

5 September 2016

Members of the ICANN Board
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

UNITED STATES OF AMERICA

By email (reconsideration@icann.org)

Dear Members of the ICANN Board of Directors,

Re: Reconsideration Request 16-11

I am writing to you on behalf of the Requesters in Reconsideration Request 16-11. I refer to the email of Dot Registry of 31 August 2016, in which Dot Registry made some allegations.

Below is a comment on each of the allegations, from which you will understand that Reconsideration Request 16-11 contains no inaccuracies.

- Comment on alleged inaccuracy No. 1:

The selective quote by Dot Registry of the Applicant Guidebook Module 4-9 confirms that the CPE criteria were specifically developed to prevent "*undue priority [being given] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string*". Dot Registry rightfully states that "*[i]t should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be*". However, Dot Registry chooses to omit the phrases that immediately follow this statement in the Applicant Guidebook, which provide that:

"[t]his is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid."¹

¹ Applicant Guidebook, Module 4-9 (emphasis added).

Dot Registry also fails to take account of the overall purpose of the new gTLD program to promote competition in the provision of registry services². This overall purpose is the reason why the requirements for qualification of a community-based application were so very stringent. When ICANN explained the community priority evaluation (CPE) to prospective applicants, it clarified that what the GNSO “*had in mind and what [it] had at heart*” when developing the CPE policy was “*really to protect communities like the Navaho community*”³, *the communities that really didn’t have any other kind of protection, and they*”⁴ *wanted to protect these communities in a certain way. [...] The important thing is really remember what the GNSO had in mind, what the policy had in mind, and the policy [...] which was to protect the communities. The community-based application was nothing more but to protect small communities. That was the intent of the GNSO*”.⁵

Requesters fail to see how HTLD or Dot Registry could ever meet the very stringent criteria of the CPE.

With respect to Dot Registry, the majority of the IRP Panel did not pronounce itself on Dot Registry’s CPE Applications. The one IRP Panelist who addressed the issue stated that Dot Registry’s CPE applications “*never had a chance of succeeding. The ‘communities’ proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of ‘communities’ under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook*”.⁶

With respect to the CPE of HTLD’s application for .hotel, all three IRP Panelists agreed that Requesters’ arguments about the inconsistent application of the CPE criteria by the EIU in the evaluation of .hotel have merit.⁷

Requesters do not determine whether Dot Registry’s applications achieve community priority status or not; however it is clear to Requesters that HTLD’s application for .hotel should not achieve community priority status.

- Comment on alleged inaccuracy No. 2:

Dot Registry challenges the fact that ICANN had clear policies to deny community priority to mere industries.

Whereas the Applicant Guidebook does not explicitly state that mere industries do not qualify as a community, the very stringent requirements for qualification of a community-based application make clear that mere industries could not qualify as a community. As explained above, the purpose of the CPE policy was to protect small communities like the Navajo community. ICANN required more cohesion than a “*mere commonality of interest*”⁸.

² See *inter alia* Principle C of the Board approved policy: ICANN GNSO, *Final Report – Introduction of New Generic Top-Level Domains – Part A: Final Report*, 8 August 2007.

³ The Navajo community refers to the largest federally recognized tribe of indigenous people in the United States of America.

⁴ The GNSO members.

⁵ Transcript of Karla Valente morning session in Abu-Dhabi on 4 August 2009, as published on <https://archive.icann.org/en/topics/new-gtlds/consultation-outreach-en.htm>.

⁶ ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, Dissenting Opinion of Judge Charles N. Brower, para. 3.

⁷ ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 146.

⁸ Applicant Guidebook, Module 4-11.

Dot Registry alleges that, according to the Applicant Guidebook, an association of suppliers of a particular service *can* form a community. However, for the association of suppliers to qualify as a community, the Applicant Guidebook provides that there needs to be awareness and recognition of the community among the members of that community⁹. Moreover, the applied-for string had to identify the community described in the application, which means that the applied for string must “*closely describe the community or the community members, without over-reaching substantially beyond the community*”¹⁰. Associations are known under the name of the association or their acronym; not by the service they provide or the sector they are active in. *E.g.*, the Women's Tennis Association (WTA) is known by its name and acronym; not by the word “tennis”.¹¹ The service or industry in which members of a well-defined, delineated, organized and pre-existing association are active does not describe the community; they merely refer to the sector in which they are active.

Therefore, it can be seen that ICANN had clear policies to deny community priority to mere industries.

Also, it is unclear how Dot Registry is concerned by Requesters' description of ICANN's CPE policy, as Dot Registry does not define the alleged communities it invokes as “industries”.

Finally, Dot Registry does not challenge the fact that ICANN had clear policies to disqualify applicants who were not trustworthy, and, as is apparent from Dot Registry's alleged “inaccuracy No. 4” (which is in fact not an inaccuracy, see below), Dot Registry seems to be in agreement that untrustworthy applicants must be disqualified.

- Comment on alleged inaccuracy No. 3:

Dot Registry tries to trivialize the close connection between the IRP Declarations in the *Despegar et al.* case and the *Dot Registry* case by focusing on the underlying interests of the Claimants in both cases. The underlying interests of the Claimants in the respective IRPs are clearly different. Indeed, Dot Registry never had a chance of succeeding in a CPE, even if no violation of ICANN's Articles of Incorporation (Aol) and Bylaws had occurred. In contrast, Requesters would have prevailed in their actions against HTLD's application for .hotel, if no violation of ICANN's Aol and Bylaws had occurred. In any event, both IRPs are closely connected, as they both arose out of issues relating to the fair and transparent treatment and handling of applicants by ICANN and the Economist Intelligence Unit during the CPE process.

In Reconsideration Request 16-11, Requesters explain in detail why the IRP Panels in both cases reached incompatible conclusions. Dot Registry recognizes that the two IRP Panels reached opposite conclusions, and that these conclusions are incompatible because Claimants in both IRPs criticized the same failings in ICANN's handling of the CPE process.

For the reasons explained in more detail in Reconsideration Request 16-11, the ICANN Board should consider both IRP Declarations together to avoid the risk of irreconcilable decisions.

⁹ Applicant Guidebook, Module 4-12.

¹⁰ Applicant Guidebook, Modules 4-12 and 4-13.

¹¹ In contrast with Dot Registry's alleged communities, the WTA is an association; Dot Registry's applied for strings refer to specific corporate forms, not to an association with a commonality of interest.

- Comment on alleged inaccuracy No. 4:

Under the heading "Inaccuracy No. 4", Dot Registry describes itself as a party affected by ICANN's Applicant Portal Data Breach, because it was not made aware of the existence of the new information that other individuals may have also been involved in the data breach. Dot Registry rightfully submits that, as a matter of transparency, ICANN should immediately send formal notification to all of the affected parties.

Dot Registry's submission in this respect is not an "inaccuracy", but a confirmation that ICANN's handling of the Applicant Portal Data Breach violates ICANN's Aol and Bylaws.

- Comment on alleged inaccuracy No. 5:

Dot Registry clarifies that ICANN has not paid any of Dot Registry's legal fees, but that it only refunded the legal costs related to Dot Registry's share of the ICDR fees.

Requesters never claimed that the ICANN Board agreed to refund all of Dot Registry's legal costs, and thanks Dot Registry for its clarification.

- Comment on alleged inaccuracy No. 6:

Dot Registry claims that ICANN has not provided a remedy or final decision in their regard. However, Dot Registry has been refunded a share of its legal costs, and it has received the ICANN Board's assurance that the ICANN Board will consider next steps in relation to Dot Registry's Reconsideration Requests or the relevant new gTLDs before the Board takes any further action. The former provides a remedy, which is final; the latter provides the assurance that the ICANN Board will consider the issue. Because of the ICANN Board's assurance, Dot Registry has obtained a provisional remedy given that the resolution of the contention set for its applications has been stayed.

In contrast, until now, ICANN has not taken the necessary steps to ensure that Requesters' applications for .hotel remain in contention.

*

In view of the above, Requester's Reconsideration Request 16-11 contains no inaccuracies.

In summary, I wish to remind the Board about two essential main points in the current proceedings:

1. There are now two IRPs that concern ICANN's handling of the CPE process. In one case (in which the CPE panel decided to grant the priority to HTLD), the IRP panel's finding that ICANN had followed the process was based upon the belief that ICANN had merely adopted a decision made by the CPE panel. In other words, the IRP panel reached this decision because ICANN had convinced the panel that the CPE panel was acting independently. In the second case (in which the CPE did not agree to grant priority to Dot Registry) the IRP panel found that ICANN's process was flawed because it discovered

that ICANN was closely involved in the CPE process. In view of this second case, the IRP panel in the first case was unquestionably misled and would have decided differently had it known ICANN's real role in the CPE process.

2. The illegal entry to ICANN's platform and the collection of information by Mr. Krischenowski and two of his associates, including the CEO of HTLD, is an unquestionable violation of the application rules which should disqualify the applicant regardless of both when that access and collection took place and who the owner is of that applicant.

In our view, the reason why Dot Registry is invoking so-called inaccuracies – all of which have been explained away – is because Requesters made a side comment that Dot Registry had not proved it had suffered material harm as a result of ICANN's violation of the Aol and Bylaws. However, I would ask the ICANN Board not to be distracted by this nibbling at the edges of the main issue.

I remain at your disposal for further comments.

Should the ICANN Board organize a meeting with Dot Registry or otherwise have contact with Dot Registry regarding the Reconsideration Request 16-11, Requesters request that there be full transparency concerning this contact.

Yours sincerely,


Filip Röllin