

## 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 February 1<sup>st</sup>, 2016, ICANN published the Determination of the Board Governance Committee (BGC) in relation to Requester's Reconsideration Request 15-21 (hereinafter: the "Second BGC Determination").

On the basis of the arguments set out in the Second BGC Determination, *"the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21."*

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

February 1<sup>st</sup>, 2016.

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

February 2<sup>nd</sup>, 2016.

**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*”.

Despite having invoked ICANN’s Accountability Mechanisms on various occasions, “*the BGC conclude[d] that the Requester has not stated proper grounds for reconsideration, and therefore denie[d] Request 15-21.*”

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 a “last resort” auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the EIU Determinations 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 does not necessarily have the public 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 in many countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the safety and security of this community and its members.

The fact that not only Requester but the gay community in its entirety is affected by the CPE Report and the Determinations is substantiated by the various letters of support for the Reconsideration Requests that have been submitted to ICANN by the Federation of Gay Games, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, and the National Gay & Lesbian Chamber of Commerce. Requester also refers in this respect to the numerous letters of support received when developing its Application for the .GAY gTLD.

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

### **8.1. Introduction**

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.

In the First Determination, the BGC specified that *“new CPE evaluators (and potentially new core team members) [were] to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel’s Report.”*

Now, the evidence provided by Requester shows that the EIU has appointed at least one evaluator who developed the First EIU Determination in order to develop the Second EIU Determination, which is contrary to the instructions by the BGC.

### **8.2. The Second BGC Determination**

Section C of the Second BGC Determination reads as follows:

*“The Requester contends that reconsideration is warranted because “it appears that both during the first and second CPE, the EIU appointed the same evaluator for performing the new CPE,” in contravention of the BGC’s Determination on Request 14-44. However, this argument is inaccurate. The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU. Moreover, the identities of CPE evaluators are confidential. ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and replaced one core team member for the administration of the Second CPE.” (emphasis added)*

### **8.3. The “CPE Panel Process Document”**

On August 6, 2014, ICANN published the Economist Intelligence Unit’s Process documentation for Community Priority Evaluation in view of providing

*“transparency of the panel’s evaluation process”.*<sup>1 2</sup>

According to this CPE Panel Process Document:

*“The Community Priority Evaluation panel comprises a core team, in addition to several independent evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”*<sup>3</sup> (emphasis added)

The CPE Panel Process Document describes the CPE Evaluation Process as follows:

*“The EIU evaluates applications for gTLDs once they become eligible for review under CPE. The evaluation process as described in section 4.2.3 of the Applicant Guidebook and discussed in the CPE Guidelines document is described below:*

*[...]*

*As part of this process, one of the two evaluators assigned to assess the same string is asked to verify the letters of support and opposition. (Please see “Verification of letter(s) of support and opposition” section for further details.)”*<sup>4</sup> (emphasis added)

Furthermore, on page 5 of the CPE Panel Process Document, the EIU has described the process for “Verification of letter(s) of support and opposition”, which reads as follows:

*“As part of this CPE evaluation process, one of the two evaluators assigned to assess the same string verifies the letters of support and opposition. This process is outlined below:”*

*[...]*

*“For every letter of support/opposition received, the designated evaluator assesses both the relevance of the organization and the validity of the documentation. Only one of the two evaluators is responsible for the letter*

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<sup>1</sup> See <https://newgtlds.icann.org/en/applicants/cpe>, § CPE Resources.

<sup>2</sup> See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf> for the actual CPE Panel Process Document.

<sup>3</sup> CPE Panel Process Document, Page 2.

<sup>4</sup> CPE Panel Process Document, Page 2, §CPE Evaluation Process, third bullet.

*verification process.”*

And:

*“To provide every opportunity for a response, the evaluator regularly contacts the organization for a response by email and phone for a period of at least a month.”*

#### **8.4. The EIU made a process error in allowing a third person, not even a core team member, and certainly not an “independent evaluator” to perform the verification of the letters of support and opposition**

Bearing in mind the confirmation by the BGC that the “*CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements*”, and that “*the CPE Materials are entirely consistent with the Guidebook*”, the BGC confirmed – apparently on the basis of information ICANN does not want to see independently verified – that:

*“The EIU appointed two new evaluators to conduct the Second CPE, and added an additional core team member as well, just as the BGC recommended in its Determination on Request 14-44. While the Requester provided emails that it believes suggest the same evaluator conducted both the first and second CPE, the fact is that the author of the emails submitted by the Requester conducted neither CPE. Rather, that person is responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”*

Now, considering the fact that the CPE Process Document – which is considered by the BGC to be “*consistent with*” and “*strictly adheres to the Guidebook’s criteria and requirements*”, it is clear that the verification of the letters should have been performed by an independent evaluator (as emphasized in §8.2 above), and not by someone “*responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”.

It is therefore clear that, according to the CPE Panel Process Document, the point of contact for organizations had to be an evaluator. Also, the verification of the letters had to be performed by an evaluator.

Based on the statement contained in the last BGC Determination, it is clear that the BGC confirmed that the contact person for organizations was not an evaluator, and the letters of have not been verified by an evaluator.

In any case, it is obvious that – when reviewing the Second BGC Determination in light of the Applicant Guidebook and the CPE Panel Process Document –

previously defined processes and policies have not been followed, regardless of whether one sees the Applicant Guidebook and the CPE Panel Process Document as defining the same process, or that the one complements the other.

### **8.5. The BGC rejected Requester’s arguments that the CPE Materials imposed additional requirements than the ones contained in the New gTLD Applicant Guidebook**

In the context of its First and Second Reconsideration Requests, Requester claimed that the EIU was not entitled to develop the CPE Materials in so far and to the extent they imposed more stringent requirements than the ones set forth by the Applicant Guidebook. Furthermore, Requester contended that the EIU’s use of these CPE Materials violated the policy recommendations, principles and guidelines issued by the GNSO relating to the introduction of new gTLDs.<sup>5</sup>

Nonetheless, the BGC confirmed in the Second BGC Determination that:

- *“none of the CPE Materials comprise an addition or change to the terms of the Guidebook;”<sup>6 7</sup>*
- *“The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements”;*<sup>8</sup>
- *“the CPE Materials are entirely consistent with the Guidebook”.*<sup>9</sup>

One of the key arguments put forward by the BGC was that Requester should have challenged the development and implementation of the CPE Materials earlier, in particular *“within 15 days of the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action”.*

The BGC concluded that:

- *“[...] nothing about the development of the CPE Materials violates the GNSO policy recommendations or guidelines relating to the introduction of new gTLDs as the Requester has suggested.”;* and
- *“no reconsideration is warranted based on the development or use of the CPE Materials, because any such arguments are both time-barred and without merit.”<sup>10</sup>*

Requester notes that the Applicant Guidebook does not include the concept of a

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<sup>5</sup> Second BGC Determination, page 11.

<sup>6</sup> The Second BGC Determination defines the term “CPE Materials” as “(1) the EIU’s CPE Panel Process Document; (2) the CPE Guidelines; (3) ICANN’s CPE Frequently Asked Questions page, dated 10 September 2014 (FAQ Page); and (4) an ICANN document summarizing a typical CPE timeline (CPE Timeline).

<sup>7</sup> Second BGC Determination, page 12.

<sup>8</sup> *Ibid.*

<sup>9</sup> Second BGC Determination, footnote 34.

<sup>10</sup> Second BGC Determination, page 14.

“core team” that is appointed in the context of CPE. In fact, the Applicant Guidebook only refers to a “Community Priority Panel” that is appointed by ICANN in order to perform CPE.<sup>11</sup>

Therefore, the CPE Panel Process Document introduces a concept that has not been included in the Applicant Guidebook, which only refers to “evaluators”.

Indeed, according to the CPE Panel Process Document, each application is evaluated by seven individuals, being two independent evaluators and five core team members.

The fact that the BGC confirmed that, in addition to the seven individuals, an eight person has contributed to developing the CPE Determinations, being a “*person [...] responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU*”, can only lead to the following conclusions:

- the CPE Panel Process Document provides for a process and composition of a team that is different from what the Applicant Guidebook states (being only a “Community Priority Panel” that performs CPE);

OR

- the team that has been composed by the EIU in order to perform CPE for Requester’s Application does not have the composition that has been defined in the Applicant Guidebook nor in the CPE Panel Process Document.

## **8.6. Conclusion**

For the reasons set out above, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies:

- contained in the Applicant Guidebook;
- contained in the CPE Materials;
- 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.

Indeed, when developing the Second BGC Determination, the BGC should, on the basis of the arguments and facts set out above, have confirmed:

- that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator, as

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<sup>11</sup> See Applicant Guidebook, 4-8.

prescribed by this CPE Panel Process Document, but by someone else (a “core team member” or someone “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU”; or

- that the CPE Panel Process Document does define and describe a process that is more stringent than the one set out in the Applicant Guidebook, which does not require the independent evaluator perform such verification of letters of support and objection.

In the first case, the process followed by the EIU would be in direct contradiction with the processes it has designed itself and, moreover, would be contrary to the First BGC Determination, which required the EIU to appoint a new evaluation panel for performing CPE.

In the second case, the BGC has erred in confirming that “*none of the CPE Materials comprise an addition or change to the terms of the Guidebook*”.

Setting aside any possible arguments regarding possibly unfounded time-barred allegations, it is obvious that the outcome of a process is often, if not always, determined by the fact whether the correct process has been followed. In any event, the above facts clearly show that the EIU and – by extension ICANN – have not.

### **8.7. Request for a Hearing**

Bearing in mind the elements set out above, Requester respectfully submits the request to organize a hearing with the BGC in order to further explain its arguments and exchange additional information in this respect.

### **8.8. Reservation of Rights**

Notwithstanding the fact that Requester only relates to the fact that the EIU and ICANN have not followed due process in developing the Second CPE Determination, Requester is submitting this Reconsideration Request with full reserve of its rights, claims and defenses in this matter, whether or not stated herein.

## **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) determine that the Second BGC Determination is to be set aside;
- (iii) invite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;
- (iv) determine that, given the circumstances, any and all of its requests set out in §9 of Requester's Second Reconsideration Request be awarded, which are incorporated herein by reference.

**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.**

Requester has standing in accordance with:

- (1) ICANN's By-Laws, considering the fact that Requester has been adversely affected by the Second BGC Determination; and
- (2) ICANN's Top-Level Domain Application Terms and Conditions.

**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?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

**Terms and Conditions for Submission of Reconsideration Requests**

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

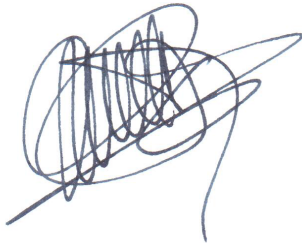
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

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

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

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

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be 'Bart Lieben', with a large, loopy flourish extending from the end.

February 17, 2016

Bart Lieben

Date

Attorney-at-Law