

Reconsideration Request

1. Requester Information

Name: Commercial Connect, LLC
Contact Information Redacted

Address:

Email: 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 January 26, 2016, ICANN Staff decided that Requester's Request for Cooperative Review (the "Request") submitted on the same date was invalid and determined that ICANN could not proceed with Requester's Request, notwithstanding clear and unambiguous evidence that Requester complied with the procedural requirements determined by ICANN in the context of the latter's Accountability Mechanisms set forth in ICANN's By-Laws.

4. Date of action/inaction:

January 26, 2016.

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

January 26, 2016.

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

Requester is the applicant for the community-based gTLD .SHOP, (Application ID: 1-1830-1672, Prioritization Number: 649; see <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/307> and [1](https://gtldresult.icann.org/application-</p></div><div data-bbox=)

result/applicationstatus/applicationdetails:downloadapplication/307?t:ac=307) (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 May 21st, 2015, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester’s application for the .SHOP gTLD “*did not prevail in Community Priority Evaluation*”. Requester refers to the full CPE Report for its application for the community-based .SHOP gTLD that is made available on ICANN’s website at

<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>.

On the basis of the arguments and statements set forth in this CPE Report, 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 not taken into account relevant information provided to ICANN by Requester prior to and after the commencement of CPE;
- (iv) 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;
- (v) 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 various 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 .SHOP gTLD. In this respect, ICANN has requested Requester to participate in an auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the CPE Report and ICANN's Determination following the publication of such report not to accept Requester's community-based qualification of its application 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.

The .SHOP gTLD, as contemplated by Requester, intends to become an asset to its stakeholders and the e-commerce community, better defining and representing this community, helping to establish standards, providing enhanced security and verification, and making the internet more safe, secure, and intuitive while giving back to its community and the world.

In preparing its application, Requester has gathered significant support from various respectable governmental institutions, national and international companies and organizations.

If the .SHOP gTLD would be awarded to the highest bidder in the context of an ICANN administered auction, there is a clear and imminent risk that this extension will eventually be managed by an organization that either reserves the right to only register domain names in its own name, or which will not perform any verification of domain name registrants, which clearly poses an imminent risk for consumers: in the first case, they will be deprived from choice (which is clearly contrary to the objectives of ICANN's New gTLD Program); in the other case, they will have no guarantees at all that they will be dealing with a reputable organization that bears in mind the interests and rights of consumers.

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 the evaluation of Requester's Application for the .SHOP gTLD and more in particular Requester's position for operating such new gTLD in favor of a wide variety of stakeholders seeking to create and deal within a safe on line commercial environment.

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;
- (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;
- (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; 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 and other requests directed to ICANN in the context of the evaluation process.

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.*¹

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 (see: <https://newgtlds.icann.org/en/applicants/cpe>):

- *CPE Panel Process Document*, published on August 6, 2014;
- *CPE Guidelines*, published on September 27, 2013;
- *Updated Frequently Asked Questions (FAQs)*, published on September 10, 2014; and
- *CPE Processing Timeline*, published on September 10, 2014 (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 they submitted them in the beginning of 2012 ...²

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.³ 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

¹ This was in fact the first GNSO Recommendation, contained in its Principles, Recommendations & Implementation Guidelines.

² 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.

³ Please refer to <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>.

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, 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"*.

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 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”.⁴

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.

For instance, in a number of cases, the EIU expressly referred to 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. Moreover, in its Application, Requester expressly refers to the use of the word SHOP in various languages, other than English.

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.

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 ...

8.5. The “Support” criterion

According to the CPE Report:

“The Community Priority Evaluation panel has determined that there is relevant opposition to the application from a group of non-negligible size, from an entity within the community explicitly addressed by the application. The entity is a multinational company. The grounds for the

⁴ Community Priority Evaluation Panel Process, page 1.

objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the applicant's right to regulate a namespace in which the opponent has a place. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition."

Requester does not understand how one single entity can be considered a "group of non-negligible size", as a "group" always consists of more than one person or entity. In particular, principles of international law – and more in particular antitrust / competition laws in various countries and regions of the world – consider a "multinational group" as a single economic unit.

For this reason alone, the scoring awarded by the EIU should be set aside by ICANN, since the EIU has clearly misinterpreted the criteria and standards set forth by the Applicant Guidebook.

8.6. ICANN has not followed due process in the context of its Accountability Mechanisms

Reference is made to ICANN's Accountability Mechanisms set out in its By-Laws.

Requester has utilized all of these processes, to no avail:

- no direction was provided by the BGC nor the NGPC following Requester's Request for Reconsideration submitted on July 10, 2015;
- ICANN did not accept Requester's Request for Cooperative Review submitted on November 17, 2015, nor the Request submitted on January 26, 2016.

ICANN's conduct in this respect can only be interpreted as being in favor of resolving the .SHOP contention set in the most profitable manner for ICANN, since it has denied every form of cooperation or leniency, notwithstanding the various deficiencies encountered by Requester in this process.

8.6. ICANN has not provided clear guidance to Requester following the publication of the CPE Report and ICANN's Determination in relation thereto

Both during and after the publication of the CPE Report, ICANN has misguided and misdirected Requester who attempted to seek further information and guidance from ICANN in relation to the steps to be taken to correct and rectify the outcome of CPE.

Reference is made to various email exchanges between Requester and ICANN, and more in particular:

Various Emails attached

It is clear that, based upon the information referred to above, Requester has attempted on November 17, 2015 to initiate the Cooperative Engagement Process and the Independent Review proceedings, but ICANN did not provide for accurate guidance or at least failed to correct or accept deficiencies that were outside of Requester's control.

Bearing in mind the above, it is clear that ICANN should have provided Requester with an additional delay and other ways to seek relief under ICANN's Accountability Mechanisms. However, ICANN chose to remain vague, allowing for deadlines to expire and ultimately invoked the fact that Requester's requests were time-barred.

It is clear that the actions and inactions of ICANN Staff in this respect were unfair when reviewed in light of ICANN's By-Laws. For these reasons alone, Requester is of the opinion, and respectfully requests the BGC, the NGPC and the ICANN Board as a whole to provide Requester with an additional delay and opportunity to seek relief under ICANN's Accountability Mechanisms.

8.7. 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 and the ICANN Board, 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:
 - o not having reached out to all of Requester's supporters, although the CPE Panel had the express obligation to do so;
 - o 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 certain false information has been disregarded;
- 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.
- Failure to honor and follow the gNSO's Final Report which made defined what community was, what was to be considered and who could object.
- no appeals mechanism is in place to provide for misinterpretation of information provided, errors or other issues that may be relevant.

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.

In addition, when Requester reached out to ICANN to seek further clarification, initiate the Cooperative Engagement Process and proceedings under ICANN's Independent Review accountability mechanism, vague answers were provided. Only after the expiration of the timeframes set out in ICANN's By-Laws and more in particular ICANN's Accountability Mechanisms, ICANN informed Requester that its requests were time-barred, providing no adequate solution to the issues raised by Requester.

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 Requester's requests referred to in §8 above, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN;
- (iii) accept Requester's Notice of Independent Review submitted on

- November 17, 2015 and the initiation of the Cooperative Engagement Process by Requester on the same date;
- (iv) in the meantime, suspend the process for string contention resolution in relation to the .SHOP gTLD;
 - (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;
 - (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 full score of 16 points or determine that the applicant meets the Community standards as required by the gNSO's final report and allow the applicant to proceed to delegation.

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 May 21, 2015 its Determination on the basis of the CPE Report, stating that Requester's application for the .SHOP gTLD did not meet the criteria for community-based applications, as defined in the Applicant Guidebook.

Requester has standing in accordance with ICANN's By-Laws and 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,



Jeffrey Smith

President
Commercial Connect, LLC.

January 26, 2016

Date