

Reconsideration Request

1. Requester Information

Name: dotgay LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: Bart Lieben Contact Information Redacted

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

Board action/inaction

Staff action/inaction

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

On October 6, 2014, ICANN published its Community Priority Evaluation Panel's New gTLD Program Community Priority Evaluation Report for the .GAY gTLD application submitted by the Requester. Reference is made to <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> (hereinafter: the "CPE Report").

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

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

Although the Disclaimer contained in the Determination states that "[...] these Community Priority Evaluation results do not necessarily determine the final result of the application", ICANN has changed the "Contention Resolution Status" of the Application into "Active", and the "Contention Resolution Result" into "Into Contention", apparently following the publication of the CPE Report. This action by ICANN is hereinafter referred to as the "Determination", which Requester is seeking to have reconsidered.¹

Following receipt of the Determination, Requesters have submitted a detailed Request for Information to ICANN under the latter's Documentary Information

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

Disclosure Policy (DIDP).

More in particular, Requester has asked ICANN to disclose further information relating to the Determination. The full Request for Information has been enclosed to this Reconsideration Request as **Annex A-2** and is incorporated herein by reference.

ICANN's Response to the Request for Information states:

“For each of the items identified above as subject to Defined Conditions of Nondisclosure, ICANN has determined that there are no particular circumstances for which the public interest in disclosing the information outweighs the harm that may be caused to ICANN, its contractual relationships and its contractors’ deliberative processes by the requested disclosure” (see **Annex A-3** for the full Response).

Furthermore, Requester has provided ICANN with additional information that demonstrates that certain parties – upon information and belief: even supported by another applicant for the .GAY gTLD – have engaged in spurious activities which have obviously influenced the scoring in the CPE Report (see Annexes **C-2** to **C-12**). However, ICANN informed Requester that they would not take any action in this respect (see **Annexes C-2** and **C-3**).

Considering the fact that all of the above elements are in essence connected, as they relate to the Community Priority Evaluation process, including the criteria and information that have been assessed in this respect, Requester has combined each of these elements into one single Reconsideration Request, seeking:

- reconsideration of the CPE Report and the Determination;
- disclosure of the information requested in its Request for Information;
- reconsideration of ICANN's position towards Requester's allegations regarding spurious activity.

4. Date of action/inaction:

- October 6, 2014 in relation to the publication of the CPE Report and the Determination;
- October 31, 2014 in relation to ICANN's response to Requester's Request for Information;
- November 14, 2014 as regards ICANN's response to Requester's email containing allegations regarding spurious activity;

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

- October 7, 2014 in relation to the publication of the CPE Report and the Determination;
- November 3, 2014 in relation to ICANN's response to Requester's Request for Information;
- November 17, 2014 as regards ICANN's response to Requester's email containing allegations regarding spurious activity.

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

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

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

On October 7, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester's application for the .GAY gTLD "*did not prevail in Community Priority Evaluation*".

Having experienced the process carried out by ICANN in approving the Application following Initial Evaluation, publishing the Determination, not responding to Requester's Request for Information nor its allegations regarding spurious activity it has become clear that:

- (i) the EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook;
- (ii) the EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Determination;
- (iii) the EIU has, when carrying out the CPE, intentionally misguided parties who have sponsored and endorsed Requester's Application for the .GAY gTLD;
- (iv) ICANN has not taken into account relevant information provided by Requester prior to the commencement of CPE;
- (v) the EIU has not taken into account prior Expert Determinations regarding the .GAY gTLD and Requester's supporters;
- (vi) the EIU has not taken into account relevant information provided to ICANN

- by Requester prior to and after the commencement of CPE;
- (vii) the CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU;
 - (viii) notwithstanding the fact that Requester has requested ICANN to provide them with relevant information in order to obtain a better insight in the actual CPE process and the way how the CPE criteria have been applied in the context of Requester's Application, ICANN has deliberately refused to provide Requester with such information both within and outside ICANN's transparency and accountability processes.

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

Therefore, the Requester is now facing contention resolution with three other applicants for the same string "*through the other methods as described in Module 4 of the Applicant Guidebook*", requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in an auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the Determination had been developed in accordance with ICANN's standards, in particular those set out in the Applicant Guidebook.

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

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

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

The fact that the gay community is affected by the CPE Report and the

Determination is substantiated by the various letters of support for this Reconsideration Request that have been submitted to ICANN by the Federation of Gay Games (**Annex C-22**), the International Lesbian, Gay, Bisexual, Trans and Intersex Association (**Annex C-23**), and the National Gay & Lesbian Chamber of Commerce (**Annex C-24**).

8. Detail of Board or Staff Action – Required Information

8.1. Introduction

According to the Requester, the EIU and ICANN has not acted in compliance with a wide variety of processes, procedures, and rules, in particular ICANN's own By-Laws as well as the Applicant Guidebook at various stages of the CPE process and thereafter, which has materially affected Requester's Application for the .GAY gTLD and more in particular Requester's position for operating such new gTLD in favor of the gay community.

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

8.2. Summary

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

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

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

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

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

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

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

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process."²

The EIU has published four documents in the timeframe September 2013 – September 2014, being more than one and a half years, respectively two and a half years *after* the publication of the final version of the Applicant Guidebook, and more than a year / two years following the closing of the application window for new gTLDs, which are available on ICANN's website:³

- *CPE Panel Process Document*, published on August 6, 2014 (**Annex B-3**);
- *CPE Guidelines*, published on September 27, 2013 (**Annex B-4**);
- *Updated Frequently Asked Questions (FAQs)*, published on September 10, 2014 (**Annex B-5**); and
- *CPE Processing Timeline*, published on September 10, 2014 (**Annex B-6**) (jointly referred to as the "CPE Documents").

Not only could one question the legitimacy of these documents, which undisputedly contain additional criteria, accents, and specifications to the criteria laid down in the Applicant Guidebook, but have not gone through ICANN's policy development processes, it is moreover undisputedly so that applicants have not been in the position to base their applications upon such new requirements when

² This was in fact the first GNSO Recommendation, contained in its Principles, Recommendations & Implementation Guidelines, attached hereto as **Annex B-1**.

³ See **Annex B-2**.

they submitted them in the beginning of 2012 ...⁴

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

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

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

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

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

Therefore, Requester is of the opinion that:

- ICANN has not acted in compliance with the requirement set out by the GNSO and the ICANN community at large that applicants had to be evaluated against transparent and predictable criteria, since the processes and criteria contained in the CPE Documents are to be considered *“additional selection criteria used in the selection process”* that have not been made *“fully available to the applicants prior to the initiation of the process”*.

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

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

The fact that ICANN and the EIU have requested input from the ICANN community on the draft CPE Documents:

- (i) is a clear demonstration of the fact that both ICANN and the EIU have attempted to make additional (or modified) criteria or additional or modified interpretations thereof been part of the CPE process. Indeed, if the processes and criteria set out in the Applicant Guidebook were clear, why would there be a need to publish four additional documents dealing with this process ...?; and
 - (ii) does not take away that these CPE Documents have not been made available to applicants prior to the initiation of the selection process (i.e. during the first 5 months of 2012);
- the EIU has not acted in compliance with the criteria set out in the AGB as they have applied their own standards in developing the CPE Report; and
 - ICANN has obviously discriminated community-based applicants by not providing each applicant, and Requester in particular, on an individual basis with the opportunity to clarify its position in relation thereto.

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

According to the CPE Panel Process document:

With few exceptions, verification emails are sent to every entity that has sent a letter(s) of support or opposition to validate their identity and authority.⁶

Following an enquiry organized by Requester with its sponsors, it appears that only a minority of the 240+ supporters of Requester's Application have received a verification email from the EIU. Indeed, according to the feedback obtained from the Requester's supporters, less than 20% of them have received such a verification email.

According to the EIU's own CPE Panel Process Document, a number of exceptions apply to the EIU's basic obligation to contact all of the parties who have endorsed or who are opposed to a particular application, which exceptions apply in the following circumstances:

- *If there are no contact details included in the letter(s). However, the evaluator will attempt to obtain this information through independent research.*

⁶ CPE Panel Process Document, page 5.

- *If the person sending the letters(s) does not represent an organization. However, if the content of the letter(s) suggests that the individual sending a letter has sent this letter(s) on behalf of an organization/entity the evaluator will attempt to validate this affiliation.*⁷

None of these “exceptions” apply in this case. Furthermore, if the EIU or ICANN would not have access to contact information of a particular supporter, this issue could have been easily resolved by sending a clarifying question to the Requester, who is in permanent contact with all of its sponsoring organizations.

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

*“If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified.”*⁸

For reasons unknown to the Requester, the EIU deliberately decided not to issue such clarifying question.

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

According to the Frequently Asked Questions page relating to ICANN’s Clarifying Questions process,⁹ it is clear that such questions may be sent from the following panels:

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

⁷ CPE Panel Process Document, page 5.

⁸ CPE Panel Process Document, page 3.

⁹ See **Annex B-7**.

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

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

Requester did not receive any further questions relating to its answers to community-related Questions 20 *et seq.*, it rightfully assumed that ICANN had no further questions with respect to the answers provided by Requester to such community-related questions.¹⁰

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

8.5. The EIU has, when carrying out the CPE, intentionally misguided parties who have sponsored and endorsed Requester’s Application for the .GAY gTLD;

Besides the fact that the EIU has not acted in accordance with the processes designed by ICANN or even by the EIU itself by not reaching out to all of Requester’s supporters, it has moreover intentionally misguided those parties to whom a verification email has been sent.

Indeed, many of the letters that have been sent out by the EIU to the Requester’s sponsors state a response date that predates the date of the actual verification email: as evidence shows, recipients have been invited to respond to the EIU’s verification email, sent on June 30, 2014, by June 24, 2014 ...

Reference is made to **Annexes C-18 to C-21**, which all contain a true copy of the email received by some of Requester’s sponsors, and which clearly show that the EIU has set a due date for a response that predates the actual date of sending the email to Requester’s supporters. Based on the feedback and questions Requester has received, it is clear that many of its sponsors have not provided input or have verified their endorsement for Requester’s Application, since the response due date had already passed at the time of receipt of the

¹⁰ Reference is made to ICANN Case #00022186, where ICANN has asked for additional information in relation to Requester’s response to Question 44.

email.

Requester has received an overwhelming support from various organizations and LGBTQIA interest groups from all over the world, as is shown by the list attached hereto as **Annex C-17**. There is no doubt that all of these endorsers and supporters combined are “clearly recognized by the community members as representative of the community” as required by the Applicant Guidebook in order to qualify for a score of 2. However, the EIU chose to ignore Requester’s supporters.

Furthermore, there is no doubt that the likely limited response received by the EIU following its flawed outreach has led to the latter giving a score of 1 out of 2 possible points.

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

According to the CPE Panel Process Document, the EIU’s “core team” may carry out additional research *“to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures”*.¹¹

Referring to the CPE Report, it is clear that such additional research has been carried out by the EIU. Some examples include:

- the EIU expressly referring to the definition of “gay” in the Oxford English Dictionary, which definition was not referred to in the Application;
- the EIU has referred to an organization within the communities explicitly addressed by the application, which has opposed to Requester’s Application, and which organization – according to the CPE Report – is purported to be *“a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following”*, however without disclosing who this organization was, making it impossible for Requester to verify whether the EIU’s evaluation was accurate.

By doing so, the EIU completely disregarded the transparency requirement that forms an integral part of ICANN’s (and, apparently, also the EIU’s) decision making standards. Requester has submitted a Request for Information under ICANN’s Documentary Information Disclosure Policy. However, ICANN refused to disclose the identity of this organization, leaving Requester completely in the dark with respect to an essential element in determining whether ICANN’s (and the EIU’s) Determination is in line with the Applicant Guidebook ...

¹¹ CPE Panel Process Document, page 3.

For this reason, Requester is of the opinion that:

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

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

Bearing in mind the fact that various incorrect allegations have been made with respect to Requester's Application (on public fora, in the context of objections that have been initiated against Requester's Application, etc.), Requester has reached out to ICANN on various occasions, providing proof of the fact that such allegations were false. Such information included clear and irrefutable evidence of the fact that a community center from Portland, Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based – provided ICANN with false information with respect to Requester's intentions. Reference is made to the correspondence with and evidence provided to ICANN contained in Annex **C-2** to **C-12** hereto.

ICANN staff has confirmed that such information would be provided to the EIU, but the CPE Report does not refer at all to the evidence of spurious activity submitted by Requester to ICANN. However, ICANN allowed misleading and untruthful documents to be presented by at least one other applicant for the .GAY gTLD to be used as evidence, without allowing Requester to provide for any context or challenge.¹²

For these reasons alone, Requester is of the opinion that the EIU has relied on incorrect, at least biased information, and has not taken action (e.g., by reaching out to Requester directly) in order to obtain a position from Requester in relation to any opposition received in connection with its Application.

¹² More in general, ICANN staff refused to hear comments from cTAG and multiple community applicants concerning vulnerability to spurious activity faced by community applicants when opposed by standard applicants.

The EIU (and ICANN) have therefore not complied with their standards of transparency, which makes Requester believe that there was a clear bias against Requester's Application.

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

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

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

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

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

¹³ See ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex B-8**; ICDR Case No. EXP/394/ICANN/11, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. United TLD Holdco Ltd*, **Annex B-9**; ICDR Case No. EXP/392/ICANN/9, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Design, LLC*, **Annex B-10**; and ICDR Case No. EXP/393/ICANN/10, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Domain Holdings Limited*, **Annex B-11**.

¹⁴ See: ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex B-8**.

Report.

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

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

According to the EIU, *"consistency of approach in scoring applications is of particular importance"*.¹⁵

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

8.9.1. Using the Oxford English Dictionary as a "standard"

In a number of cases, the EIU expressly referred to the definition of the string in the Oxford English Dictionary. However, in some of the CPEs that have been published, no such reference was made which, in essence, shows that the approach propagated by the EIU has not been consistent.

The fact of only using the Oxford English Dictionary as the sole basis for "evaluating" the community definition has not been established as a standard in the community priority evaluation criteria set out in the AGB. Therefore, Requester is of the opinion that this reference point should not have been used, as:

- (i) it shows a clear bias towards using the British English language on the Internet;
- (ii) the different versions of the Oxford English Dictionary appear to use different criteria and standards by themselves: according to the EIU, the Oxford English Dictionary refers to a "gay" person as "a homosexual, especially a man", while the online version of the Oxford English Dictionary defines the term "gay" as "(a): of a person: homosexual; (b) of a place, milieu, way of life, etc.) of or relating to

¹⁵ Community Priority Evaluation Panel Process, page 1.

homosexuals,” whereby it is expressly stated that “Although more frequently used of male homosexuals, this sense can either include or exclude lesbians” (emphasis added).¹⁶

Therefore, notwithstanding the fact that the EIU has apparently *unilaterally* (i.e., not supported by any AGB criterion) promoted the Oxford English Dictionary as *the* standard to evaluate the community definition provided by *some* of the community-based applicants, it is clear that the Oxford English Dictionary by itself is using different (or even contradicting) definitions and standards ...

8.9.2. The EIU is using different standards than the ones set out in the AGB

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

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

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

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

As indicated above, Requester has performed an Internet search, as suggested by the CPE Guidelines, and has found substantial evidence that proves that in common language, the words “gay”, “LGBT” and “LGBTQIA” are used as synonyms.¹⁷ Requester refers to various references in quality press, including the

¹⁶ See **Annex C-1**, page 8.

¹⁷ See the research report and press articles contained in **Annex C-16**.

Economist¹⁸ and the New York Times,¹⁹ where the word “gay” is being used as a “catch-all term”, synonym or *pars pro toto* term for LGBTQIAs.

Requester has not only obtained the official endorsement and support for its application for the .GAY gTLD from the Complainant in the case referred to above, namely the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA),²⁰ but is also recognized by the ICDR and ICANN as an established institution associated with a clearly delineated community.²¹

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

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

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

8.9.3. Community definition not to include non-community members

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

¹⁸ <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;

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

¹⁹ http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all&_r=0.

²⁰ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>;

²¹ See ICDR Case No. EXP/390/ICANN/7, §13.

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

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

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

According to Requester:

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

A. Specific arguments for including "allies" into the gay community definition

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

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

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

Furthermore, as stated in the Application, LGBTQIAs are a vulnerable group in

many countries and societies, and too often still the subject of prosecution for who they are. In order to put in place safeguards for those gay community members who do not wish to be directly associated with a domain name registration, organizations and companies who in essence cannot be “non-heterosexual” should have the possibility to act as a proxy service, which is common practice in the domain name industry.

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

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

- the community definition contained in the .OSAKA gTLD application # 1-901-9391 states: *[m]embers of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following: [...] Entities, including natural persons who have a legitimate purpose in addressing the community.*” (emphasis added);²²
- the community definition contained in the .HOTEL gTLD application #1-1032-95136 includes: *“Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2”;*

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

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

²² See the .OSAKA CPE Report, attached hereto as **Annex C-13**, page 2.

B. The role of .GAY Authentication Partners

The CPE Panel seems to incorrectly assume here that, in order to become a registrant of a .GAY domain name, the candidate registrant must be a member of an Authentication Partner.

This is not the case: the application clearly states that Authentication Partners have two key tasks in the context of the .GAY gTLD, being: (1) connecting to potential registrants, and (2) confirming whether potential registrants meet the eligibility requirements that are inherent to the .GAY gTLD.²³

Indeed, the Requester's Application clearly states:

“Through the use of established membership organizations in the Gay Community as Authentication Partners, dotgay LLC not only complies with the most restrictive community registration requirements, but also provides the best solution for connecting with potential registrants. Authentication Partners are the community membership organizations used by dotgay LLC to confirm eligibility. Authentication Partners become advocates for the .gay TLD and provide a trusted entry point for members of the community. Authentication Partners are also the advocates for their registrants within the .gay community-model.” Application, answer to Question 18 (c) ii.

Furthermore, the Panel has determined that the community described in Requester's Application “over-reaches substantially” referring to, on the one hand, the 7 million members of the Applicant's Authentication Partners identified at the time of submission of the Application, and – on the other hand – the estimated 1.2% of the global population who are considered to be LGBTQI.

This is, in the Requester's opinion, an obvious misreading of the Application, as these two elements are not interrelated in relation to determining the scope of “gay”. Indeed, the 1.2% of the global population is an illustrative estimate that has been put into Requester's Application in order to demonstrate the size of the community: absent any official numbers. Considering the fact that LGBTQIs are in some countries not recognized (or even prosecuted), there is no way in determining the actual size at this stage.

Therefore, Requester is of the opinion that the perceived “discrepancy” between the two numbers (i.e., 7 million members of Authentication Partners and 1.2% of the global population that is estimated to be LGBTQI) is irrelevant in this respect. Any other uncertainty on behalf of the EIU could have easily been resolved by issuing a clarifying question to Requester.

²³ The latter being a requirement in order to meet the criteria for Registration Policies, for which the Requester obtained a score of 4 out of 4 points.

8.9.4. Support

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

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

It does not appear to Requester that there is one single organization recognized by the “radio” community²⁴ or the “hotel” community²⁵, who have both obtained a score of 2 out of 2 points on this criterion. Based on these CPE reports, it is clear that also these community-based applicants appear to have sought (and found) support from a number of national and international endorsers in a similar way than Requester, who only scored 1 out of 2 points.

8.10. Notwithstanding the fact that Requester has requested ICANN to provide them with relevant information in order to obtain a better insight in the actual CPE process and the way how the CPE criteria have been applied in the context of Requester’s Application, ICANN has deliberately refused to provide Requester with such information both within and outside ICANN’s transparency and accountability processes

Notwithstanding the EIU’s claim that its evaluation process *“respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination”*, ICANN’s response to Requester’s Request for Information clearly shows that this is clearly not the case.

Indeed, ICANN denied Requesters’ Request for Information, whereby Requesters refer to the following quotes from the Response to the Request for Information:

- 1) *“The contract between ICANN and the EIU is not appropriate for public disclosure through the DIDP”*. More in particular, ICANN refers to certain alleged Defined Conditions for Nondisclosure that would apply to the requested contract:

²⁴ <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

²⁵ <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
 - *Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.*
 - *Confidential business information and/or internal policies and procedures.*
- 2) *"ICANN has previously indicated in response to Request No. 20140804-1 that ICANN has communications with persons at EIU that are not involved in the scoring of a CPE (but otherwise assist in the facilitation of a particular CPE), and identified that those communications are not appropriate for public disclosure";*
- 3) *"To help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team. ICANN does not have, nor does it collect or maintain, the work papers of the individual CPE Panels (including the .GAY CPE Panel) that would likely contain the information called for within these items."*

None of the above arguments are convincing in light of ICANN's By-Laws obligations relating to transparency and accountability:

The mere fact of denying Requesters access to information that has been used in connection with the evaluation of the Application without (i) expressly referring on which information the Community Priority Evaluation Panel has relied, (ii) providing a statement regarding the relevancy of such information in connection with the actual evaluation, nor (iii) arguments on why such information is supporting the outcome of the actual evaluation deprives Requesters of the possibility to review the Determination, and restricts their fundamental rights to challenge such Determination in the context of a Reconsideration Request and, ultimately, use the transparency and accountability mechanisms embedded into ICANN's By-Laws.

Indeed, it is not because of the fact that the EIU is independent from ICANN or Requesters, that it would not be required to be subject to the same obligations of transparency and accountability as ICANN itself. Indeed, if a decision or determination by such third party materially affects and/or has a material effect in

a process that is managed by ICANN – as it has been described in the Applicant Guidebook, the CPE Guidelines, etc. – then such party should be subject to the same transparency and accountability mechanisms as ICANN.

In Requester's opinion, the EIU, who has been appointed by ICANN as the community priority evaluation independent panel firm, is subject to the same policies – especially those relating to transparency and accountability – as ICANN. Since the EIU is considered an "ICANN Affiliated Party" under ICANN's Top-Level Domain Application Terms and Conditions,²⁶ the EIU is subject to the same rules and procedures as ICANN, and more precisely those roles and procedures reflected in ICANN's By-Laws.

Therefore, ICANN cannot simply deny its own By-Laws obligations when entering into undisclosed agreements with third parties, in particular when such party or parties assume(s) a role that is actually ICANN's to fulfill.

Indeed, the fact that ICANN has apparently deferred the actual community priority evaluation to a third party does not release ICANN or such third party from the transparency and accountability obligations contained in ICANN's By-Laws.

8.11. Conclusion

Requester has paid USD 22,000 in order to participate to the CPE Process, which is an amount that is far higher than the USD 10,000 estimate that has been referred to in the AGB. One would expect that for such an amount, ICANN and the CPE firm, under the delegated authority of ICANN, would act diligently when applying the standards set out in the AGB, follow the processes defined prior to the establishment of the New gTLD Program, and – at least as a form of what is generally referred to as "customer service" – reach out to applicants if certain elements contained in their application are unclear or verify statements made by others in an open and transparent manner.

None of this has happened in the development of the CPE Report and the Determination:

- new criteria and standards have been developed until more than two years after the closing of the application window in May of 2012, without having given Requester the opportunity to amend its application;
- additional research has been performed without verifying and validating the outcome thereof with the Requester;
- undisputable process errors have been made by the EIU when verifying the identity and statements made by Requester's supporters, including but not limited to:

²⁶ See <http://newgtlds.icann.org/en/applicants/agb/terms>.

- not having reached out to all of Requester's supporters, although the CPE Panel had the express obligation to do so;
- for the limited number of cases where a supporter of Requester has been contacted, the EIU has provided a response time to its enquiry that was in the past, which has obviously misguided quite a few of Requester's supporters;
- information that has been provided by Requester to ICANN in order to counter and put into context certain false information has been disregarded despite multiple attempts to gain resolve;
- inconsistent standards have been used by the EIU in actually performing the evaluation, especially when comparing the arguments and information relied upon by the EIU in other CPEs.

On top of this, ICANN has refused to provide additional information to Requester in accordance with ICANN's own transparency and accountability processes, and more in particular specific information relating to the various process and policy errors identified, as well as the inconsistencies identified, notwithstanding the fact that also the EIU is committed to these transparency and accountability obligations.

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

9. What are you asking ICANN to do now?

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

- (i) acknowledge receipt of this Reconsideration Request;
- (ii) review the Requester's requests referred to in §§8.2 to 8.9 above, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN, and hence to reverse the Determination as set out in (viii) below;
- (iii) in the meantime, suspend the process for string contention resolution in relation to the .GAY gTLD;
- (iv) provide Requester with all relevant information in light of the elements set out in §8.10 above, and more in particular the information requested in Requester's Request for Information;
- (v) request a third party appointed by ICANN to or have ICANN perform a new determination in view of the CPE criteria set out in the Applicant

Guidebook, and bearing in mind the information provided by Requester as referred to in §8.10 above;

- (vi) within a timeframe of one month following the appointment of such third party, allow Requester to submit a written statement to such third party;
- (vii) following that, organize a telephonic or in-person hearing whereby the Requester can submit, present and discuss its arguments and relevant information before ICANN or such third party appointed by ICANN, in view of enabling the latter to take an informed decision on the issue;
- (viii) if ICANN would decide not to award the remedies sought by Requester set out in (i) to (vii) above, Requester respectfully requests ICANN to reconsider the Determination and determine that the Application meets the required thresholds for eligibility under the Community Priority Evaluation criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein, and provide to the Application:
 - a score of 4 out of 4 points in relation to Criterion #2: Nexus between Proposed String and Community; and
 - a score of 4 out of 4 points in relation to Criterion #4: Community Endorsement,

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

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

As stated above, ICANN published on October 7, 2014 its Determination on the basis of the CPE Report, stating that Requester's application for the .GAY gTLD did not meet the criteria for community-based applications, as defined in the Applicant Guidebook.

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

Yes

No

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

complaining parties? Explain.

N/A

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

Reference is made to the Annexes attached hereto, a list whereof has been contained in a separate overview.

Terms and Conditions for Submission of Reconsideration Requests

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

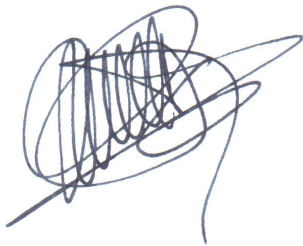
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

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

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

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

Respectfully Submitted,



November 29, 2014

Bart Lieben

Date

Attorney-at-Law