between ICANN staff and the EIU to argue that the EIU assigned the same evaluators to all of Dot Registry’s Applications.²¹ In fact, the email Dot Registry cites demonstrates exactly the contrary: two evaluators reviewed each of Dot Registry’s Applications, and no Application was reviewed by the same two evaluators.²² Yet, even if the exact same people reviewed all three Applications, there is no established policy or

¹⁹ IRP Response ¶¶ 39-48.

²⁰ Additional Submission ¶ 29.

²¹ *Id.*

²² 18 July 2014 Email EIU Contact Information Redacted to R. Weinstein (explaining that Dot Registry’s application for .INC was reviewed by evaluators “1 and 2,” its application for .LLC by evaluators “3 and 2,” and its application for .LLP by evaluators “3 and 4”), Ex. C-50.

procedure that would have prevented this. Nor, as noted in the BGC’s Determination, is there any established policy or procedure that would have prevented the evaluators for each of Dot Registry’s Applications from collaborating with one another regarding the research for or the drafting of the CPE Reports.²³

23. With respect to the later-rescinded letter from the EC, Dot Registry has not demonstrated that the BGC violated any Articles or Bylaws provision in determining that the one point Dot Registry lost due to the oversight was immaterial. As the BGC noted in its Determination, Dot Registry’s Applications each received five points in their respective CPE Reports, and each needed 14 points to prevail.²⁴ The BGC was well within its discretion to recognize that the CPE Panels’ possible oversight regarding the EC’s letter—which, at most, would have given each application one more point for a total of six—did not warrant reconsideration of the CPE Reports.

3. The BGC’s Determination on Reconsideration Requests 14-30, 14-32 and 14-33 Was in No Way Affected Because NASS was Not Listed as a Co-Requester.

24. Dot Registry argues that the BGC “ignored” the fact that the National Association of Secretaries of State (“NASS”) was a co-requester on Dot Registry’s Reconsideration Requests. As explained in ICANN’s IRP Response, even though NASS was not listed as a co-requester in the BGC’s Determination on Dot Registry’s Reconsideration Requests, this omission did not have *any* effect on the substance of the BGC’s Determination, and Dot Registry does not

²³ BGC Determination on Requests 14-30, 14-32, and 14-33 at 13-15, Ex. C-4.

²⁴ *Id.* at 11. Dot Registry argues that the BGC’s treatment of its Reconsideration Requests was at odds with its treatment of the reconsideration request filed by DotGay. DotGay also objected to a CPE report determining that its application did not qualify for community priority. The BGC granted DotGay’s request, determining that the CPE panel evaluating DotGay’s request had violated established policy by failing to verify over 50 letters of support submitted by DotGay. (BGC Determination on Request 14-44 at 1, Ex. C-54.) This is in stark contrast with the situation here, where the CPE Panels failed to realize that a single letter (from the EC) had been rescinded after the CPE Panels’ evaluation was already underway. (17 July 2014 Email EIU Contact Information Redacted) to C. Bare, Ex. C-45.)

identify anything that the BGC might or should have done differently had NASS been listed as a co-requester.

25. Notably, the declaration Dot Registry submits from the Honorable Elaine F. Marshall, NASS's President, does not contain a single reference to Dot Registry's Reconsideration Requests, nor does it mention any involvement NASS had with those requests. And despite the fact that Dot Registry's Reconsideration Requests sought reconsideration of the CPE Panels' findings that its Applications qualified for community priority, Ms. Marshall's declaration is silent as to whether NASS believes that Dot Registry's Applications qualified for community priority under the Guidebook (an issue regarding which NASS would not have expertise in any event). Instead, a fair reading of her declaration indicates that NASS objected to *all* of the applications for these three strings, albeit that it appears to have viewed Dot Registry's application as the "least worst alternative." Indeed, neither of the two Secretary of State declarations submitted by Dot Registry even hints at the notion that the EIU "got it wrong" by determining that LLCs, INCs, and LLPs are not "communities" as that concept is defined in the Guidebook.

4. The BGC Included the Information It Collected From the EIU in Its Determinations.

26. Dot Registry argues that the Bylaws required the BGC to provide it with any information it collected from third parties in investigating Dot Registry's Reconsideration Requests.²⁵ As reflected in ICANN's document production in this IRP, the only information that was collected with respect to Dot Registry's Reconsideration Requests was information regarding: (1) whether the same CPE panelists evaluated each of Dot Registry's Applications;

²⁵ Additional Submission ¶ 32; *see also* Bylaws, Art. IV, § 2.13.

and (2) whether the CPE Panels considered the later-rescinded opposition of the EC.²⁶ Both of those issues were addressed in the BGC’s Determination, and Dot Registry has not demonstrated that the BGC violated the Articles or Bylaws in determining that neither issue warranted reconsideration.

B. The Board Took No Other Action with Respect to the CPE Reports and Was Not Required to Do So.

27. Dot Registry argues that the Board should have taken further action with respect to Dot Registry’s Applications and the CPE Reports.²⁷ However, the Board took *precisely* the action contemplated by the Guidebook—the Board (through the BGC) reviewed Dot Registry’s Applications in conjunction with Dot Registry’s Reconsideration Requests to assess whether the CPE Panels had acted inconsistently with any established policy or procedure in rendering the CPE Reports. It did not otherwise make a substantive evaluation of whether the CPE Panels “got it right” because doing so is outside of the Board’s mandate.

28. Dot Registry has not identified any Article or Bylaws provision that the BGC violated in determining that Dot Registry had not stated a basis for reconsideration or in electing not to intervene further with respect to Dot Registry’s Applications. As discussed above, ICANN and the community have appropriately determined that the Board does not have the expertise (or the time and resources) to sit as a court of appeal for substantive decisions made by third-party expert panels in the context of the New gTLD Program. The BGC reviewed the CPE Reports, determined that there was nothing showing that the CPE Panels acted inconsistent with any established policy or procedure, and properly declined to intervene further.

29. It is not an IRP panel’s role to second-guess this reasoned exercise of the Board’s

²⁶ 17 July 2014 Email EIU Contact Information Redacted to C. Bare, Ex. C-45; 18 July 2014 Email EIU Contact Information Redacted to R. Weinstein, Ex. C-50.

²⁷ See, e.g., Additional Submission ¶ 21.

independent judgment.²⁸ As the IRP panel in *Booking.com v. ICANN* explained:

So long as the Board acts without conflict of interest and with due care, it is entitled—indeed, required—to exercise its independent judgment in acting in what it believes to be the best interests of ICANN

In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws, and, in this case, with the policies and procedures established by the Guidebook.”²⁹

III. THE ADDITIONAL “MATERIAL FACTS” DOT REGISTRY ADDRESSES DO NOT IMPLICATE BOARD ACTION, NOR DO THEY DEMONSTRATE THAT THE CPE PANELS ERRED OR THAT DOT REGISTRY’S APPLICATIONS WERE TREATED UNFAIRLY.

30. Dot Registry’s Additional Submission identifies a number of additional purportedly material facts in dispute. These allegedly disputed facts are not relevant to any actions taken by ICANN’s Board (including the BGC), and should not even be considered by the IRP Panel. However, out of an abundance of caution, and to put any such arguments to rest, ICANN briefly addresses them below.

A. Dot Registry’s Substantive Disagreement with the CPE Panels’ Conclusions Does Not Demonstrate that the CPE Panels Erred.

31. As noted many times above, an IRP is not a vehicle by which an applicant can submit a “substantive appeal” of a third-party expert determination. The Guidebook does not provide any appellate mechanism for substantive review, and any attempt to use an IRP for that purpose should be rejected (as was made clear in the *Booking.com* IRP).

32. However, there is no doubt that Dot Registry’s real purpose in filing this IRP is that it disagrees with the substance of the CPE Reports and hopes to persuade the IRP Panel to evaluate the underlying substance even though such a substantive review is not within the IRP

²⁸ Bylaws, Art. IV, § 3.4.

²⁹ *Booking.com* Final Declaration ¶¶ 108-109, Ex. R-5.

Panel’s mandate (nor was it within the BGC’s mandate in evaluating the Reconsideration Requests). To that end, Dot Registry submits a 90-page report from Michael A. Flynn, an economist who has no experience with the Guidebook (much less the Guidebook’s CPE procedure) arguing on a “line-by-line” basis that the CPE Panels should have awarded Dot Registry’s Applications 15 instead of five points.

33. Notably, however, Mr. Flynn’s report does not actually support the conclusion that the CPE Panels erred. Rather, it is clear even from Dot Registry’s report that the CPE Panels followed all policies and procedures, and the circumstances of Dot Registry’s Applications are materially different from those applications that did prevail in CPE. There is little doubt that Dot Registry’s Applications did not merit the 14 out of 16 possible points that each Application needed in order to prevail on CPE.

Criterion 1 (Community Establishment) – 0/4 Points

34. The most fundamental disagreement Dot Registry and Mr. Flynn have with the CPE Reports is the reports’ conclusion that none of Dot Registry’s Applications identified the type of “community” required for community priority. This disagreement underlies two of the five instances in which Dot Registry argues that the EIU “altered” the Guidebook criteria, as well as two of the four additional purported “process” errors that Dot Registry identifies.³⁰

35. The Guidebook requires that the “community,” as defined in the application, has an “awareness and recognition of a community among its members.” Without this, a community is not considered a community for the purpose of CPE, and the application is not eligible for any points on CPE Criterion 1: “Community Establishment.”³¹

36. As Mr. Flynn’s report notes, neither the Guidebook nor the CPE Guidelines

³⁰ Additional Submission ¶¶ 22, 26.

³¹ Guidebook § 4.2.3; *see also* Flynn Report at 9-10.

provide a specific definition of what constitutes “awareness and recognition of a community among its members.”³² As such, the consideration of this element is discretionary. The CPE Panels determined that the communities defined in Dot Registry’s Applications did not demonstrate “awareness and recognition of a community among its members,” and for this reason awarded the Applications zero points on the “Community Establishment” criterion. The CPE Panels noted that LLCs, LLPs, and corporations operate in vastly different sectors, and that the *only* connection among community members in the respective communities was choice of corporate form. They concluded that such a connection did not suffice to demonstrate community cohesion. For example, with respect to LLCs, the CPE Panel determined that “[t]here is no evidence that [] limited liability companies would associate themselves with being part of the community as defined by the applicant,” *i.e.*, the community of “businesses registered as [LLCs] with the United States or its territories.”³³

37. Contrary to Dot Registry’s argument, the communities defined in its Applications are considerably different from the communities defined in the applications that have prevailed in CPE. For example:

- The .ECO community was defined as organizations and individuals who “demonstrate active commitment, practice, and reporting” to environmental missions,³⁴ including not-for-profits and governmental agencies with “demonstrable mission[s] [] directly associated with promoting environmental goals,” and individuals who are members of those groups or “academics or professionals whose degree, license, or other form of certification demonstrates that their area of work falls in a field related to the environment.”³⁵

³² Flynn Report at 8 n.22.

³³ .LLC CPE Report at 2, Ex. C-18.

³⁴ .ECO CPE Report at 2, Ex. 11 to Flynn Report. Dot Registry cites to the .OSAKA, .RADIO, AND .ECO CPE Reports as Exhibits C-32, C-33, and C-34, respectively. However, Dot Registry does not appear to have attached those reports as exhibits to its Additional Submission. The reports are attached as exhibits to the Flynn Report, and ICANN cites to those exhibit numbers.

³⁵ *Id.*

- The .OSAKA community was defined to include individuals and entities within Osaka and those who identify as having a tie to the city or its culture.³⁶
- The .RADIO community was defined to include those in the radio industry, including those who broadcast in the traditional sense and those who stream over the Internet.³⁷

38. The CPE Panels determined (as was within their discretion) that LLCs, LLPs, and INCs do not feel awareness and recognition of a community. Mr. Flynn disagrees because in his view the fact that, for example, corporations take steps to register and complete other corporate filing requirements demonstrates that corporations feel themselves to be part of a community consisting of other corporations.³⁸ However, Mr. Flynn’s perspective—that, for example, Apple, Wendy’s and Kemper Insurance (each a Fortune 1000 company) are all members of the same “community” because each is organized as a corporation even though each operates in entirely different lines of business—is *not* evidence that the CPE Panels improperly exercised their discretion. Instead, Mr. Flynn’s report merely reflects a different point of view, not an *objective* determination that corporations have “awareness and recognition” of a community specifically consisting of any and all other registered corporations.

Criterion 4-A (Support) – 1/2 Points

39. Mr. Flynn also argues that Dot Registry’s Applications should have received two points (instead of one) on the “Support” element of CPE Criterion 4: “Community Endorsement.” However, neither Dot Registry nor Mr. Flynn disputes the CPE Panels’ statement that “the viewpoints expressed in [the] letters [of support Dot Registry submitted from a number of Secretaries of State of US states] were not consistent among states,” and that while some expressed “clear support . . . others either provided qualified support, refrained from

³⁶ .OSAKA CPE Report at 1-2, Ex. 12 to Flynn Report.

³⁷ .RADIO CPE Report at 1-2, Ex. 10 to Flynn Report.

³⁸ Flynn Report at 19.

endorsing one particular applicant over another, or did not respond to the verification request.”³⁹

The CPE Panels relied on this conditional support in determining that Dot Registry’s Applications qualified for only one out of two possible points on the “Support” element of the fourth CPE criterion. As the Guidebook indicates, a score of one is warranted where an application has “[d]ocumented support from at least one group with relevance, but insufficient support for a score of 2.”⁴⁰ Again, there was no basis for the BGC to have determined that the CPE Panels acted inconsistently with established policy or procedure in awarding this score.

40. Indeed, the declaration of the Honorable Jeffrey W. Bullock, the Secretary of State of Delaware, does not express unambiguous support for Dot Registry’s Applications. Instead, Mr. Bullock is primarily concerned about the .LLP, .LLC, and .INC strings being delegated *at all*. For example, Mr. Bullock states that he believes that “the public [would be] best protected if these corporate identifier extensions are not made available for use.”⁴¹ Mr. Bullock concludes that he can provide “conditional support” for applications that include safeguards against fraud and abuse and that, to his knowledge, only Dot Registry has done so.⁴²

41. Similarly, in her declaration, the Honorable Elaine F. Marshall, the president of NASS, refrains from providing a full endorsement to Dot Registry’s Applications. She too expresses concern about the delegation of strings representing corporate identifiers, and concludes that she “understand[s] that Dot Registry is [] the only applicant” that has made a binding commitment to restrict registration on those gTLDs and that NASS members “are

³⁹ .LLP CPE Report at 6-7, Ex. C-19; .LLC CPE Report at 7, Ex. C-18; .INC CPE Report at 7, Ex. C-20. The response of Dot Registry’s expert is to argue that he is “not aware of any evidence that the EIU reached out to *every* explicit or implicit member of the .RADIO, .HOTEL, .OSAKA and .ECO communities.” (Flynn Report at 49.) This argument is misleading because the CPE Panel Reports make clear that they reached out to Secretaries of State from whom Dot Registry had submitted letters of support (as they were required to do to verify those letters).

⁴⁰ Guidebook, § 4.2.3.

⁴¹ Bullock Decl. ¶ 18.

⁴² *Id.* ¶ 25.

encouraged by [Dot Registry’s] diligence” in working with the various Secretaries of State to develop appropriate safeguards.⁴³

B. The EIU Fairly and Competently Handled Dot Registry’s Applications, Although That Issue Is Not Before This Panel In Any Event Since No Board Conduct is Implicated.

42. Dot Registry’s Additional Submission renews its argument that the Board failed to appoint a “competent” evaluator to perform CPE reviews. As discussed in ICANN’s IRP Response, the Board did not select the EIU to perform CPE reviews. Rather, the EIU was selected by ICANN staff following a public solicitation of Expressions of Interest.⁴⁴ Dot Registry never objected to the selection of the EIU, and the time to do so has long since passed. Further, Dot Registry’s primary “evidence” of the EIU’s alleged lack of competence is Dot Registry’s substantive disagreement with the CPE Reports.⁴⁵ Disagreeing with an outcome does not mean that the evaluator lacked the requisite skill and expertise to do the job.

1. CPE Panels Have the Discretion to Determine What, if Any, Research Is Appropriate.

43. Mr. Flynn performed his own research in producing his report, and he faults the CPE Panels for not having performed the same research. However, the CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, *if deemed necessary* to reach informed scoring decisions.”⁴⁶

44. Moreover, the CPE Panels *did* perform independent research, as specifically

⁴³ Marshall Decl. ¶ 14.

⁴⁴ IRP Response ¶ 26.

⁴⁵ Additional Submission ¶ 35.

⁴⁶ Guidebook, § 4.2.3 (emphasis added).

indicated in the CPE Reports.⁴⁷ Despite the CPE Panels' specific reference to its research, Dot Registry argues that the fact that the results of that research were not produced in this case is somehow evidence that that research was not performed.⁴⁸ This is simply incorrect; the research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN's custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry's Reconsideration Requests).

2. The CPE Panels' Consideration of the Later-Rescinded Opposition Letter from the EC Was Not Material to the Results of the CPE.

45. As discussed above, the CPE Panels mistakenly considered the later-rescinded letter from the EC in evaluating Dot Registry's Applications. However, this error did not materially affect the outcome of the CPE Reports—even if Dot Registry had received the additional point, Dot Registry's Applications still would have been awarded only six out of 16 possible points, which is eight less than needed to prevail in CPE. In addition, as demonstrated by the communication from the EIU to ICANN, that error was inadvertent and did not reflect any disparate treatment of Dot Registry's Applications.⁴⁹

MATERIAL FACTS IN DISPUTE

46. As requested by the Panel, Dot Registry's brief identifies a number of material facts purportedly in dispute in this IRP. As discussed above, given the limited scope of any independent review process, the only material fact at issue is whether the Board acted in accordance with the Articles and Bylaws in determining that the CPE Panels followed

⁴⁷ See, e.g., .LLP CPE Report at 2, 3, Ex. C-19.

⁴⁸ Additional Submission ¶ 26.

⁴⁹ 17 July 2014 Email ^{EIU Contact Information Redacted} to C. Bare, Ex. C-45. As discussed in this email, the oversight was due to the fact that the EC's comment retracting its earlier opposition was posted after the CPE Panels' evaluations of Dot Registry's Applications had begun. *Id.*

established policy and procedure in rendering the CPE Reports. None of the other facts identified by Dot Registry are material to the outcome of this IRP.⁵⁰

CONCLUSION

47. The majority of Dot Registry's Additional Submission focuses on issues completely immaterial to this IRP, the singular purpose of which is to assess whether ICANN's Board acted consistently with its Articles of Incorporation and Bylaws. Neither the Guidebook, nor anything in the Articles or Bylaws requires ICANN's Board to perform a substantive review of third-party expert determinations in the New gTLD Program. The ICANN community, which had extensive input into the multiple drafts of the Guidebook, did not intend for ICANN's Board or any other body to sit as an appellate court for the thousands of expert determinations that are being made in conjunction with the 1,930 applications that ICANN received for new gTLDs, and nothing in the Articles or Bylaws requires the Board to do so.

48. The only Board conduct at issue in this IRP is the BGC's evaluation of Dot Registry's Reconsideration Requests, and the BGC's conduct in that regard was fully consistent with ICANN's Articles and Bylaws. Dot Registry does not really argue otherwise. ICANN therefore urges the IRP Panel to deny Dot Registry's IRP Request and to declare that ICANN's Board did not act contrary to ICANN's Articles and Bylaws in evaluating Dot Registry's Reconsideration Requests.

⁵⁰ ICANN does not dispute that Dot Registry has standing to bring this IRP.

Respectfully submitted,

JONES DAY

Dated: August 10, 2015

By: Jeffrey A. LeVee /RHZ
Jeffrey A. LeVee

Counsel for Respondent ICANN