

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS LIMITED, BRS MEDIA, INC, ) ICDR CASE NO. 01-15-0005-2073  
AND TIN DALE, LLC, )  
)  
Claimants, )  
)  
and )  
)  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
)  
Respondent. )  
\_\_\_\_\_)

**ICANN'S RESPONSE TO THE REQUEST FOR INDEPENDENT  
REVIEW PROCESS SUBMITTED BY CLAIMANTS  
AFILIAS LIMITED, BRS MEDIA, INC, AND TIN DALE, LLC**

Jeffrey A. LeVee  
Rachel Zernik  
JONES DAY  
Contact Information  
Redacted

Counsel to Respondent  
The Internet Corporation  
For Assigned Names and Numbers

10 November 2015

## TABLE OF CONTENTS

	<b>Page</b>
INTRODUCTION .....	1
BACKGROUND FACTS .....	4
STANDARD OF REVIEW .....	10
ARGUMENT .....	12
I. CLAIMANTS’ CHALLENGE TO THE CPE GUIDELINES IS BOTH UNSUPPORTED AND TIME-BARRED .....	13
II. THE ICANN BOARD FOLLOWED ICANN’S ARTICLES AND BYLAWS IN RENDERING ITS DETERMINATION REGARDING RECONSIDERATION REQUEST 14-41 .....	14
A. THE BOARD APPLIED THE CORRECT STANDARD OF REVIEW FOR RECONSIDERATION REQUESTS .....	15
B. THE BOARD CORRECTLY ANALYZED WHETHER THE CPE PANEL HAD VIOLATED ESTABLISHED POLICY AND PROCEDURE IN RENDERING THE CPE REPORT .....	17
C. THE ICANN BOARD CORRECTLY ANALYZED WHETHER ICANN STAFF HAD VIOLATED ESTABLISHED POLICY AND PROCEDURE IN RESPONDING TO CLAIMANTS’ DIDP REQUEST .....	18
III. CLAIMANTS’ CONTENTION THAT THE CPE PANEL ERRED IS IRRELEVANT AND WITHOUT MERIT .....	20
IV. RESPONSE TO THE CLAIMANTS’ REQUESTED RELIEF .....	23
CONCLUSION.....	24

## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Response to the Request for Independent Review Process (“IRP Request”) submitted by claimants Afilias Limited, BRS Media, Inc., and Tin Dale, LLC (collectively, “Claimants”) on 1 October 2015.

1. IRPs are conducted pursuant to Article IV, Section 3 of ICANN’s Bylaws, which provide a non-binding method of evaluating certain actions of ICANN’s Board of Directors.<sup>1</sup> This IRP Panel has one (and only one) responsibility: to provide a declaration stating the IRP Panel’s opinion as to “whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”<sup>2</sup>

2. As explained herein, Claimants’ IRP should be denied because the ICANN Board has not taken any action that violates any provision of ICANN’s Articles of Incorporation (“Articles”) or Bylaws. Instead, Claimants improperly seek to challenge the report of a third-party expert made in conjunction with the New gTLD Program. However, because the ICANN Board took no action (and was not required to take any action) with respect to that report, Claimants’ challenge does not support independent review.

3. Each of the Claimants applied to ICANN for the opportunity to operate the new generic top level domain (“gTLD”) .RADIO. The European Broadcasting Union (“EBU”) also submitted an application for .RADIO (“EBU Application”). The Claimants submitted “standard” applications that would permit any person to obtain a domain name within the TLD, whereas the EBU submitted a “community application,” which means that the EBU proposes to operate

---

<sup>1</sup> ICANN’s Bylaws (“Bylaws”), Art. IV, § 3 (Cls. Ex. Annex 5B), *also available at* <http://www.icann.org/en/about/governance/bylaws>.

<sup>2</sup> *Id.*, Art. IV, § 3.4.

the .RADIO gTLD “for the benefit of a clearly delineated community.”<sup>3</sup>

4. Where, as here, a community based application is in “contention” with standard applications for the same proposed new gTLD, the community based application is invited to participate in Community Priority Evaluation (“CPE”).<sup>4</sup> If the application participates and prevails in CPE, only that application (and any other community based applications for the same string that also have prevailed in CPE) is permitted to proceed.<sup>5</sup> The New gTLD Applicant Guidebook (“Guidebook”) that ICANN and the community developed in order to evaluate new gTLD applications specifically states that the requirements to prevail in CPE are “very stringent” because a qualifying community based application “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”<sup>6</sup> In other words, the Guidebook provides that is difficult for applications to prevail in CPE.

5. The CPE panel evaluating the EBU Application (“CPE Panel”) issued a report finding that the EBU Application met the criteria set forth in the Guidebook to establish priority and therefore prevailed in CPE (“CPE Report”). Accordingly, only the EBU Application for .RADIO will proceed.

6. Disappointed with this result, Claimants asked ICANN’s Board Governance Committee (“BGC”) to reconsider the CPE Report as well as ICANN staff’s determination, pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”), that certain documents related to the CPE Report were not appropriate for public disclosure under the DIDP criteria. The BGC denied Claimants’ request for reconsideration (“Request 14-41”) because Claimants did not state a proper basis for reconsideration as defined in ICANN’s Bylaws.

---

<sup>3</sup> Guidebook § 1.2.3.1 (Cls. Ex. Annex 5C).

<sup>4</sup> *Id.* § 4.2

<sup>5</sup> *Id.* § 4.2.2.

<sup>6</sup> *Id.* § 4.2.3.

7. In this IRP, Claimants challenge the BGC’s denial of Request 14-41. Claimants also appear to challenge the actual CPE Guidelines, which were drafted by the EIU, published by ICANN staff (with no Board involvement), and “provide additional clarity around the process and scoring principles outlined in the [Guidebook].”<sup>7</sup> As explained further below, Claimants’ challenges fail to support independent review.

8. Claimants’ fundamental goal is to challenge the CPE Report, and the focus of Claimants’ argument is that the CPE Panel erred. However, IRPs are not a vehicle to substantively challenge third-party expert reports, as other IRP panels have confirmed over the past few months.<sup>8</sup> The ICANN Board is not involved in the creation of CPE reports, was not involved in any way in this particular report, and has no obligation to review (substantively or otherwise) any such report.

9. Claimants essentially propose that the ICANN Board should have conducted a substantive review of the CPE Report (and perhaps all CPE expert reports and all other third-party expert reports that have been issued in conjunction with the New gTLD Program). However, the Board and the ICANN community, in adopting the Guidebook, made clear that the Board would not undertake such a responsibility, and nothing in the Articles or Bylaws requires the Board to do so. Because the Board has no obligation to review CPE reports, the Board’s failure to do so in this instance cannot possibly violate ICANN’s Articles or Bylaws.

10. ICANN understands that Claimants are disappointed that their applications for .RADIO will not proceed. However, as recommended by ICANN’s Generic Names Supporting Organization (“GNSO”), which is the part of the ICANN community designated by the Bylaws as “responsible for developing and recommending to the ICANN Board substantive

---

<sup>7</sup> CPE Guidelines at 2 (Resp. Ex. 1), *also available at* <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>8</sup> *Booking.com* Final Declaration ¶¶ 104, 131-138 (Resp. Ex. 2); *Vistaprint* Final Declaration ¶¶ 157-171 (Resp. Ex. 3).

policies relating to generic top-level domains,”<sup>9</sup> those applications representing a community are given priority in string contention. The Guidebook makes this clear, and there is no basis to conclude that such a preference is somehow a violation of ICANN’s Articles or Bylaws.

11. Ultimately, neither the creation nor the acceptance of the CPE Report constitutes ICANN Board action; nor does the promulgation of the CPE Guidelines. The only Board action at issue here is the BGC’s denial of Request 14-41 and, as discussed herein, the BGC carefully adhered to ICANN’s Articles and Bylaws in rendering that determination.

## **BACKGROUND FACTS**

### **Background Information On ICANN**

12. ICANN was formed in 1998. It is a California nonprofit public benefit corporation. As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” including the domain name system (“DNS”).<sup>10</sup>

13. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors and over 300 staff members. Yet, ICANN is much more than just the corporation—it is a community of participants. In addition to the Board, the staff, and an Ombudsman,<sup>11</sup> the ICANN community includes a Nominating Committee,<sup>12</sup> three Supporting Organizations,<sup>13</sup> four Advisory Committees,<sup>14</sup> a group of technical expert advisors,<sup>15</sup> and a large, globally distributed group of community members who

---

<sup>9</sup> Bylaws, Art. X, § 1 (Cls. Ex. Annex 5B).

<sup>10</sup> *Id.*, Art. I, § 1.

<sup>11</sup> *Id.*, Art. V.

<sup>12</sup> *Id.*, Art. VII.

<sup>13</sup> *Id.*, Arts. VIII-X.

<sup>14</sup> *Id.*, Art. XI.

<sup>15</sup> *Id.*, Art. XI-A, § 2.

participate in ICANN's processes.

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

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

15. The New gTLD Program (the "Program") constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII gTLDs and new non-ASCII, internationalized domain name ("IDN") gTLDs.<sup>16</sup> In developing the Program with the ICANN community, numerous versions of the Guidebook were prepared, distributed for public comment, and then revised as a result of the public input received. That process repeated many times and over many years until ultimately, ICANN went forward with the Program based on the version of the Guidebook published on 4 June 2012. The Guidebook provides detailed instructions to gTLD applicants and sets forth the procedures as to how new gTLD applications are evaluated. The Program has been a great success at achieving its goals: ICANN received 1,930 gTLD applications and, as of this writing, more than 700 new gTLDs have been added to the Internet, with hundreds more to come.

16. The Guidebook provides that new gTLD applicants may designate their

---

<sup>16</sup> IDN gTLDs are gTLDs that include characters not within the US-ASCII (American Standard Code for Information Exchange) or Latin alphabets.

applications as either standard or community based, *i.e.*, “operated for the benefit of a clearly delineated community.”<sup>17</sup> Applicants for community based gTLDs are expected to, among other things, “demonstrate an ongoing relationship with a clearly delineated community” and “have applied for a gTLD string strongly and specifically related to the community named in [their] application.”<sup>18</sup> The Guidebook provides that “community-based applications are intended to be a narrow category, for applications where there are unambiguous associations among the applicant, the community served, and the applied-for gTLD string.”<sup>19</sup>

17. If two or more applications are for identical or “confusingly similar” new gTLDs and complete all preliminary stages of evaluation, they are placed in a “contention set.”<sup>20</sup> An applicant with a community based application that is placed in a contention set may elect to proceed with Community Priority Evaluation (“CPE”) for that application.<sup>21</sup> If the applicant elects to proceed to CPE, the application is forwarded to an independent, third-party provider—the EIU—for review.<sup>22</sup> ICANN’s staff selected the EIU to conduct Community Priority Evaluations in 2011.<sup>23</sup>

18. Once an applicant submits its materials in support of CPE, a panel constituted of EIU experts (known as a “CPE panel”) evaluates the application.<sup>24</sup> The CPE panel evaluates the application against the CPE criteria, using the CPE Guidelines as additional guidance, which include scoring rubrics, definitions of key terms, and specific questions to be scored.<sup>25</sup> The final version of the CPE Guidelines was published by the EIU in September 2013 after consideration

---

<sup>17</sup> Guidebook, § 1.2.3.1 (Cls. Ex. Annex 5C).

<sup>18</sup> *Id.*, § 1.2.3.1.

<sup>19</sup> *Id.*, § 1.2.3.2.

<sup>20</sup> *Id.*, § 4.1.

<sup>21</sup> *Id.*, § 4.2.

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

<sup>23</sup> See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>.

<sup>24</sup> Community Priority Evaluation Panel and Its Processes (“CPE Process”) at 2 (Cls. Ex. Annex-7).

<sup>25</sup> *Id.*; CPE Guidelines (Resp. Ex. 1).



of the ICANN community’s feedback on a first draft.<sup>26</sup> The CPE Guidelines “are meant to provide additional clarity around the process and scoring principles outlined in the [Guidebook]. [They] do[] not modify the [Guidebook] framework nor do[] [they] change the intent or standards laid out in the [Guidebook].”<sup>27</sup>

19. If the application is found to meet the CPE criteria set forth in the Guidebook—meaning that the CPE panel awards the application at least 14 out of 16 possible points on those criteria—the application will prevail in CPE.<sup>28</sup> ICANN’s Board has no role whatsoever in the analysis of each of the criterion by a CPE panel or in the scoring of an application.

20. If an application prevails in CPE, it (and any other community based applications in the contention set that prevail in CPE) will proceed to the next stage of evaluation.<sup>29</sup> Other standard applications in a contention set (such as those submitted by Claimants) will not proceed if the community based application(s) have achieved priority.<sup>30</sup> As discussed further below, this outcome is consistent with the recommendation of the GNSO that applications representing communities be awarded priority in string contention.<sup>31</sup>

### **Background Information Regarding the DIDP**

21. A principal element of ICANN’s approach to transparency and information disclosure is its commitment to make publicly available on its website a comprehensive set of materials concerning ICANN’s operational activities. In that regard, ICANN has identified

---

<sup>26</sup>See <http://newgtlds.icann.org/en/announcements-and-media/announcement-4-16aug13-en> (announcing a public comment period lasting from 16 August 2013 through 7 September 2013).

<sup>27</sup> CPE Guidelines at 2 (Resp. Ex. 1).

<sup>28</sup> Guidebook § 4.2.2 (Cls. Ex. Annex 5C). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of four points. *Id.* § 4.2.3.

<sup>29</sup> *Id.* § 4.2.2.

<sup>30</sup> *Id.*

<sup>31</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (“ICANN Board Rationales”) at 94 (Resp. Ex. 4).

various categories of documents that are made public as a matter of course.<sup>32</sup> In addition, ICANN’s Documentary Information Disclosure Policy (“DIDP”) allows interested parties to request that ICANN make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control” that is not already publicly available.<sup>33</sup>

22. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests.”<sup>34</sup> ICANN staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP’s Nondisclosure Conditions, which include, among several others: (i) “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process”; and (ii) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates.”<sup>35</sup> If the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.<sup>36</sup>

### **Relevant Facts Regarding the Applications for .RADIO**

23. Claimants each submitted a standard application for .RADIO. Their applications were placed in a contention set with the community based application that the EBU submitted for .RADIO.

---

<sup>32</sup> See Documentary Information Disclosure Policy (“DIDP”) (Resp. Ex. 5), *also available at* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>33</sup> *Id.*

<sup>34</sup> Process for Responding to DIDP Requests (Resp. Ex. 6), *also available at* <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>35</sup> DIDP (Resp. Ex. 5).

<sup>36</sup> *Id.*

24. On 19 February 2014, the EBU Application was invited to participate in CPE for .RADIO, and was forwarded to the EIU for evaluation.<sup>37</sup> On 10 September 2014, the CPE Panel issued the CPE Report.<sup>38</sup> The CPE Panel determined that the EBU Application received fourteen out of sixteen possible points on the CPE criteria, meaning that it prevailed in CPE.<sup>39</sup> Pursuant to the procedures set forth in the Guidebook, because the EBU Application prevailed in CPE, the .RADIO contention set was resolved, and only the EBU Application will proceed to contracting.<sup>40</sup>

25. On 25 September 2014, Claimants filed Reconsideration Request 14-41, seeking reconsideration of the CPE Report.<sup>41</sup> On 26 September 2014, Claimants filed a DIDP request seeking the publication of documents relating to the CPE Report (“DIDP Request”).<sup>42</sup> At Claimants’ request, the BGC deferred its consideration of Request 14-41 until ICANN had responded to the DIDP Request.

26. On 24 October 2014, ICANN responded to DIDP Request (“DIDP Response”).<sup>43</sup> ICANN identified documents responsive to the DIDP Request that were already publicly available, and noted that many of the requested documents explaining the CPE process—including the Guidebook, the CPE Guidelines, and a “CPE Panel Process Document” further explaining the CPE panels’ process—were already available online.<sup>44</sup> With respect to those requested documents that were in ICANN’s possession and were not already publicly available, ICANN explained that those documents would not be made publicly available because they were subject to various DIDP Nondisclosure Conditions, including the nondisclosure conditions

---

<sup>37</sup> See <http://newgtlds.icann.org/en/applicants/cpe>.

<sup>38</sup> CPE Report (Cls. Ex. Annex-3).

<sup>39</sup> *Id.* at 1.

<sup>40</sup> Guidebook § 4.2.2 (Cls. Ex. Annex 5C).

<sup>41</sup> Initial Reconsideration Request 14-41 (Cls. Ex. Annex 13).

<sup>42</sup> DIDP Request (Cls. Ex. Annex 12).

<sup>43</sup> DIDP Response (Cls. Ex. Annex 14).

<sup>44</sup> *Id.* at 1-2.

protecting “information exchanged, prepared for, or derived from the deliberative and decision-making process” and “confidential business information and/or internal policies and procedures.”<sup>45</sup> ICANN also explained that “[t]o help assure independence of the [CPE] process . . . , ICANN (either Board or staff) is not involved with the CPE Panel’s evaluation of criteria, scoring decisions, or underlying analyses” and “does not have . . . collect or maintain[] the work papers of the individual CPE Panels (including the .RADIO CPE Panel). . . .”<sup>46</sup>

27. On 10 November 2014, Claimants submitted a revised version of Request 14-41, seeking reconsideration both of the CPE Report and of the DIDP Response.<sup>47</sup> On 20 October 2014, the BGC denied Request 14-41, finding that the Claimants “d[id] not identify any misapplication of policy or procedure by ICANN staff or the CPE Panel.”<sup>48</sup>

28. Claimants then initiated a Cooperative Engagement Process (“CEP”) with ICANN<sup>49</sup> and subsequently filed this IRP.

### STANDARD OF REVIEW

29. The 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, but only to the extent that Board action was inconsistent with ICANN’s Articles or Bylaws.<sup>50</sup> The IRP Panel is tasked with providing its opinion as to whether a challenged action of the ICANN Board violated ICANN’s Articles or Bylaws.<sup>51</sup> ICANN’s Bylaws specifically identify the standard of review that the IRP Panel must apply when evaluating the

---

<sup>45</sup> *Id.* at 2-3.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> Revised Reconsideration Request 14-41 (Cls. Ex. Annex 15).

<sup>48</sup> BGC Determination on Request 14-41 at 2 (Cls. Ex. Annex 16).

<sup>49</sup> Bylaws, Art. IV, § 3.14 (Cls. Ex. Annex 5B). Claimants are encouraged to enter into CEP with ICANN prior to filing IRP requests in order to resolve or narrow the issues that are contemplated to be brought to the IRP. *See* Cooperative Engagement Process, *available at* <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>.

<sup>50</sup> *Id.*, Art. IV, §§ 3.1, 3.2.

<sup>51</sup> *See id.* Art. IV, §§ 3.2, 3.4.

actions of the ICANN Board, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
  - b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
  - c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>52</sup>
30. An IRP Panel is not to substitute its judgment for that of the Board.<sup>53</sup> As the IRP

panel in *Booking.com v. ICANN* (“*Booking.com*”) recently explained:

[s]o 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.”<sup>54</sup>

31. ICANN has appointed the International Centre for Dispute Resolution (“ICDR”) as ICANN’s IRP Provider. ICANN’s Bylaws and the Supplementary Procedures, which the ICDR specifically adopted for ICANN IRP proceedings, apply here.<sup>55</sup> The Bylaws provide that the IRP be conducted via “email and otherwise via the Internet to the maximum extent feasible.”<sup>56</sup> The IRP Panel may also hold meetings via telephone where necessary, and “[i]n the unlikely event that a telephone or in-person hearing is convened, the hearing shall be limited to

---

<sup>52</sup> *Id.*, Art. IV, § 3.4.

<sup>53</sup> *See id.*

<sup>54</sup> *Booking.com* Final Declaration, ¶¶ 108-109 (Resp. Ex. 2); *see also Vistaprint Ltd. v. ICANN*, Final Declaration ¶ 123 (“The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgment in taking a decision believed to be in the best interests of ICANN.”) (Resp. Ex. 3).

<sup>55</sup> Absent a governing provision in ICANN’s Bylaws or the ICDR’s Supplemental Procedures, the ICDR Rules apply. In the event of any inconsistency between the Supplementary Procedures and the ICDR’s Rules, the Supplementary Procedures shall govern. Bylaws, Art. IV, § 3.8; *see also* ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process (“Supplementary Procedures”) § 2, (Resp. Ex. 4), *also available at* <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

<sup>56</sup> Bylaws, Art. IV, § 3.12 (Cls. Ex. Annex 5B).

argument only; all evidence, including witness statements, must be submitted in writing in advance.”<sup>57</sup>

32. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written declaration designating, among other things, the prevailing party.<sup>58</sup> The Board will give serious consideration to the IRP Panel’s opinion and, “where feasible,” shall consider the IRP Panel’s declaration at the Board’s next meeting.<sup>59</sup>

### ARGUMENT

33. Although Claimants raise a number of arguments, Claimants’ ultimate purpose is to challenge the EIU’s substantive determination that the EBU Application prevailed in CPE. Incorporating by reference the same arguments they made in their initial and revised Reconsideration Request, Claimants compare the CPE Report to reports issued by other CPE panels, argue that the CPE Report was “unclear and imprecise,” and disagree with substantive decisions made by the CPE Panel (such as the CPE Panel’s determination “not [to] refer to the Oxford English Dictionary in the [Report]).”<sup>60</sup> Indeed, Claimants’ requested relief—that the IRP Panel “determine that the EIU erred in reviewing and scoring the EBU Application” and restore the .RADIO contention set to “in contention”—confirms that this IRP is a substantive challenge to the CPE Report.<sup>61</sup> However, as discussed herein, IRPs are not a forum for challenging third-party expert reports because they do not involve any Board action.

---

<sup>57</sup> *Id.*, Art. IV, § 3.12; Supplementary Procedures ¶ 10.

<sup>58</sup> Bylaws, Art. IV, § 3.18 (Cls. Ex. Annex 5B).

<sup>59</sup> *Id.*, Art. IV, § 3.21.

<sup>60</sup> IRP Request ¶ 81.

<sup>61</sup> IRP Request ¶ 91. As the IRP panel in *Vistaprint Ltd. v. ICANN* recently declared: “[T]he IRP Panel does not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.” *Vistaprint* Final Declaration ¶ 149. Rather, the IRP Panel is limited to stating its opinion by “declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and *recommending* that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. Bylaws, Art. IV, §§ 3.4, 3.11(c-d) (Cls. Ex. Annex 5B).

34. In fact, Claimants identify only one Board action—the denial of Request 14-41—that can even be asserted in an IRP proceeding. As explained below, that action was wholly consistent with ICANN’s Articles and Bylaws.

**I. CLAIMANTS’ CHALLENGE TO THE CPE GUIDELINES IS BOTH UNSUPPORTED AND TIME-BARRED.**

35. Claimants argue that the CPE Panel “did not have the authority” to follow the CPE Guidelines in rendering the CPE Report, contending that the CPE Guidelines somehow modify or conflict with the CPE criteria set forth in the Guidebook.<sup>62</sup> As a preliminary matter, Claimants have not identified any Board action, either insofar as they are challenging the CPE Panel’s application of the CPE Guidelines or insofar as they are challenging the development of the CPE Guidelines.

36. The ICANN Board had no involvement in the development or promulgation of the CPE Guidelines. Rather, in accordance with the Guidebook, the Board established the New gTLD Program and its overall guidelines, while properly leaving the implementation to ICANN staff. This is particularly appropriate with respect to the Program, which involved numerous evaluation procedures to be performed on over 1,900 applications.<sup>63</sup> As discussed above, the EIU drafted the CPE Guidelines after considering community input on a first draft. ICANN published the final version of the CPE Guidelines online in September 2013.

37. Even if there were some Board action to review with respect to the CPE Guidelines, which there is not, Claimants incorrectly argue that the CPE Guidelines are inconsistent with the CPE criteria set forth in the Guidebook. To the contrary, as discussed

---

<sup>62</sup> IRP Request ¶¶ 54-60.

<sup>63</sup> For example, each application was subject to a string similarity review, a financial evaluation, a technical evaluation, and a registry services evaluation. *See* New gTLD Program – Evaluation Process (excerpted from the Guidebook) (Resp. Ex. 7). ICANN’s Board did not participate in any of these evaluations; indeed, had the Board been involved in evaluating 1,930 gTLD applications, the process would have ground to a near halt.

above, the CPE Guidelines explicitly state that they “do not modify the Guidebook framework” or change the Guidebook standards.<sup>64</sup> Rather, as the BGC noted in its determination on the Request 14-41, the CPE Guidelines “provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.”<sup>65</sup> Their intent—in line with the goals of the New gTLD Program—is to “increase transparency, fairness and predictability around the [CPE] assessment process.”<sup>66</sup>

38. Finally, any challenge to the CPE Guidelines is time-barred. The first draft of the CPE Guidelines was posted for public comment in August 2013, and the final CPE Guidelines were published on 27 September 2013. If the Claimants objected to ICANN staff’s publishing of the final guidelines, they had thirty days to file an IRP request or fifteen to file a reconsideration request. They cannot do so now over two years later (and only in the context of challenging a CPE Report with which they disagree).<sup>67</sup>

## **II. THE ICANN BOARD FOLLOWED ICANN’S ARTICLES AND BYLAWS IN RENDERING ITS DETERMINATION REGARDING RECONSIDERATION REQUEST 14-41.**

39. The only Board action at issue in this IRP is the Board’s denial of Request 14-41. As discussed further below, the Board—through the BGC—applied the correct standard for reconsideration requests and properly found that there was no basis for reconsideration of either the CPE Report or the DIDP Response.

---

<sup>64</sup> CPE Guidelines at 2 (Resp. Ex. 1).

<sup>65</sup> BGC Determination on Request 14-41 at 6 (Cls. Ex. Annex 16). Even if some modification had occurred, the terms and conditions of the new gTLD applications submitted by Claimants provide that ICANN “reserves the right to make reasonable updates and changes to [the Guidebook]” and that new gTLD applications “will be subject to any such updates and changes.” New gTLD Application Terms and Conditions ¶ 14 (Cls. Ex. Annex 5D).

<sup>66</sup> CPE Guidelines at 2 (Resp. Ex. 1).

<sup>67</sup> Bylaws Art. IV, § 2.5 (15-day deadline for seeking reconsideration of staff or Board actions) (Cls. Ex. Annex 5B); *id.* Art. IV, § 3.3 (30-day deadline for filing request for independent review of Board actions).



**A. THE BOARD APPLIED THE CORRECT STANDARD OF REVIEW FOR RECONSIDERATION REQUESTS.**

40. Claimants argue that the BGC violated ICANN’s Bylaws by declining to perform a substantive review of the CPE Report.<sup>68</sup> However, ICANN’s Bylaws provide for review of “staff actions or inactions” only to determine whether those actions or inactions “contradict[ed] established ICANN policy(ies).”<sup>69</sup> 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”).<sup>70</sup> Even though ICANN’s Board has extended reconsideration to Third Party Providers (reasoning that they are essentially acting in place of ICANN 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 has never 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 Board is, in itself, in contravention of established processes and policies within ICANN.<sup>71</sup>

41. The BGC has explained in detail the reasons that it does not conduct substantive reviews of expert determinations by reiterating the NGPC’s rationale that “the Board is not a mechanism for direct, de novo appeal of [] decisions with which the requester disagrees,” and further explaining that “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

---

<sup>68</sup> IRP Request ¶¶ 45-50.

<sup>69</sup> Bylaws, Art. IV, § 2.2 (Cls. Ex. Annex 5B).

<sup>70</sup> BGC Recommendation on Request 13-5 at 4 (Resp. Ex. 8). The BGC’s recommendation was adopted by the NGPC. NGPC Resolution 2013.09.10.NG02, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en>.

<sup>71</sup> Rationale for NGPC Resolution 2013.05.18.NG04 (Resp. Ex. 9).

panel formed for that particular purpose.”<sup>72</sup> As the BGC has indicated several times, expert panels – including those appointed by the EIU – were selected because they had specific expertise that the ICANN Board does not have, should not have, and was not expected to have.

42. Specifically with respect to CPEs, the Guidebook is clear that CPE “will be performed by a community priority panel appointed by ICANN.”<sup>73</sup> 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) “applications that are in direct contention with [a prevailing community-based application] will be eliminated” from contention.<sup>74</sup> The Guidebook does not contain any policy or procedure for appealing the determinations of CPE panels on substantive grounds, and this was an intentional decision by ICANN and the community.<sup>75</sup>

43. Claimants are correct that the New gTLD Application Terms and Conditions provide that new gTLD applicants may utilize ICANN’s accountability mechanisms to challenge final decisions made with respect to their applications.<sup>76</sup> Claimants have chosen to do just that. However, nothing in the language of Terms and Conditions expands the scope of ICANN’s accountability mechanisms or creates a substantive appeals mechanism, which was purposely not provided for in the Guidebook.

44. In sum, the BGC’s review was properly limited to whether the CPE Panel followed established policies and procedures in rendering the CPE Report.

---

<sup>72</sup> BGC Recommendation on Request 13-5 at 9-10 (Resp. Ex. 8).

<sup>73</sup> Guidebook § 4.2.2 (Cls. Ex. Annex 5C).

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

<sup>75</sup> *Id.* As Claimants acknowledge, the Guidebook procedures, including the CPE 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. IRP Request ¶ 17; *see also* ICANN Board Rationales at 93-105 (Resp. Ex. 4); *see also id.* at 5-6.

<sup>76</sup> New gTLD Application Terms and Conditions ¶ 6 (Cls. Ex. Annex 5D).

**B. THE BOARD CORRECTLY ANALYZED WHETHER THE CPE PANEL HAD VIOLATED ESTABLISHED POLICY AND PROCEDURE IN RENDERING THE CPE REPORT.**

45. Request 14-41 challenged the substance of the CPE Report. Claimants argued, as they do in their IRP Request, that the CPE Panel incorrectly applied the CPE criteria in determining that the EBU Application prevailed in CPE. However, as the BGC pointed out in its determination, “the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports,”<sup>77</sup> which would involve exactly the sort of comprehensive appellate review that the Board (and the community) determined it would not undertake. The BGC did, however, address each of Claimants’ complaints regarding the CPE Panel’s scoring of the EBU Application. The BGC noted that, in each instance, Claimants’ complaint was that the number of points awarded by the CPE Panel was “wrong” as a substantive matter, not that the CPE Panel had violated any ICANN policy or procedure in scoring the EBU Application.<sup>78</sup>

46. Claimants do not identify any ICANN Article or Bylaws provision that the BGC allegedly violated in reviewing Request 14-41. Claimants simply object to the BGC’s adherence to the standard for reconsideration requests, which calls for the BGC to review only whether the actions of the third-party evaluators “contradict[ed] established ICANN policy(ies).”<sup>79</sup> The BGC did not violate any Article or Bylaws provision in adhering to the Bylaws standard for reconsideration requests.

---

<sup>77</sup> BGC Recommendation on Request 13-5 at 7 (Cls. Ex. Annex 16).

<sup>78</sup> *Id.* at 5-9.

<sup>79</sup> Bylaws, Art. IV, § 2.2(a) (Cls. Ex. Annex 5B). The Bylaws make reconsideration available only to challenge actions of ICANN’s staff or Board, but the BGC has determined that “the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its procedures or policies in accepting that determination.” BGC Determination on Request 14-34 at 4 (Resp. Ex. 10).

**C. THE ICANN BOARD CORRECTLY ANALYZED WHETHER ICANN STAFF HAD VIOLATED ESTABLISHED POLICY AND PROCEDURE IN RESPONDING TO CLAIMANTS' DIDP REQUEST.**

47. Claimants argue that the BGC violated ICANN's Articles and Bylaws in denying reconsideration of the ICANN staff's determination, pursuant to the DIDP, that certain documents related to the CPE Report were not appropriate for publication or were not in ICANN's possession, custody, or control.<sup>80</sup> Again, Claimants fail to identify any Article or Bylaws provision that the BGC violated in making that determination.

48. ICANN considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that its decision making is in the public benefit and in a manner accountable to all stakeholders. As the BGC has noted, the DIDP is not a litigation tool designed to "make pieces of information available to specific interested parties."<sup>81</sup> Rather, it is "intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."<sup>82</sup>

49. Not every document in ICANN's possession is properly disclosed to the wider public. As discussed in the DIDP Response, Claimants' DIDP Request sought documents containing confidential business information and documents, the public disclosure of which could compromise the integrity of ICANN's and/or the EIU's deliberative process.<sup>83</sup> The BGC's determination addressed each of Claimants' arguments and properly concluded that ICANN staff had followed the policies and procedures of the DIDP in determining that certain documents

---

<sup>80</sup> IRP Request ¶¶ 61-77.

<sup>81</sup> BGC Determination on Request 14-39 at 1 (Resp. Ex. 11).

<sup>82</sup> *Id.* (quoting the Documentary Information Disclosure Policy).

<sup>83</sup> DIDP Response at 1-3 (Cls. Ex. Annex 14).

related to the CPE Report were subject to Nondisclosure Conditions, and that the public interest in disclosing those documents did not outweigh the harm that might be caused by such disclosure.<sup>84</sup>

50. One of Claimants' requests was that ICANN make public its contract with the EIU. At the time of the response, ICANN declined to do so, noting that the confidential contract was subject to certain Nondisclosure Conditions.<sup>85</sup> The BGC found that that determination was in accordance with the DIDP. As Claimants note, however, since that time ICANN has elected to publish a redacted version of its contract with the EIU on ICANN's website. That decision was made in conjunction with another IRP, *Dot Registry v. ICANN*, involving a challenge to a different CPE report. Having received the permission of the EIU and having made the contract available to parties in that IRP, ICANN made the EIU contract available online so everyone has equal access to the same information. That determination in no way suggests that ICANN staff failed to follow established policy or procedure in initially determining in response to a DIDP request that ICANN's confidential contract with the EIU was not appropriate for disclosure pursuant to the DIDP. Disclosure pursuant to the DIDP is evaluated under different criteria than document production in a formal dispute proceeding.

51. Claimants further argue, as they did in Request 14-41, that ICANN staff improperly claimed that certain requested documents were not in ICANN's possession. Claimants assert that, "to the extent ICANN Staff did not have certain [requested] documents [], ICANN [] indisputably [had] the possibility to request access to this information [from the

---

<sup>84</sup> BGC Determination on Request 14-41 at 19-21 (Cls. Ex. Annex 16).

<sup>85</sup> ICANN's contract with the EIU contains a confidentiality provision providing that "[t]he parties agree also that the existence and terms of [the contract] are confidential and shall not be disclosed by either party without prior written consent in writing by the other party." New gTLD Program Consulting Agreement, Exhibit A, ¶ 5(b) (Cls. Ex. Annex 19).

EIU].”<sup>86</sup> However, ICANN is not required to seek documents from third parties in order to respond to DIDP requests. As the BGC has noted, “the DIDP is only available as a means to collect documents ‘within ICANN’s possession, custody, or control.’”<sup>87</sup> ICANN also has explained these parameters in several DIDP responses—“a threshold consideration in responding to a DIDP request, [ ] is whether the documents requested are in ICANN’s possession, custody, or control. Under the DIDP Policy, where the responsive document does not exist, ICANN shall not be required to create or compile summaries of any documented information,”<sup>88</sup> nor is ICANN staff required to collect documents in the possession of a third-party expert.

### **III. CLAIMANTS’ CONTENTION THAT THE CPE PANEL ERRED IS IRRELEVANT AND WITHOUT MERIT.**

52. Although the BGC properly did not perform a substantive review of the CPE Report, since it is not within the scope of a reconsideration request or an IRP to do so, the Claimants have presented no evidence suggesting that the EIU improperly determined that the EBU Application qualified for community priority. Indeed, the BGC determined that the EIU looked at and evaluated all of the required criteria in coming to its determination on CPE.

53. With respect to the first CPE criterion, the CPE Panel evaluated the community as defined in the EBU Application – the “radio industry” – and found that it was both clearly defined and had been active prior to September 2007.<sup>89</sup> The CPE Panel further found that that community was of considerable size and that its pursuits were of a “lasting, non-transient nature.”<sup>90</sup> However, because the CPE Panel found that while “[t]here are several entities that represent parts of the radio community,” “the community as defined in the application does not

---

<sup>86</sup> IRP Request ¶ 74.

<sup>87</sup> BGC Determination on Reconsideration Request 14-41 at 22.

<sup>88</sup> Response to DIDP Request No. 20141212-8 at 5, *available at* <https://www.icann.org/en/system/files/files/cis-response-17jan15-en.pdf>.

<sup>89</sup> RADIO CPE Report at 1-3 (Cls. Ex. Annex 3).

<sup>90</sup> *Id.* at 4.

have one entity mainly dedicated to the community.” As such, the CPE Panel ultimately awarded the EBU Application three out of four points on the first CPE criterion.

54. With respect to the second CPE criterion, the CPE Panel evaluated the nexus between the applied-for string, .RADIO, and the community the EBU Application is meant to serve, and found that the string “h[ad] no other significant meaning beyond identifying [that] community” and “closely describe[d] the community, without overreaching substantially beyond the community.”<sup>91</sup> However, the CPE Panel found that the “a small part of the community as defined by the applicant,” such as “companies providing specific services and products to radio broadcasting organizations[,] . . . may not be automatically associated with the gTLD string.” The CPE Panel therefore awarded the EBU Application two out of three possible points on the second CPE criterion.

55. With respect to the third CPE criterion, the CPE Panel determined that the EBU Application included the required registration policies—restricting registrations in .RADIO to community members and “includ[ing] rules for content and use for registrants that are consistent with the articulated community-based purpose” of the gTLD—as well as the required enforcement and appeals mechanisms.<sup>92</sup> The CPE Panel therefore awarded the EBU Application four out of four possible points on the third CPE criterion.

56. With respect to the fourth CPE criterion, the CPE Panel determined that the EBU Application had documented support from recognized community institutions, and opposition only from groups of “negligible size” or that did not have an “association with the applied for string.”<sup>93</sup> The CPE Panel therefore awarded the EBU Application four out of four possible points on the fourth CPE criterion. In sum, the CPE Panel awarded the Application 14 out of 16

---

<sup>91</sup> *Id.* at 5.

<sup>92</sup> *Id.* at 5-6.

<sup>93</sup> *Id.* at 7.

possible points, concluding that the EBU Application “met the requirements specified in the [ ] Guidebook” for community priority and therefore prevailed in CPE.<sup>94</sup>

57. Claimants disagree with those findings, arguing that “upon information and belief, based upon the contents of the [CPE Report], it is clear that the information relied upon by the [CPE Panel] w[as] false, incomplete, or materially incorrect.”<sup>95</sup> This does not constitute evidence that the CPE Panel erred. Furthermore, inasmuch as there was no action by the ICANN Board with respect to the CPE Report, Claimants’ disagreement with the CPE Report is not a basis for independent review.

58. Claimants’ primary argument that the CPE Panel erred is that, because certain other, completely separate applications for entirely different strings did not prevail in CPE, the EBU Application also should not have prevailed.<sup>96</sup> However, different outcomes in unrelated CPEs obviously do not demonstrate that the EBU Application was treated inappropriately.

59. As set forth in the BGC’s denial of Request 14-41, the CPE Panel did not deviate from any of the required CPE criteria in evaluating the EBU Application.<sup>97</sup> For example, Claimants’ assertion that the CPE Panel should have relied on the Oxford English Dictionary’s definition of “radio” does not mean that the CPE Panel erred.<sup>98</sup> Nor does Claimants’ assertion that there was opposition to the EBU Application (based in part on their own opposition) demonstrate that the CPE Panel erred in determining that the letters of opposition received were not relevant since they were: “(1) from individuals or groups of negligible size, or (2) were not from the communities either explicitly mentioned in the application nor from those with an

---

<sup>94</sup> *Id.* at 1.

<sup>95</sup> IRP Request ¶ 53.

<sup>96</sup> IRP Request ¶ 81.

<sup>97</sup> BGC Determination on Request 14-41 at 9-18 (Cls. Ex. Annex 16).

<sup>98</sup> IRP Request ¶ 81.



implicit association from such communities.”<sup>99</sup>

#### IV. RESPONSE TO THE CLAIMANTS’ REQUESTED RELIEF.

60. Claimants’ IRP Request should be denied in its entirety, including its request for relief. Claimants request that this IRP Panel “restore [the .RADIO contention set] to ‘In Contention’” and “revise ICANN’s respective decisions whereby each of the Claimants’ application for the .RADIO gTLD ‘Will Not Proceed’ to contracting.”<sup>100</sup> However, as the *Vistaprint* IRP panel recently declared: “[A]n IRP Panel does not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.”<sup>101</sup> Instead, the authority of an IRP panel is limited to stating its opinion as to “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending, if requested, that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP panel.<sup>102</sup> Even if there were a basis for some kind of relief here (which there is not), this IRP Panel does not have the authority to award affirmative relief.<sup>103</sup>

61. With respect to Claimants’ request that ICANN be ordered to produce the documents Claimants requested in their DIDP Request that were withheld as subject to certain Nondisclosure Conditions, Claimants’ DIDP Request seeks documents providing further detail regarding the CPE Panel’s rationale for the CPE Report. Those documents have no bearing on the only topic at issue in this IRP—whether ICANN’s Board violated any Article or Bylaws provision in denying Request 14-41. As discussed, it is not the task of either ICANN’s Board or

---

<sup>99</sup> .RADIO CPE Report at 7 (Cls. Ex. Annex 3); IRP Request ¶ 81.

<sup>100</sup> IRP Request ¶ 91.

<sup>101</sup> *Vistaprint* Final Declaration ¶ 149 (Resp. Ex. 3).

<sup>102</sup> Bylaws, Art. IV, §§ 3.4, 3.11(c-d) (Cls. Ex. Annex 5B).

<sup>103</sup> Indeed, the IRP Panel in the first ever IRP found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, ¶ 133, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

this IRP Panel to assess whether, in the Board or the IRP Panel's view, the CPE Report was substantively correct. As such, the documents sought by Claimants are immaterial, and the IRP Panel should deny Claimants' request.

### CONCLUSION

62. The thrust of Claimants' IRP filing is that the EIU wrongly granted community priority status to one of Claimants' competitors. The EIU's decision, however, did not involve – and was never intended to involve – any action of the ICANN Board. As such, that decision is not subject to independent review under the terms of ICANN's Bylaws. The fact that the Claimants disagree with the CPE Report does not give rise to an IRP because the ICANN Board does not perform substantive reviews of such reports, and ICANN's Articles and Bylaws do not require it to do so. In addition, Claimants' belated challenge to the CPE Guidelines does not involve Board action, and is in any event both unsupported and time-barred.

63. The only ICANN Board conduct at issue in this case (the BGC's evaluation of Request 14-41) was fully consistent with ICANN's Articles and Bylaws; Claimants provide no argument otherwise. For these reasons, ICANN urges the IRP Panel to deny Claimants' IRP, declare that ICANN's Board acted consistently with ICANN's Articles and Bylaws with respect to the issues raised in Claimants' IRP Request, and declare ICANN the prevailing party.

Respectfully submitted,

JONES DAY

Dated: 10 November 2015

By: Jeffrey A. LeVee /RLH  
Jeffrey A. LeVee  
Counsel for Respondent ICANN