

**DETERMINATION  
OF THE BOARD GOVERNANCE COMMITTEE (BGC)  
RECONSIDERATION REQUEST 14-34**

**22 AUGUST 2014**

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Despegar Online SRL, DotHotel, Inc., dot Hotel Limited, Fegistry, LLC, Spring McCook, LLC and Top Level Domain Holdings Limited (collectively, the “the Requesters”) seek reconsideration of the Community Priority Evaluation Panel’s Report (“Report”), and ICANN’s acceptance of that Report, finding that HOTEL Top-Level-Domain S.a.r.l.’s application for .HOTEL prevailed in Community Priority Evaluation (“CPE”).

**I. Brief Summary.**

All six Requesters applied for .HOTEL. HOTEL Top-Level-Domain S.a.r.l. (“Applicant”) also applied for .HOTEL as a community applicant. All seven .HOTEL applications were placed into a contention set. Having submitted the only community application for .HOTEL, the Applicant was invited to and did participate in a CPE for .HOTEL. On 12 June 2014, the Application prevailed in CPE. The Requesters now claim the CPE Panel (“Panel”) failed to comply with established ICANN policies and procedures in rendering its Report. Specifically, the Requesters contend the Panel: (i) improperly interpreted and applied the CPE criteria set forth in the New gTLD Applicant Guidebook (“Guidebook”); and (ii) breached “other ICANN [p]rinciples” set forth in the ICANN Bylaws. (Request, § 8, Pgs. 5-11.)

The Requesters’ claims are unsupported. First, while the Request is couched in terms of the Panel’s purported violations of various procedural requirements, the Requesters do not identify any misapplication of a policy or procedure, but instead challenge the merits of the Panel’s Report, which is not a basis for reconsideration. Second, the Requesters’ allusions to the

broad fairness principles expressed in ICANN’s Bylaws cannot serve as a basis for reconsideration, as the Requesters do not identify any specific Panel action that contravenes those principles. Because the Requesters have failed to demonstrate that the Panel acted in contravention of established policy or procedure, the BGC denies Request 14-34.

## **II. Facts.**

### **A. Background Facts.**

All six Requesters applied for .HOTEL.

The Applicant filed a community application for .HOTEL (*i.e.*, a seventh application for .HOTEL).

On 19 February 2014, the Applicant was invited to participate in the CPE process for .HOTEL. The Applicant elected to participate in the process, and its .HOTEL community application (“Application”) was forwarded to the CPE Panel assembled by the Economist Intelligence Unit (“EIU”).

On 11 June 2014, the Panel issued its Report. The Panel determined the Application met the requirements specified in the Guidebook and therefore concluded that the Application prevailed in the CPE. Because the Application prevailed in CPE, each of Requesters’ applications in the .HOTEL contention set will not proceed. (*See* Guidebook, § 4.2.3.)

On 12 June 2014, ICANN posted the Report on its microsite.

On 28 June 2014, the Requesters filed Request 14-34, requesting reconsideration of the Panel’s determination that the Application prevailed in CPE.<sup>1</sup>

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<sup>1</sup> Reconsideration Requests must be filed 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.” Bylaws, Art. IV, § 2.5.b. Requesters arguably “should have become aware of” the CPE Panel’s Report on 12 June 2014, the day it was publicly posted, in which case Requesters Reconsideration Request – which was submitted on 28 June 2014 – is untimely. However, because the Requesters represent that they did not in fact become aware of the CPE Panel’s Report until 13 June 2014, the BGC will consider the Request on the merits.

## **B. The Requesters' Claims.**

The Requesters contend that the Panel failed to comply with ICANN policies and procedures in two ways. First, the Requesters claim “there are three instances where the Panel has not followed the AGB policy and processes for conducting the CPE.” (Request, § 8, Pg. 5.) Second, the Requesters claim “the Panel, and ICANN staff, have breached more general ICANN policies and procedures in the conduct of this CPE.” (Request, § 8, Pg. 5.)

## **C. Relief Requested.**

The Requesters suggest “that the current finding that the Applicant has prevailed in CPE should be set aside . . . [and] should be remitted to the Panel for re-examination, with the Panel directed to have regard to [*sic*] the matters raised in the reconsideration request[.]” (Request, § 9, Pg. 11.)

## **III. Issues.**

In view of the claims set forth in Request 14-34, the issues are whether the Panel acted in contravention of established policy or procedure by:

- A.** Improperly applying the criteria set forth in the Guidebook in determining that the Application prevailed in CPE; and
- B.** Violating other ICANN policies and procedures by: (i) providing insufficient information regarding the Panel’s qualifications; (ii) failing to publicly post communications that might have taken place between the Panel and the Applicant; or (iii) providing insufficient analysis of the Panel’s determination.

## **IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Priority Evaluation.**

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in

accordance with specified criteria.<sup>2</sup> (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC<sup>3</sup> agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party service providers, such as the EIU, where it can be stated that the Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.<sup>4</sup>

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE reports. Accordingly, the BGC does not evaluate the Panel's substantive conclusion that the Applicant prevailed in the CPE. Rather, the BGC's review is limited to whether the Panel violated any established policy or process, which the Requesters suggest was accomplished when the Panel: (i) purportedly misapplied the CPE

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<sup>2</sup> Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

<sup>3</sup> New gTLD Program Committee.

<sup>4</sup> See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

criteria set out in the Guidebook; and (ii) violated core ICANN principles set forth in its Bylaws. (Request, § 8, Pg. 5.)

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – has published supplementary guidelines (“CPE Guidelines”) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.<sup>5</sup>

CPE will occur only if a community-based applicant selects this option and after all applications in the contention set have completed all previous stages of the process. (Guidebook, § 4.2.) Community priority evaluations will be performed by an independent community priority panel appointed by EIU to review these applications. (*See* Guidebook, § 4.2.2.) The panel’s role is to determine whether any of the community-based applications fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in a CPE, an application must receive a minimum of 14 points on the scoring of foregoing four criteria, each of which is worth a maximum of four points (for a maximum total of 16 points).

## **V. Analysis and Rationale.**

The Requesters have failed to demonstrate that the Panel violated any established policy or procedure in rendering the Report.

### **1. The Panel Properly Applied the CPE Criteria.**

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<sup>5</sup> The CPE Guidelines may be found here: <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

The Requesters identify three ways in which the Panel allegedly failed to apply the Guidebook criteria. First, the Requesters claim the Panel did not analyze whether a “community,” as that term is defined in the Guidebook, has been identified. Second, the Requesters argue the Panel was “confused or mistaken” about the criteria required to support a finding that the community is sufficiently delineated. Third, the Requesters assert the Panel failed to apply the Guidebook’s test for uniqueness. (Request, § 8, Pgs. 6-11.) As discussed below, the Requesters have provided no support for their contention that the Panel incorrectly applied any policy or procedure.

**(a) The Panel Properly Analyzed Whether The “Hotel Community” Meets the Guidebook Definition of a Community.**

Guidebook section 4.2.3 sets forth the requirements for “Community Establishment.” It states that whether an Applicant has established a “community” for CPE purposes will be “measured by” two factors: delineation and extension. In addition, Guidebook section 4.2.3 provides:

[A]s “community” is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.

The Requesters concede the Panel “did refer to these definitions” (Request, § 8, Pg. 6), but contend the Panel erred in failing to “consider the first and vital question of whether there was first a cohesive community” separate and apart from the specified above-listed criteria. (Request, § 8, Pg. 6.) However, the Requesters point to no obligation to conduct any inquiry as to the definition of a community other than those expressed in section 4.2.3 of the Guidebook, which Requesters admit the Panel took into account. As such, the Requesters fault the Panel for adhering to the Guidebook’s definition of a “community” when evaluating the Application.

Given that the Panel must adhere to the standards laid out in the Guidebook, this ground for reconsideration fails.

The Requesters also contend the Applicant’s proposed community, *i.e.*, the “Hotel Community,” does not qualify as a community for CPE purposes because “rather than showing cohesion, [it] depend[s] on coercion; every hotelier is deemed a member of this community, even if they have never heard of it[.]” But the Panel reached the contrary conclusion, noting “the community as defined in the application has awareness and recognition among its members. This is because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.” (Report, Pg. 2.) As even the Requesters note, a request for reconsideration cannot challenge the substance of the Panel’s conclusions, but only its adherence to the applicable policies and procedures. Accordingly, reconsideration is not warranted based on the Requesters’ complaint that the Panel came to a different conclusion than Requesters’ would have liked as to whether the Hotel Community enjoys sufficient recognition amongst its members.

**(b) The Panel Properly Applied the Test for Delineation.**

Guidebook section 4.2.3 provides that delineation “relates to the membership of a community,” and that membership must be “[c]learly delineated, organized, and pre-existing [the completion of the new gTLD policy recommendations in 2007].” The Requesters contend the Panel committed an “error of process” because it “imported the test for determining whether there is a ‘community’ . . . into the test for ‘delineation.’” (Request, § 8, Pg. 7.) Specifically, the Requesters fault the Panel for purportedly ignoring the requirements that the community be organized and preexisting before 2007. (*Id.*) The Requesters’ claim is unsupported, as the Report shows that the Panel fully examined all three requirements for delineation.

The Panel began its assessment of the test for delineation by noting: “Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members.” (Report, Pg. 1.) As the Requesters admit, the Panel then “proceeds through the proper requirements of Delineation, which it names accurately[.]” (Request, § 8, Pg. 8.) The Requesters thus defeat their own argument, as they squarely concede the Panel assessed the “proper requirements” of the test for delineation.

Again, the Requesters dispute the Panel’s allusion to the “awareness and recognition” of the Hotel Community’s members not because that reference constitutes any procedural violation, but because the Requesters simply disagree whether there is any such recognition amongst the Hotel Community’s members. In fact, in the same section where they fault the Panel for considering self-awareness in the process of the delineation inquiry, the Requesters also complain of the Panel’s purported “failure to consider the issue of self-awareness and recognition.” (Request, § 8, Pg. 8.) At bottom, the Requesters do not challenge how and when the Panel applied either the delineation or self-awareness tests, but instead seek reconsideration of the substance of the Panel’s determination that the Hotel Community is clearly delineated and its members are sufficiently self-aware. Disagreement with the Panel’s substantive conclusions, however, is not a proper basis for reconsideration.

**(c) The Panel Properly Applied the Test for Uniqueness.**

The second criterion by which the Application is assessed in CPE is the nexus between the proposed string and the community. (Guidebook, § 4.2.3.) This criterion evaluates “the relevance of the string to the specific community that it claims to represent” through the scoring of two elements—2-A, nexus (worth three points), and 2-B, uniqueness (worth one point). (Guidebook, § 4.2.3.) To fulfill the requirements for element 2-B, the string must have “no other

significant meaning beyond identifying the community described in the application.”

(Guidebook, § 4.2.3.)

Here, the Panel concluded that .HOTEL “has no other significant meaning beyond identifying the community described in the application.” (Report, Pg. 4.) The Panel cited the Application’s definition of “hotel” as “an establishment with services and additional facilities where accommodation and in most cases meals are available.” (Request, § 8, Pg. 9; Report, Pg. 2.) The Requesters contend the Panel erred in so finding because “[p]atently, the word ‘hotel’ has another ‘significant meaning’ apart from identifying a community – it means a place where a customer can purchase lodgings.” (Request, § 8, Pg. 9.) In other words, the Requesters claim that the string .HOTEL has a significant meaning apart from identifying the Hotel Community, because it claims the Hotel Community is an “association of business enterprises that run the hotels,” whereas the word “‘hotel’ means to most of the world what the [Application’s] definition says it means – a place for lodging and meals.” (Request, § 8, Pgs. 9-10.)

The Requesters have identified no procedural deficiency in the Panel’s determination that the uniqueness requirement was met. The Requesters concede that “HOTEL” has the significant meaning of a place for lodging and meals, and common sense dictates that the Hotel Community consists of those engaged in providing those services. The attempt to distinguish between those who run hotels and hotels themselves is merely a semantic distinction. Again, while the Requesters may disagree with the Panel’s substantive conclusion, that is not a proper basis for reconsideration. The Requesters do not identify any Guidebook or other procedural requirement that the Panel purportedly violated in reaching its determination that “HOTEL” has the significant meaning of a place for lodging and meals, and the Requesters arguments that the finding was erroneous do not form the grounds for a reconsideration request.

## 2. The Panel Did Not Breach Any Provisions of the ICANN Bylaws.

The Requesters argue that three aspects of the CPE process violate core ICANN values of promoting fair and transparent decision-making. (Request, § 8, Pgs. 10-11 (citing ICANN Bylaws, Art. 1, § 2.8; *id.*, Art. III, § 1; *id.*, Art. IV, § 2.2; ICANN Affirmation of Commitments, Art. 7).) In particular, the Requesters argue the CPE process is “prejudicial to standard applicants” because: (1) the standard applicants are not given enough information regarding the identity or qualifications of the Panelist to assess potential conflicts; (2) the materials considered by the Panel are not publicly posted; and (3) the Panel provided insufficient “analysis and reasons” for its conclusions.

None of these concerns represent a policy or procedure violation for purposes of reconsideration under ICANN’s Bylaws. The Guidebook does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application. In essence, the Requesters argue that because the Guidebook’s CPE provisions do not include Requesters’ “wish list” of procedural requirements, the Panel’s adherence to the Guidebook violates the broadly-phrased fairness principles embodied in ICANN’s foundational documents. Were this a proper ground for reconsideration, every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request. Such a result would undermine the stability of the New gTLD Program and ICANN’s accountability mechanisms. ICANN’s general commitment to fairness and transparency cannot form a basis for reconsideration here because the Guidebook simply does not confer upon standard applicants the benefits that the Requesters complain they did not receive, and reconsideration is only warranted where a staff action “contradict[s] *established* ICANN policy(ies)[.]” (Bylaws, Art. IV, § 2, emphasis added.) Moreover, the Guidebook was extensively vetted by the ICANN stakeholder community over a course of years and included a total of ten versions with multiple notice and public comment

periods.<sup>6</sup> To stray from the Guidebook's terms and impose additional requirements, as the Requesters would have the BGC do here, would violate many of the very same fairness principles the Requesters invoke.<sup>7</sup>

## **VI. Determination.**

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-34. Given that there is no indication that the Panel violated any policy or procedure in reaching, or staff in accepting, the conclusions in the Panel's Report, this Request should not proceed. If the Requesters believe they have somehow been treated unfairly in the process, the Requesters are free to ask the Ombudsman to review this matter.

In accordance with Article IV, § 2.15 of the Bylaws, the BGC's determination on Request 14-34 shall be final and does not require Board consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-34 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.

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<sup>6</sup> The current version of the Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb>. The prior versions of the Guidebook are available at <http://newgtlds.icann.org/en/about/historical-documentation>. As noted in its Preamble, the Guidebook was the product of an extensive evaluation process that involved public comment on multiple drafts.

<sup>7</sup> Moreover, any challenge to the terms of the current version of the Guidebook are untimely, as more than fifteen days have elapsed since it was promulgated in June 2012. (See Bylaws, Art. IV, § 5 (setting forth fifteen day deadline to file reconsideration request after challenged action.)

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. (*See* Bylaws, Article IV, § 2.16.) To satisfy the thirty-day deadline, the BGC would have to have acted by 28 July 2014. Due to the volume of Reconsideration Requests received within recent months, it was impractical for the BGC to consider Request 14-34 prior to 22 August 2014.