

Exhibit 1

To: Arif Ali on behalf of dotgay LLC

Date: 18 June 2017

Re: Request No. 20170518-1

Thank you for your request for documentary information dated 18 May 2017 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers (ICANN) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (dotgay). For reference, a copy of your Request is attached to the email transmitting this Response.

Items Requested

Your Request seeks the disclosure of the following documentary information relating to the Board initiated review of the Community Priority Evaluation (CPE) process (the Review):

1. All documents relating to ICANN's request to "the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;"
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN's request for "the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports," and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm ("the evaluator") undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;
12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

Response

Community Priority Evaluation (CPE) is a method to resolve string contention for new gTLD applications. CPE occurs if a community application is both in contention and elects to pursue CPE. The evaluation is an independent analysis conducted by a panel from the CPE provider. The CPE panel's role is to determine whether a community-based application fulfills the community priority criteria. (See Applicant Guidebook, § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) As part of its process, the CPE provider reviews and scores a community applicant that has elected CPE against the following four criteria: Community Establishment; Nexus between Proposed String and Community; Registration Policies, and Community Endorsement. An application must score at least 14 out of 16 points to prevail in a community priority evaluation; a high bar because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants. (*See id.*)

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the CPE process. Recently, the Board discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (See Dot Registry IRP Final Declaration at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.) The Board decided it would like to have some additional information related to how the ICANN organization interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the process by which the ICANN organization has interacted with the CPE provider. (See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.)

Further, as Chris Disspain, the Chair of the Board Governance Committee, stated in his [letter of 26 April 2017 to concerned parties](#), during its 18 October 2016 meeting, the BGC discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided, as part of the President and CEO's review, to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs to help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. (See Letter from Chris Disspain to Concerned Parties, 26 April 2017,

<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; see also, Minutes of BGC 18 October 2016 Meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en.>)

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, in November 2017, ICANN undertook the process to find the most qualified evaluator for the review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because it has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists. On 13 January 2017, FTI signed an engagement letter to perform the review.

As described in the [Community Priority Evaluation Process Review Update](#), dated 2 June 2017, the scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE panels to the extent such reference materials exist for the evaluations which are the subject of pending Reconsideration Requests.

The review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks. (See [Community Priority Evaluation Process Review Update](#), dated 2 June 2017.)

Items 1, 2, 3, 8, and 13

Items 1, 2, 3, 8, 9, and 13 seek the disclosure of overlapping categories of documents relating to the Review. Specifically, these items request the following:

- Documents relating to "ICANN's request to the CPE provider for the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports" (Item 1);
- "[D]ocuments from the EIU provider to ICANN including but not limited to: (a) ICANN's request for 'the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports,' and

(b) all communications between the EIU and ICANN regarding the request” (Item 2);

- “[D]ocuments relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation” (Item 3);
- Materials provided to the evaluator by the EIU (Item 8); and
- Materials provided to ICANN by the evaluator concerning the Review (Item 13).

As stated in ICANN’s [Response to DIDP Request 20170505-1](#) that you submitted on behalf DotMusic Limited, these documents are not appropriate for disclosure based on the following applicable DIDP Defined Conditions of Non-Disclosure:

- 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 exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Items 4, 5, 6, 7

Items 4 through 7 seek the disclosure of the identity of the individual or firm undertaking the Review (Item 4), “[t]he selection process, disclosures, and conflict checks undertaken in relation to the appointment” (Item 5), the date of appointment (Item 6), and the terms of instructions provided to the evaluator (Item 7). The information responsive to these items were provided in the [Community Priority Evaluation Process Review Update and above](#). With respect to the disclosures and conflicts checks undertaken in relation to the selection of the evaluator, FTI conducted an extensive

conflicts check related to the ICANN organization, the CPE provider, ICANN's outside counsel, and all the parties that underwent CPE.

Item 9

Item 9 seeks the disclosure of "materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN's Board or any subcommittee of the Board." As detailed in the [Community Priority Evaluation Process Review Update](#), the review is being conducted in two parallel tracks. The first track focuses on gathering information and materials from the ICANN Organization, including interviews and document collection. This work was completed in early March 2017. As part of the first track, ICANN provided FTI with the following materials:

- New gTLD Applicant Guidebook, <https://newgtlds.icann.org/en/applicants/agb>
- CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- CPE Panel Process Document, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>
- EIU Contract and SOW Information, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>
- CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>
- Updated CPE FAQs, <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>
- CPE Processing Timeline, <https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>
- CPE webpage and all materials referenced on the CPE webpage, <https://newgtlds.icann.org/en/applicants/cpe>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Board Resolution 2016.09.17.01, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>
- Minutes of 17 September 2016 Board meeting, <https://www.icann.org/resources/board-material/minutes-2016-09-17-en>
- Briefing materials related to Board Resolution 2016.09.17.01, <https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-17sep16-en.pdf>
- Minutes of 18 October 2016 BGC meeting, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>
- New gTLD Program Implementation Review regarding CPE, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> at section 4.1
- Correspondence between the ICANN organization and the CPE provider regarding the evaluations, including any document and draft CPE reports that were exchanged.

With the exception of the correspondence between the ICANN organization and the CPE provider regarding the evaluations, all materials provided to the evaluator are publicly available. Regarding the internal correspondence between the ICANN organization and the CPE provider, these documents are not appropriate for disclosure for the same reasons identified in ICANN’s response to the DIDP previously submitted by dotguy. Rather than repeating those here, see Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>. The second track of the review focuses on gathering information and materials from the CPE provider. As noted [Community Priority Evaluation Process Review Update](#) of 2 June 2017, this work is still ongoing.

Item 10

Item 10 seeks “[t]he materials submitted by affected parties provided to the evaluator.” It is unclear what the term “affected parties” is intended to cover. To the extent that the term is intended to reference the applicants that underwent CPE, FTI was provided with the following materials submitted by community applicants:

- All CPE reports, <https://newgtlds.icann.org/en/applicants/cpe#invitations>
- Reconsideration Requests related to CPEs and all related materials, including BGC recommendations or determinations, Board determinations, available at <https://www.icann.org/resources/pages/accountability/reconsideration-en>, and the applicable BGC and Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>

- Independent Review Process (IRP) related to CPEs and all related materials, available at <https://www.icann.org/resources/pages/accountability/irp-en>, Board decisions related to the IRP and the corresponding Board minutes and Board briefing materials, available at <https://www.icann.org/resources/pages/2017-board-meetings>
- All public comments received on the applications that underwent evaluation, which are publicly available at <https://gtldresult.icann.org/application-result/applicationstatus> for each respective application.

Items 11

Item 11 seeks the disclosure of “[a]ny further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator.” This item overlaps with Items 7 and 9. The information responsive to the overlapping items has been provided in response to Items 7 and 9 above.

Item 12

Item 12 asks for an estimate of completion of the review. The information responsive to this item has been provided [Community Priority Evaluation Process Review Update](#) of 2 June 2017. ICANN anticipates on publishing further updates as appropriate.

Notwithstanding the applicable Defined Conditions of Nondisclosure identified in this Response, ICANN also evaluated the documents subject to these conditions to determine if the public interest in disclosing them outweighs the harm that may be caused by such disclosure. ICANN has determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.

About DIDP

ICANN’s DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest. We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Exhibit 2

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

VIA E-MAIL DIDP@ICANN.ORG

ICANN
c/o Steve Crocker, Chairman
Goran Marby, President and CEO
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning
Community Priority Evaluation for .GAY Application ID 1-1713-23699**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report¹ found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.²

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.³ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

¹ .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>

² See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>

³ See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

*Documentary Information Disclosure Policy (DIDP) Requests.*⁴ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.⁵ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the "BGC").⁶ Dotgay has sent several letters to ICANN noting that ICANN's protracted delays in reaching a decision and ICANN's continued lack of responsiveness to dotgay's inquiries about the status of dotgay's request represent a violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"⁷ and that the BGC may have requested from the CPE provider "the materials and research

⁴ Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

⁵ *Id.*

⁶ <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; See also *dotgay's* powerpoint presentation:

⁷ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”⁸

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.⁹ Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation.¹⁰

Dotgay has received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:¹¹

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but

⁸ Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

⁹ Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

¹⁰ Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>

¹¹ Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3. . . ." ¹² According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway."¹³ Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

¹² Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

¹³ Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

1. All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”¹⁴
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”¹⁵ and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm (“the evaluator”) undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

¹⁴ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

¹⁵ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

12. The most recent estimates provided by the evaluator for the completion of the investigation; and

13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,



Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

Exhibit 3

Response to Documentary Information Disclosure Policy Request

To: Bart Lieben on behalf of dotgay LLC

Date: 21 October 2015

Re: Request No. 20151022-1

Thank you for your Request for Information dated 22 October 2015 (Request), which was submitted through the Internet Corporation for Assigned Names and Numbers' (ICANN's) Documentary Information Disclosure Policy (DIDP) on behalf of dotgay LLC (Requester). For reference, a copy of your Request is attached to the email forwarding this Response.

Items Requested

Your Request seeks documentary information relating to the second Community Priority Evaluation (CPE) of dotgay LLC's application for the .GAY gTLD (Application ID: 1-1713-23699), which was completed and for which a CPE Report was issued on 8 October 2015. Specifically, you request the disclosure of:

- 1) policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process, including references to decisions by the ICANN Board that such guidelines, directives, instructions or guidance are to be considered "policy" under ICANN by-laws;
- 2) internal reports, notes, (weekly) meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application;
- 3) detailed information on the evaluation panels that have reviewed Requester's Application during the first CPE that was conducted in 2014, as well as the evaluation panels that have conducted the second CPE in 2015, including the names and respective positions of the members of the evaluation panels;
- 4) detailed information in relation to (i) the information reviewed, (ii) criteria and standards used, (iii) arguments exchanged, (iv) information disregarded or considered irrelevant, and (v) scores given by each individual Community Priority Evaluation panel member in view of each of the criteria set out in the Applicant Guidebook, and more in particular:

I. In relation to the criterion "Nexus"

- 5) which information, apart from the information contained in the Application, has been used by the CPE Panel in order to determine that the word "gay" "does not identify or match the name of the community as defined in the Application,

nor is it a well-known short-form or abbreviation of the community”, notwithstanding the fact that public references to this “catch-all” or “umbrella” term made by reputable organizations prove otherwise;

6) whether, in considering that individuals who qualify as transgenders, intersex or “allies” are not deemed to be members of the community as defined by the Application, whereas various national, international and supranational organizations such as Parents, Families, and Friends of Lesbians and Gays (PFLAG) and Children of Lesbians and Gays Everywhere (COLAGE), both of which are also endorsing the Requester’s Application for the .GAY gTLD,³ are clearly being recognized as supporting the same causes and endorsing the same values as expressed by the “inner circle” of members of this community, especially since they are closely linked to the thematic remit the community has;

7) based on the CPE Report, it seems that the EIU assumed that an “ally” necessarily would be an individual, notwithstanding various statements Requester has made to the contrary, for instance in the context of its initial Reconsideration Request. Therefore, Requester would like to obtain insights into the definition or concept used by the EIU in order to determine what an “ally” is;

8) in relation to the above: which information, statistics, etc. and criteria to evaluate and weigh the importance of such information have been used in determining that transgenders, intersex, or “allies” would be “substantially” overreaching the term “gay”;

9) why, considering the fact that the CPE Panel did not provide passing scores in relation to Requester’s answers in relation to the “Nexus between Proposed String and Community” and “Community Endorsement” aspects of the Application, the CPE Panel or ICANN has not reached out to the Requester in the form of Clarifying Questions.

II. In relation to the criterion “Community Endorsement”:

10) which letters of endorsement and/or support have been considered and verified by the CPE Panel in making its Determination, bearing in mind the fact that the BGC has determined that the EIU has made a process error in the context of the first CPE that was performed in 2014. The information provided in the second CPE Report does not allow Requester to distinguish the letters that have been provided by Requester in the context of the Application from the letters that have been published on ICANN’s correspondence page or through other means since the publication of the first CPE Report;

11) which criteria and/or standards have been used by the CPE Panel in order to determine which group is “of relevance” in relation to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application;

12) why, although the CPE Panel has recognized that Requester “possesses documented support from many groups with relevance”, only the support of “one group of relevance” has been taken into consideration by the CPE Panel;

13) what were the criteria and standards that have been used by the Panel in making such distinction and coming to such determination;

14) bearing in mind the previous question, why the CPE Panel has come to a different assessment in relation to the standing of ILGA expressed by the Expert Determination provided by the ICDR, which has been acknowledged and endorsed by ICANN in dismissing an official complaint lodged before the ICDR by Metroplex Republicans of Dallas, in which the Requester prevailed;

15) which scores or evaluations have been given to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application against such criteria and/or standards for each of the organizations, companies and groups referred to in the Application and the CPE Report;

16) if no particular additional criteria and/or standards have been utilized by the CPE Panel, apart from the ones published in the Applicant Guidebook and the Guidelines published by the CPE Panel, a detailed overview of the arguments that have been brought forward and have been adopted or acknowledged by the CPE Panel for not considering the letters of support and/or endorsement from other groups, organizations, companies and individuals;

17) which independent research has been performed by the CPE Panel and how the results of such research have been taken into account by the CPE Panel in the scoring they have applied. Considering the wide endorsement obtained from various umbrella organizations, national and supranational groups, the Determination makes it clear that only one letter of endorsement from one group considered “relevant” by the CPE Panel has been taken into account.

III. In relation to the criterion “Opposition”:

18) the name, address, and standing of the anonymous organization considered by the CPE Panel;

19) an overview of the staff members, including their names, roles and responsibilities of such organization;

20) the events and activities organized by such organization;

21) which standards and criteria have been used by the CPE Panel in order to determine that such activities had a “substantial” following;

22) the metrics used by ICANN and the Community Priority Evaluation Panels in performing the evaluation; and

23) whether any of the information provided by the Requester to ICANN in relation to potential spurious or unsubstantiated claims made by certain organizations have been taken into account, and – in such event – the reasons for not taking into account such information;

24) in particular, Requester would like to know whether the Community Priority Panel has considered the letter of the Q Center of April 1st, 2015 in which the latter requested the opposition letter of the Q Center to be voided

Response

The standards governing CPE are set forth in Module 4.2 of the New gTLD Applicant Guidebook (Guidebook), and are available at <http://newgtlds.icann.org/en/applicants/agb>. CPE will occur only if a community-based applicant in contention selects CPE, and after all applications in the contention set have completed all previous stages of the gTLD evaluation process. (*See* Guidebook, § 4.2.) CPEs are performed by independent CPE panels that are coordinated by the Economist Intelligence Unit (EIU), an independent, third-party provider, which contracts with ICANN to perform that coordination role. (*See id.*; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.) The CPE panel's role is to determine whether a community-based application meets the community priority criteria. (*See id.*) The Guidebook, the CPE Panel Process Document, and the CPE Guidelines (all of which can be accessed at <http://newgtlds.icann.org/en/applicants/cpe>) set forth the guidelines, procedures, standards and criteria applied to CPEs, and make clear that the EIU and its designated panelists are the only persons or entities involved in the performance of CPEs.

As part of the evaluation process, the CPE panels review and score a community application submitted to CPE against the following four criteria: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement. An application must score at least 14 out of a possible 16 points to prevail in CPE; a high bar because awarding priority eliminates all non-community applications in the contention set as well as any other non-prevailing community applications. (*See* Guidebook at § 4.2; *see also*, CPE webpage at <http://newgtlds.icann.org/en/applicants/cpe>.)

To provide transparency of the CPE process, ICANN has established a CPE webpage on the new gTLD microsite, at <http://newgtlds.icann.org/en/applicants/cpe>, which provides detailed information about CPEs. In particular, the following information can be accessed through the CPE webpage:

- CPE results, including information regarding the Application ID, string, contention set number, applicant name, CPE invitation date, whether the

applicant elected to participate in CPE, and the CPE status.
(<http://newgtlds.icann.org/en/applicants/cpe#invitations>).

- CPE Panel Process Document
(<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).
- EIU Contract and Statement of Work Information (SOW)
(<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>).
- CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).
- Draft CPE Guidelines
(<http://newgtlds.icann.org/en/applicants/cpe/guidelines-16aug13-en.pdf>).
- Community Feedback on Draft CPE Guidelines
(<http://newgtlds.icann.org/en/applicants/cpe#invitations>).
- Updated CPE Frequently Asked Questions
(<http://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>).
- CPE Processing Timeline
(<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>).

Preliminary Statement regarding Request No. 20151022-1

As a preliminary matter, many of the items in the Request do not specify whether the request relates to the first CPE of the Application that was performed in 2014 or the re-evaluation that was performed in 2015. Because you have previously filed a similar DIDP Request on 22 October 2014 seeking documents related to the first CPE, for purposes of this Response, we will interpret the Request to relate to the second CPE, unless otherwise specified in the request.

Item No. 1

Item No. 1 seeks “policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process.” This request was previously made and responded to in Request No. 20141022-2. (See Response to Request No. 20141022-2, Item No. 3, *available at* <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.) As noted therein, ICANN has published documentary information responsive to this item on the CPE webpage, including, the CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>), the CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>), Module 4.2 of the Guidebook ([5](http://newgtlds.icann.org/en/applicants/agb/string-</p></div><div data-bbox=)

[contention-procedures-04jun12-en.pdf](#)), and CPE Processing Timeline (<http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>). Additionally, since ICANN responded to Request No. 20141022-2, it has published the EIU Contract and SOW (<http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>). Additionally, in response to this DIDP Request, ICANN will provide the email notifications to the EIU with instructions to begin the CPE of dotgay LLC's application for the .GAY TLD that was provided to the EIU in 2014 relating to dotgay's application and the email notification to begin re-evaluation in 2015 that was initiated pursuant to the Board Governance Committee's Determination on Reconsideration Request 14-44.

Item Nos. 2, 3, 4

Item Nos. 2, 3 and 4 seek extensive, detailed information regarding CPE Panels, the materials reviewed, the analysis conducted by the CPE Panel during the first CPE conducted in 2014 as well as the re-evaluation in 2015, as well any internal reports, notes, or meeting minutes by ICANN, the CPE Panels and "other individuals or organizations involved in the CPE in relation to the Application." (Request at pg. 2.) To help assure independence of the process, 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 above and in the CPE Panel Process Document, is entirely within the work of the EIU's team. As stated in the CPE Process Document, "[t]he Panel Firm's Project Manager is notified by ICANN that an application is ready for CPE, and the application ID and public comment delivered to the EIU. The EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website." (See CPE Panel Process Document, Pg. 2, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.) Thus, except for the notices of commencement of CPE and the public comments submitted on the Application Comments page relating to the, ICANN is not responsible for gathering the materials to be considered by the CPE Panel. As such, ICANN does not have, nor does it collect or maintain, the work papers of the individual CPE panels that may contain the information sought through these items. The end result of the CPE Panel's analysis is the CPE Report, which explains the CPE Panel's determination and scoring, and is available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> and <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

With respect to your request in Item No. 2 for "internal reports, notes, (weekly) meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application", this request is vague. It is unclear whether you are seeking internal reports, notes, and weekly meeting minutes relating to the CPEs of the Application or all reports, notes, meeting minutes about the Application in general. To the extent that you are requesting that later, the request is subject to the following DIDP Defined Condition of Nondisclosure:

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; and (iii) complying with which is not feasible.
- 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 exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.
- Information subject to the attorney client privilege, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

To the extent that you are requesting these document as it relates to the CPEs, ICANN does not maintain internal notes and meeting minutes in the regular course of business and therefore, ICANN has no documents responsive to this request. As for your request for internal ICANN reports, notes, or meeting minutes relating to the CPEs of the Application, such documents are subject to the following DIDP Defined Condition of Nondisclosure:

- 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 subject to the attorney client privilege, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

With respect to Item No. 3, seeking detailed information on the CPE Panels, to help assure independence of the process and evaluation of CPEs, ICANN does not maintain any information on the identity of the CPE Panelists. ICANN (either Board or staff) is not involved with the selection of a CPE panel's individual evaluators who perform the

scoring in each CPE process, nor is ICANN provided with information about who the evaluators on any individual panel may be. ICANN therefore does not have any documentation responsive to this item. The coordination of a CPE panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team. (See CPE Process Documents, Pgs. 2 and 4, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.) The CPE Panel Process Document provides a detailed description of the EIU's experience level, qualifications, EIU evaluators and core team. Specifically, the CPE Panel Process Document states:

The Economist Intelligence Unit (EIU) was selected as a Panel Firm for the gTLD evaluation process. The EIU is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 500 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. Consistency of approach in scoring applications is of particular importance. In this regard, the Economist Intelligence Unit has more than six decades of experience building evaluative frameworks and benchmarking models for its clients, including governments, corporations, academic institutions and NGOs. Applying scoring systems to complex questions is a core competence.

EIU evaluators and core team

The Community Priority Evaluation panel comprises a core team, in addition to several independent 1 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.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators, including the core team, have ensured that no conflicts of interest exist.
- All EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures.
- EIU evaluators are highly qualified, they speak several languages and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.
- Language skills and knowledge of specific regions are also considered in the selection of evaluators and the assignment of specific applications.

(CPE Panel Process Document, Pgs. 1-2,
<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.)

Item Nos. 5 through 24

Item Nos. 5 through 24 seek the disclosure of information related to the CPE Panel’s evaluation of criteria, scoring decisions, or underlying analyses. Specifically, Item Nos. 5 through 9 request information related to the Panel’s consideration of the “nexus” criterion. Item Nos. 10 through 17 request information related to the Panel’s consideration of the “community endorsement” criterion. Item Nos. 17 through 24 request information related to the Panel’s consideration of the “opposition” criterion.

As a preliminary matter, the majority of the requests seek information relating to the CPE Panel’s evaluation. It is not clear from these items what documents are being requested, if any. The DIDP is intended to ensure that information contained in documents concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control, is made available to the public unless there are compelling grounds for maintaining confidentiality. As these items do not appear to request documents, as written they are not appropriate under the DIDP. Should the Requester wish to amend these items to clarify what documents they are seeking, ICANN will endeavor to respond to such requests.

Notwithstanding the foregoing, to the extent that the Requester is seeking documentary information related to the Panel’s evaluation of the CPE criteria, scoring decisions, or underlying analyses, as noted above, 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 EIU is responsible for gathering the application materials and other documentation, including letter(s) of support and relevant correspondence, from the public ICANN website, as well as its

analysis of said materials (See CPE Panel Process Document, Pg. 2, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.) The end result of the CPE Panel's analysis is the CPE Report, which explains the CPE Panel's determination and scoring, and is available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>. Thus, with the exception of the CPE Report, which has been published, ICANN does not have documents that contain the requested information.

The CPE criteria are set forth in Module 4.2.3 of the Guidebook, including the scoring process. (See <http://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>.) The CPE Guidelines provide further clarity around the CPE process and scoring principles outlined in the Guidebook. (See <http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>.) Thus, for those items seeking information regarding the evaluation criteria and scoring applied by the Panel (Item Nos. 8, 11, 12, 13, 15, 16, 17, 21, and 22), the responsive information can be found in the Module 4.2.3 of the Guidebook (<http://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>), the CPE Guidelines (<http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>), and the CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

With respect to those items seeking information about which letters of endorsement and/or opposition were considered by the CPE Panel (Item Nos. 10, 18, 19, 20, 22, 23, and 24), letters in support of or in opposition to an application are publicly posted on the application webpage and ICANN's Correspondence webpages. In this instance, letters regarding dotgay LLC's application for .GAY are available at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>, <https://www.icann.org/resources/pages/correspondence-2012-09-24-en> and <http://newgtlds.icann.org/en/program-status/correspondence>. With respect to the EIU's actions taken to verify, or the EIU's reliance upon, such letters, in accordance with the CPE Panel Process Document the CPE Panel may review documents and communications, including letters of support or opposition, that are publicly available through a number of resources, including, but not limited to: (a) dotgay's application for .GAY available at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>; (b) the Correspondence webpages available at <https://www.icann.org/resources/pages/correspondence-2012-09-24-en> and <http://newgtlds.icann.org/en/program-status/correspondence>; (c) the Applicant Comment Forum available at <https://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments>; (d) the Objection Determinations webpage available at <http://newgtlds.icann.org/en/program-status/odr/determination>; (e) information related to dot gay's Reconsideration Request 14-44 available at <https://www.icann.org/resources/pages/14-44-2014-10-22-en>. (See CPE Panel Process Document at Pg. 2, <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.) As further noted in the CPE Panel Process Document, the EIU reviews ICANN's public correspondence page on a regular basis for recently received

correspondence to assess whether it is relevant to an ongoing evaluation. If it is relevant, the EIU provides the public correspondence to the evaluators assigned to the evaluation of a particular application. (*See id.* at Pg. 5.) ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses, as such ICANN does. Thus, with the exception of the CPE Report, which has been published, ICANN does not have documents that contain the requested information.

Item No. 14 asks “why CPE Panel has come to a different assessment in relation to the standing of the ILGA expressed by the expert Determination provided by the ICDR.” As noted above this request seeks information, rather than documents, and is not appropriate for the DIDP. Moreover, the Expert Determination provided by the ICDR to which the Requester references relates to a Community Objection filed by Metroplex Republicans of Dallas against dotgay LLC. (*See* <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1713-23699-en.pdf>.) The criteria for Community Objections are set forth in Module 3.5.4, and are not the same standards as CPE.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see <http://www.icann.org/en/about/transparency/didp>. ICANN makes every effort to be as responsive as possible to the entirety of the Request. As part of its accountability and transparency commitments, ICANN continually strives to provide as much information to the community as is reasonable. We encourage you to sign up for an account at MyICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN's website that are of interest because, as we continue to enhance our reporting mechanisms, reports will be posted for public access.

We hope this information is helpful. If you have any further inquiries, please forward them to didp@icann.org.

Attachment 1

Subject: Application: 1-1713-23699 ready to begin CPE
Date: Monday, May 12, 2014 at 10:51:29 AM Pacific Daylight Time
From: Christopher Bare
To: EIU Designated Confidential Info
CC: Russ Weinstein

Hi EIU Designated Confidential Information

Just wanted to inform you that another application is ready to begin CPE.

Application ID: 1-1713-23699
String: GAY
Applicant: dotgay llc
CPE invite date: 23 April 2014

I have pulled the application comments for this application and placed them in the shared drive under the EIU folder ([//dfs1-lax.ds.icann.org/External-New-gTLD-Prgm/EIU/CPE Application Comment/1-1713-23699_Application_Comment_12MAY14.csv](https://dfs1-lax.ds.icann.org/External-New-gTLD-Prgm/EIU/CPE%20Application%20Comment/1-1713-23699_Application_Comment_12MAY14.csv)).

Note: there are several comments in Arabic, I have forwarded these to our translations team and will get them to you as soon as possible.

There were also several updated letters of support posted to the ICANN correspondence page last week (<http://newgtlds.icann.org/en/program-status/correspondence>). The application detail page also has the original letters submitted with the application (<https://gtldresult.icann.org/applicationstatus/applicationdetails/444>).

Please let me know if any of these need translated.

The New gTLD microsite will be updated to show the application as CPE in progress today or tomorrow.

Thanks
Chris

Chris Bare?
GDD Operations Manager

Email: Christopher.Bare@ICANN.org

Confidential Contact Information

ICANN?
12025 Waterfront Drive, Suite 300?
Playa Vista, CA 90094-2536



Attachment 2

Subject: RE: .GAY Reconsideration

Date: Tuesday, February 10, 2015 at 3:41:34 PM Pacific Standard Time

From: Jared Erwin

To: EIU Designated Confidential Information

CC: Russ Weinstein, Christopher Bare, EIU Designated Confidential Information

EIU Designated Confidential Information

That is correct. There have been no new comments since 7/7/14, so any additional letters will have to come through correspondence. For sake of the process, I have included a spreadsheet of the comments in the external share drive, dated as of today.

I am still working on getting a response to your other question, but I just want to make sure it's clear that the Panel is free to begin its re-evaluation at this point, now that the comment window has closed. The CPE micro-site (<http://newgtlds.icann.org/en/applicants/cpe>) will be updated by tomorrow morning to show that re-evaluation is in progress.

Thank you and will get back to you with more soon,

Jared

From: EIU Designated Confidential Information

Sent: February 10, 2015 15:22

To: Jared Erwin

Cc: Russ Weinstein; Christopher Bare; EIU Designated Confidential Information

Subject: Re: .GAY Reconsideration

Thanks, Jared. Unless we get any more from you, then, I'll assume there are no new comments to consider. Same will of course be the case for attachments which have not changed since the initial application. In that case, the only channel for additional potentially relevant letters of support or opposition will be the correspondence.

Thanks,

EIU Designated Confidential Information

On Tue, Feb 10, 2015 at 10:49 AM, Jared Erwin <jared.erwin@icann.org> wrote:

EIU Designated Confidential Information

To your second question: yesterday was the last day for comments/correspondence. Today I was planning on sending you the latest comments. I don't think there are any new ones, though.

As to your first question, I'll try and get an answer/clarification for you as soon as possible.

Thank you!

Jared

EIU Designated Confidential Information
From:
Sent: February 10, 2015 10:37
To: Jared Erwin; Russ Weinstein; Christopher Bare; EIU Designated Confidential
Subject: .GAY Reconsideration Information

Hi All,

I remembered as soon as we ended our call that I had a couple questions about this. First off, as per our discussion last week, we are considering dotGay LLC's reconsideration request as well as ICANN's response and any related materials (annexes, etc.) to be now "a part" of the application itself. Can you clarify exactly what that means? In other words, in several areas of dotGay's reconsideration request, they take issue with specific arguments that the CPE Panel made about certain issues - most of them in fact. As you know, ICANN did not rule favorably on any of their responses to the Panel's decisions (with the exception of the one about verification of letters), but nevertheless these arguments are now to be considered part of their application. The problem is that their arguments against the Panel's conclusions definitely verges on re-writing their initial application document. For example, information about Authenticating Partners, a key part of the Delineation section, is presented in a new light and in terms not used in the application document itself. How are our evaluators to consider such information that appears to be revised or differ to some extent from the application document?

Second, Jared, I believe today was the close of the 14-day comment window, is that correct? I just want to make sure we know when we have the last piece of incoming support/opposition materials to deal with.

Thanks.

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Attachment 3

Subject: RE: .GAY Reconsideration

Date: Wednesday, February 25, 2015 at 5:13:45 PM Pacific Standard Time

From: Jared Erwin

To: EIU Designated Confidential Information, Russ Weinstein, Christopher Bare, EIU Designated Confidential Information

EIU Designated Confidential Information

I have some feedback for you on this question. Sorry again for the long delay in responding.

- 1) Our intention was to impress upon the panel and evaluators that the reconsideration request materials should be used to *inform* the evaluation, but it should not be *part* of the application. The materials should merely be considered relevant, much in the same way that an objection determination may also be considered relevant and inform the panel's understanding of the community. Here the materials may also inform the panel on the "landscape" of the proposed TLD, community, and the applicant.
- 2) Regarding the fact that this then may create conflicting information, ICANN is of the opinion that this might require a CQ.

Hopefully this is helpful. Let me know if you have any other questions.

Best,
Jared

From: EIU Designated Confidential Information

Sent: February 10, 2015 10:37

To: Jared Erwin; Russ Weinstein; Christopher Bare; EIU Designated Confidential Information

Subject: .GAY Reconsideration

Hi All,

I remembered as soon as we ended our call that I had a couple questions about this. First off, as per our discussion last week, we are considering dotGay LLC's reconsideration request as well as ICANN's response and any related materials (annexes, etc.) to be now "a part" of the application itself. Can you clarify exactly what that means? In other words, in several areas of dotGay's reconsideration request, they take issue with specific arguments that the CPE Panel made about certain issues - most of them in fact. As you know, ICANN did not rule favorably on any of their responses to the Panel's decisions (with the exception of the one about verification of letters), but nevertheless these arguments are now to be considered part of their application. The problem is that their arguments against the Panel's conclusions definitely verges on re-writing their initial application document. For example, information about Authenticating Partners, a key part of the Delineation section, is presented in a new light and in terms not used in the application document itself. How are our evaluators to consider such information that appears to be revised or differ to some extent from the application document?

Second, Jared, I believe today was the close of the 14-day comment window, is that correct? I just want to make sure we know when we have the last piece of incoming support/opposition materials to deal with.

Thanks
EIU Designated Confidential Information

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Exhibit 4

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 1st, 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 1st, 2016.

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

February 2nd, 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”.^{1 2}

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.”³ (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.)”⁴ (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

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

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

³ CPE Panel Process Document, Page 2.

⁴ 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.⁵

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;”^{6 7}*
- *“The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements”;*⁸
- *“the CPE Materials are entirely consistent with the Guidebook”.*⁹

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.”¹⁰*

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

⁵ Second BGC Determination, page 11.

⁶ 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).”

⁷ Second BGC Determination, page 12.

⁸ *Ibid.*

⁹ Second BGC Determination, footnote 34.

¹⁰ 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.¹¹

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

¹¹ 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, sweeping flourish extending to the right.

February 17, 2016

Bart Lieben

Date

Attorney-at-Law

Exhibit 5

ARIF HYDER ALI

Contact Information Redacted
Contact Information Redacted Direct
Fax

November 15, 2016

VIA E-MAIL

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Council of Europe Report DGI (2016)17 - .GAY TLD

Dear Chairman Crocker and Board of Directors,

dotgay LLC (“**dotgay**”) writes to request that the ICANN Board (“**Board**”) add to the materials it is reviewing in connection with dotgay’s application the Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (“**CoE Report**”).¹ The CoE is Europe’s leading human rights organization, with 47 member states (28 of which are also members of the European Union),² all of which are members of the European Convention on Human Rights. The CoE has observer status within ICANN’s Governmental Advisory Committee (GAC).

The CoE Report, standing alone, and certainly when taken together with the following materials, makes it abundantly clear that the EIU erred in its evaluation of dotgay’s application and that the Board is obligated to grant community priority status to dotgay’s application for the .GAY TLD:

¹ See Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

² See <http://www.coe.int/en/>.

- (i) the former ICANN Ombudsman Chris LaHatte's Report;³
- (ii) the ICC Expert's Determination regarding .LGBT;⁴
- (iii) the Expert Opinion of Professor William N. Eskridge of Yale Law School;⁵
- (iv) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts;⁶ and
- (v) the Dot Registry IRP Decision.⁷

The CoE Report identifies a long list of human rights principles, which the Board cannot avoid giving effect in evaluating dotgay's application. The Report amply supports the conclusions reached by the ICANN Ombudsman and the two independent expert reports submitted to ICANN on 13 September and 17 October 2016.

³ Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html> (determining that “[t]he board should grant the community application status to the applicant . . . [and] comply [] with its own policies and well established human rights principles”).

⁴ *The International Lesbian Gay Bisexual Trans and Intersex Association v. Afiliads Limited*, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf> (finding that the .GAY application “is designed to serve the gay community”).

⁵ Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf> (explaining how Prof. Eskridge shows that “the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement”).

⁶ Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf> (explaining how Prof. Badgett demonstrates that “withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community”).

⁷ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> (holding that the Board Governance Committee (“BGC”) “must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination”).

The CoE Report Applies Human Rights Principles to .GAY

The CoE Report affirms that human rights principles apply to ICANN.⁸ The Report's discussion of human rights and community applications shows that the Board should independently approve dotgay's .GAY application. To assist the Board with its analysis of the CoE Report, we attach particularly relevant excerpts of it, the import of which should be self-evident:

ICANN Must Protect Public Interest Values through Community TLDs

- Community TLDs should protect “vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.”⁹
- Community TLDs should protect “[p]luralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.”¹⁰

⁸ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

⁹ *Id.*, p. 34.

¹⁰ *Id.* (emphasis added).

ICANN's Commitment to Human Rights Requires that It Support Community gTLDs

- The Right to Freedom of Expression: “For Internet users at large, domain names represent an important way to find and access information on the Internet. . . . A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. *A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.* Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.”¹¹
- The Right to Freedom of Assembly and Association: “Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests. As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.”¹²

ICANN's gTLD Program Improperly Fails to Conform with Human Rights Principles

- The Right to Procedural Due Process: “ICANN's gTLD program, including community-based applications, needs to be based on procedural due process. . . . Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus

¹¹ *Id.*, p. 19 (emphasis added).

¹² *Id.*, p. 22.

access to justice, which is generally considered a human right or at least a right at the constitutional level.”¹³

- The Right to Non-Discrimination: “The general principle of equality and non-discrimination is a fundamental element of international human rights law. . . . ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority.”¹⁴

Through its discussion of these human rights, the CoE Report confirms the ICANN Ombudsman’s determination that ICANN has a commitment to human rights and that dotgay represents a community that “is real, does need protection and should be supported” by awarding dotgay community priority status.¹⁵ It further supports the Expert Opinion of Prof. M.V. Lee Badgett, which states that ICANN should provide a safe space on the Internet for the gay community to engage in economic activity and social change.¹⁶

The BGC and the EIU failed to uphold these basic human rights when it considered dotgay’s application for the .GAY TLD. In light of the CoE Report’s recent findings, the ICANN Ombudsman’s determination, the expert opinions submitted to ICANN, and the clearly incorrect determination by the EIU, the Board should correct this error by individually considering the .GAY application in accordance with Article 5.1 of the AGB and awarding the .GAY TLD to dotgay.

The CoE Report Further Recognizes Problems with the EIU and the CPE Process

In addition to human rights considerations, the CoE Report confirms the significant problems with the EIU’s CPE of the .GAY gTLD, corroborating the Expert Opinion of

¹³ *Id.*, p. 25.

¹⁴ *Id.*, p. 26.

¹⁵ Ombudsman Report, <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

¹⁶ *See* Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

Prof. Eskridge of Yale Law School.¹⁷ The EIU clearly made fundamental errors of inconsistency and discrimination in following and applying its guidelines. The CoE Report criticizes the EIU for these inconsistencies, specifically highlighting the following issues with the EIU's consideration of .GAY:

The EIU's Inconsistent Acts during the CPE Process Raises Issues of Human Rights Violations, Unfairness, and Discrimination¹⁸

- “*First*, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. . . . The Guidebook says utmost care has been taken to avoid any ‘double-counting’. . . . However, the EIU appears to double count ‘awareness and recognition of the community amongst its member’ twice.”¹⁹
- “*Second*, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others. The EIU appears to have been inconsistent in its interpretation of ‘Nexus’ Under Criterion 2 of the CPE process. *The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.* There is no evidence provided of the relative small and ‘more than small’ segments of the identified communities

¹⁷ See Letter to ICANN Board from A. Ali enclosing the Eskridge Report (13 Sept. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

¹⁸ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), pp. 9, 45, 49, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹⁹ *Id.*, p. 49 (emphasis added).

which justified giving a score of 0 to one applicant and 2 to another.”²⁰

- “The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a *majority* of the community. . . . ***By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.***”²¹
- “***Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.***”²²
- “***Third***, the EIU changed its own process as it went along.”²³
- “***Fourth***, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. ***An example***

²⁰ *Id.*, pp. 49-50 (emphasis added).

²¹ *Id.*, p. 51 (emphasis added).

²² *Id.* (emphasis added).

²³ *Id.* (emphasis added).

that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.”²⁴

- *Fifth*, “[t]here are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. . . . It would seem that the EIU prefers to award full points on 4A[, the Support prong of ‘Community Endorsement,’] for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.”²⁵

ICANN Improperly Accepts EIU Determinations without Question and without Possibility of Appeal

- “The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) ‘failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its

²⁴ *Id.*, pp. 51-52 (emphasis added).

²⁵ *Id.*, p. 57.

transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).’ The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws.”²⁶

- “ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN. This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a ‘decision’ which it will not question. Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.”²⁷

The CPE Process does not Conform with ICANN’s Core Principles, including Human Rights Principles

- “*In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.* Here, he took to task the fact that the BGC has ‘a very narrow view of its own jurisdiction in considering reconsideration requests.’ He points out that ‘it has always been open to ICANN to reject an EIU

²⁶ *Id.*, p. 60 (quoting *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016)).

²⁷ *Id.*, p. 64.

recommendation, especially when public interest considerations are involved.’ *As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it ‘has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency’. We endorse his view and hope that our report will strengthen the argument behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.*”²⁸

- “As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate. However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN’s mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in.”²⁹

As evidenced by these inconsistencies, the EIU clearly failed to “respect[] the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB.”³⁰ The BGC’s own failure to exercise its independent judgment when evaluating the EIU’s CPE in light of these principles, which it must do according to the Dot Registry Declaration, “must be corrected.”³¹

²⁸ *Id.*, pp. 69-70 (quoting Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>) (emphasis added).

²⁹ *Id.*, p. 31.

³⁰ *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration (29 July 2016), p. 34.

³¹ Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 Nov. 2016), p. 60.

ICANN Must Proceed to Contracting with dotgay for .GAY

In light of the above considerations, we believe that there are more than sufficient grounds for the Board to act under Article 5.1 of the AGB and award the .GAY TLD to dotgay. The Board should grant dotgay's community priority application without any further delay and proceed to enter into a registry agreement with dotgay, which remains dedicated and enthusiastic about operating the .GAY registry.

Sincerely,



Arif Hyder Ali
Partner

Exhibit 6

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review
Concerning ICANN Board Action re
Determination of the Board Governance Committee
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

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I. INTRODUCTION

A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically

serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of ^{EIU Contact Information Redacted}
EIU Contact Information Redacted of the EIU
(hereinafter ^{EIU Contact Information Redacted} Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. ^{EIU Contact Information Redacted} declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” ^{EIU Contact Information Redacted} Declaration, ¶ 3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12th 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

II. PROCEDURAL HISTORY

A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute

Resolution (“ICDR”), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC (“Dot Registry”) no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit (“EIU”) to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU’s responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry’s Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry’s applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel’s order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN’s possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel’s request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry’s Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel’s request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
 - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the “Board,” and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties’ stipulations that the term “local law” as used in Article 4 of ICANN’s Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation’s Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, “[t]he Panel designate[d] the place of these proceedings as New York, New York.”

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of ^{EIU Contact Information Redacted} of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

III. SUBMISSIONS OF THE PARTIES

A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." *See, e.g.*, CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.

53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13).

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶21, at 8, and ¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that "the 'rules' at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook." Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that "the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" and its request "that candidates include a 'statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel’s question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to “respect the principles of fairness, transparency and . . . non-discrimination.” ICANN’s Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California’s business judgment rule applies to ICANN and “requires deference to actions of a corporate board of directors so long as the board acted ‘upon reasonable investigation, in good faith and with regard for the best interests of’ the corporation, and ‘exercised discretion clearly within the scope of its authority.’” Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 265 (1999).

IV. DECLARATION OF PANEL

A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN’s Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are “relevant principles of international law and applicable international conventions” that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: ***

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”

74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a 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." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN _DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there

is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

2) The Relevant Provisions of the Articles and Bylaws and Their Application

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. Articles of Incorporation, Art. 4

In performing its mission, the following core values should guide the decisions and actions of ICANN:

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website.”
Bylaws, Art. IV.2.14 provides that “The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

Requests for [] independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.

118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. Emphasis added.

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.” Bylaws, Art. IV, §2.11. The BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 *** I
3 will tell you that the Board Governance
4 Committee is aided by the Office of General
5 Counsel, which also consults with Board
6 staff.

7 The Office of General Counsel does
8 submit recommendations to the Board
9 Governance Committee, and of course, those
10 documents are privileged. For that reason,
11 we did not turn them over. We don't rely on
12 them in issuing the Board Governance
13 Committee reports, we don't cite them, and we
14 don't produce them because they are prepared
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee
14 had the EIU, the three EIU reports, and it
15 had the lengthy challenge submitted by Dot
16 Registry regarding those reports. As I've
17 said before, the Board Governance Committee
18 does not go out and obtain separate
19 substantive advice, because the nature of its
20 review is not a substantive review.
21 So I don't know what else it would
22 need, but my understanding is that apart from
23 privileged communication, what it had before
24 it was the materials that I've just
25 referenced, EIU's reports and Dot Registry's
1 reconsideration requests, which had attached
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that
4 request and the CPE panel report, would it be
5 correct to say that the diligence and care
6 the Board Governance Committee took in having
7 a reasonable amount of facts in front of it,
8 were those two submissions an [sic] inquiry of
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did
12 the Board Governance Committee go about
13 exercising its independent judgment in taking
14 the decisions it took on the reconsideration
15 requests? Again, with as much specificity as
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I
18 obviously have to refer you to is the report,
19 the 23-page report of the Board Governance
20 Committee. I, I don't have other materials
21 that I have tendered to the panel to say that
22 the Board members exercised their independent
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by
25 point through the complaints that Dot
1 Registry asserted, evaluated each of those
2 points independently, and reached the
3 conclusions that they reached.
4 MR. DONAHEY: Were there drafts of
5 that 23-page report?
6 MR. LEVEE: Yes.
7 MR. DONAHEY: And were those
8 produced?
9 MR. LEVEE: They were not.
10 MR. DONAHEY: And was that because
11 they were privileged?
12 MR. LEVEE: Yes.
13 MR. KANTOR: Mr. LeVee, what exists
14 in the record before this panel to show that
15 the Board Governance Committee exercised its
16 judgment independent from that of ICANN's
17 staff, including office [of] general counsel?
18 MR. LEVEE: The record is simply
19 that the six voting members of the Board
20 Governance Committee authorized this
21 particular report after discussing the
22 report. I cannot give you a length of time
23 that it was discussed. I don't have a record
24 of that, but I can tell you, as reflected in
25 many other situations where similar questions
1 have been asked, that the voting members of
2 the Board take these decisions seriously.
3 They are then reflected in minutes of the
4 Board Governance Committee which are
5 published on ICANN's website.
6 Candidly, I'm not sure what else I
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. *** I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.

D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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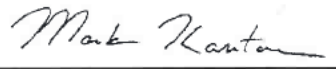
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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor".

Mark Kantor

M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2018

For the Panel Majority

Mark Kantor

A handwritten signature in dark ink, appearing to read "M. Scott Donahey", is written over a horizontal line.

M. Scott Donahey, Chair

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”), Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. **First**, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The 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 (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”¹ because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*²
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

¹ AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘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.”).

² ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.³

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

*The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.*⁴

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,⁵ but ICANN clarified that staff conduct is not reviewable in an IRP,⁶ and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.⁷ The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”⁸ The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.⁹ Despite the Declaration’s statement to the contrary,¹⁰ I cannot

³ I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

⁴ Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

⁵ *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

⁶ *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

⁷ *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

⁸ Declaration ¶ 152. (Emphasis added.)

⁹ *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

¹⁰ *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"¹¹ the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."¹² This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

These core values are deliberately expressed in very general terms, so that

¹¹ Declaration ¶ 151.

¹² See Declaration ¶¶ 149–50.

*they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, **situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.** Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. (Emphasis added.)*

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.¹³ Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements¹⁴ and a 96-page expert report to reargue the merits of its CPE Applications,¹⁵ none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”¹⁶
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”¹⁷
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”¹⁸
- Dot Registry introduced a fact witness to testify at the hearing¹⁹ in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

¹³ See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

¹⁴ See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

¹⁵ See Expert Report of Michael A. Flynn dated 13 July 2015.

¹⁶ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

¹⁷ See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

¹⁸ See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

¹⁹ See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry's procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration's analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to "skip to the front of the line" of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry "in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs."²⁰ In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

* * *

13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry's Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN's Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry's Reconsideration Requests.²¹ Therefore, I believe that the Declaration should not have addressed the BGC's standard of review. As to the four violations, I have grouped them by subject matter ("Discrimination," "Research," "Independent Judgment," and "Privilege") and address each in turn.

Discrimination

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry's CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry's applications and those submitted by other applicants.²² A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually "complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants."²³ A review of Dot Registry's three Reconsideration Requests

²⁰ Declaration ¶ 20.

²¹ See Dot Registry's Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry's Additional Written Submission dated 13 July 2015, ¶ 42; Claimant's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20-21.

²² See Declaration ¶¶ 98-100, 103-04, 122.

²³ Declaration ¶¶ 47-48, 124.

filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*²⁴

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),²⁵ and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,²⁶ but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP²⁷ — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

²⁴ See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

²⁵ See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

²⁶ See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

²⁷ See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.²⁸ The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

*Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.*²⁹ (Emphasis added.)

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”³⁰ The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”³¹ My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”³² The BGC disposed of Dot Registry’s argument as follows:

*The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.*³³

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

²⁸ Declaration ¶¶ 94–99, 106, 111, 115–22.

²⁹ Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

³⁰ Declaration ¶¶ 96–99.

³¹ Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

³² Declaration ¶ 95.

³³ Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”³⁴

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”³⁵ In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”

[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).³⁶

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

³⁴ Declaration ¶ 122.

³⁵ ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

³⁶ See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”³⁷ but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

Independent Judgment

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”³⁸ It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”³⁹ Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.⁴⁰ The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.⁴¹ In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”⁴² Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.⁴³

³⁷ See Declaration ¶¶ 117–21.

³⁸ Declaration ¶ 126.

³⁹ Declaration ¶¶ 127, 147.

⁴⁰ Declaration ¶¶ 126, 140, 147.

⁴¹ Declaration ¶¶ 127, 147.

⁴² Declaration ¶ 141.

⁴³ Declaration ¶¶ 126, 147, 150.

25. The Declaration⁴⁴ relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.

The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."⁴⁵
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.⁴⁶ ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)⁴⁷ that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.⁴⁸ The Panel, nonetheless, deems ICANN's position "simply not credible."⁴⁹ Credibility determinations have no place in this IRP, especially in relation to counsel.⁵⁰ The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

⁴⁴ See Declaration ¶¶ 128, 142, 149–50.

⁴⁵ Declaration ¶ 149.

⁴⁶ See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

⁴⁷ See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

⁴⁸ See Attestation of Elizabeth Le dated 17 June 2015.

⁴⁹ Declaration ¶ 151.

⁵⁰ Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”⁵¹ make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.⁵² Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*⁵³

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”⁵⁴ The Declaration summarily dismisses those

⁵¹ Declaration ¶ 128.

⁵² See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

⁵³ *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

⁵⁴ See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”⁵⁵ Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.

32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

Privilege

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

⁵⁵ Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.⁵⁶ It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.⁵⁷

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.⁵⁸ Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.⁵⁹ As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.⁶⁰ This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

⁵⁶ Declaration ¶¶ 133, 135-37, 143, 148-50.

⁵⁷ Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

⁵⁸ *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

⁵⁹ *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

⁶⁰ *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").

Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?

MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar

liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.

*JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.*⁶¹

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.⁶² The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.⁶³ Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.⁶⁴ In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

⁶¹ Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

⁶² *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

⁶³ ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

⁶⁴ ICANN Bylaws, Article IV.3.21.

29 July 2016

Charles N. Brower

Charles N. Brower

Exhibit 7



New gTLD Program
Community Priority Evaluation Report
Report Date: 6 October 2014

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay llc

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. 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.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	10 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16
Minimum Required Total Score to Pass <u>14</u>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> 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.</p>	

The community defined in the application (“GAY¹”) is drawn from:

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA². The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The application further elaborates the requirements of the above individuals to demonstrate membership in the community:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations. Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights.

This community definition shows a clear and straightforward membership and is therefore well defined. Membership is “determined through formal membership with any of dotgay LLC’s [the applicant’s] Authentication Partners (AP) from the community”, a transparent and verifiable membership structure that adequately meets the evaluation criteria of the AGB.

In addition, the community as defined in the application has awareness and recognition among its members. The application states:

As the foundation of the community, membership organizations are the single most visible entry point to the Gay Community around the world. They serve as “hubs” and are recognized as definitive qualifiers for those interested in affirming their membership in the community. The organizations range from serving health, social and economic needs to those more educational and political in nature; with each having due process around affirming status in the community. In keeping with standards currently acknowledged and used within the community, dotgay LLC will utilize membership organizations as APs to confirm eligibility. APs must meet and maintain the following requirements for approval by dotgay LLC:

1. Have an active and reputable presence in the Gay Community
2. Have a mission statement that incorporates a focus specific to the Gay Community
3. Have an established policy that affirms community status for member enrolment
4. Have a secure online member login area that requires a username & password, or other secure control mechanism.

¹ In this report the community as defined by the application is referred to as the “GAY community” instead of the “gay community” or the “LGBTQIA community”. The “GAY community” is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD. “Gay community” or “LGBTQIA community” are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant’s defined community. This use is consistent with the references to these groups in the application.

² The Applicant notes with regard to its use of the term LGBTQIA that “LGBTQIA – Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Ally is the latest term used to indicate the inclusive regard for the extent of the Gay Community.” This report uses the term similarly.

Based on the Panel's research and materials provided in the application, there is sufficient evidence that the members as defined in the application would cohere as required for a clearly delineated community. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community", and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic scope and the community as defined is a global one. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA's website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization representative of the community defined by the applicant, as referred to above, has records of activity beginning before 2007. LGBTQIA individuals have been active outside of organizations as well, but the community as defined is comprised of members of [AP] organizations.

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. While the application does cite global estimates of the self-identified gay/LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex, and ally) population (1.2% of world population), it does not rely on such figures to determine the size of its community. This is because the applicant requires that any such LGBTQIA individual also be a member of an AP organization in order to qualify for membership of the proposed community. According to the application:

Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members.

The size of the delineated community is therefore still considerable, despite the applicant's requirement that the proposed community members must be members of an AP.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a "presence in the Gay Community"³, and also "incorporate a focus specific to the Gay Community." By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the .GAY community⁴ are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of LGBTQIA individuals has accelerated since then, especially in recent decades and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater rates of visibility of LGBTQIA individuals, recognition of LGBTQIA rights and community organization, both in the US and other western nations as well as elsewhere.⁵ While socio-political obstacles to community

³ "Gay community" or "LGBTQIA community" are used as vernacular terms to refer to LGBTQIA individuals and organizations, whether or not explicitly included in the applicant's defined community.

⁴ The ".GAY community" is understood as the set of individuals and associated organizations defined by the applicant as the community it seeks to represent under the new gTLD.

⁵ Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

organization remain in some parts of the world,⁶ the overall historical trend of LGBTQIA rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members. This is because members must be registered with at least one Authenticating Partner (AP). The AP must have both a “presence in the Gay Community”, and also “incorporate a focus specific to the Gay Community.” By registering as a verifiable member with an AP with these characteristics, individuals would have both an awareness and recognition of their participation and membership in the defined community.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community

0/4 Point(s)

2-A Nexus

0/3 Point(s)

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community. To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.”

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. As cited above:

The membership criterion to join the Gay Community is the process of ‘coming out’. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).

The application, therefore, acknowledges that “the world at large” understands the Gay community to be an entity substantially different than the community the application defines. That is, the general population understands the “Gay community” to be both those individuals who have “come out” as well as those who are privately aware of their non-heterosexual sexual orientation. Similarly, the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part. That is, the community as defined by the applicant refers only to the sub-set of individuals who have registered with specific organizations, the Authenticating Partners.

As the application itself also indicates, the group of self-identified gay individuals globally is estimated to be 1.2% of the world population (more than 70 million), while the application states that the size of the community it has defined, based on membership with APs, is 7 million. This difference is substantial and is indicative of the degree to which the applied-for string substantially over-reaches beyond the community defined by the application.

⁶ <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

Moreover, while the applied-for string refers to many individuals not included in the application’s definition of membership (i.e., it “substantially over-reaches” based on AGB criteria), the string also fails to identify certain members that the applicant has included in its definition of the .GAY community. Included in the application’s community definition are transgender and intersex individuals as well as “allies” (understood as heterosexual individuals supportive of the missions of the organizations that comprise the defined community)⁷. However, “gay” does not identify these individuals. Transgender people may identify as straight or gay, since gender identity and sexual orientation are not necessarily linked.⁸ Likewise, intersex individuals are defined by having been born with atypical sexual reproductive anatomy⁹; such individuals are not necessarily “gay”¹⁰. Finally, allies, given the assumption that they are heterosexual supporters of LGBTQIA issues, are not identified by “gay” at all. Such individuals may be an active part of the .GAY community, even if they are heterosexual, but “gay” nevertheless does not describe these individuals as required for Nexus by the AGB. As such, there are significant subsets of the defined community that are not identified by the string “.GAY”.

The Community Priority Evaluation panel has determined that the applied-for string does not match nor does it identify without substantially over-reaching the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness **0/1 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application,*” according to the AGB (emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above,). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

Criterion #3: Registration Policies **4/4 Point(s)**

3-A Eligibility **1/1 Point(s)**

The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that:

.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.

The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Eligibility.

⁷ This prevailing understanding of “ally” is supported by GLAAD and others: <http://www.glaad.org/resources/ally>

⁸ <http://www.glaad.org/reference/transgender>

⁹ http://www.isna.org/faq/what_is_intersex

¹⁰ “Gay” is defined by the Oxford dictionaries as “A homosexual, especially a man.” The applicant defines the community as “individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society.”

3-B Name Selection	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .Gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Name Selection.</p>	
3-C Content and Use	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”</p> <p>The Community Priority Evaluation panel has determined that the application satisfied the condition to fulfill the requirements for Content and Use.</p>	
3-D Enforcement	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access. The Community Priority Evaluation panel has determined that the application satisfies both the conditions to fulfill the requirements for Enforcement.</p>	

Criterion #4: Community Endorsement	<i>2/4 Point(s)</i>
4-A Support	<i>1/2 Point(s)</i>
<p>The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.</p>	

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). (While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent it. 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. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

Exhibit 8



New gTLD Program
Community Priority Evaluation Report
Report Date: 8 October 2015

Application ID:	1-1713-23699
Applied-for String:	Gay
Applicant Name:	dotgay LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. 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.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	10 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	4	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	4	4
#4: Community Endorsement	2	4
Total	10	16
Minimum Required Total Score to Pass <u>14</u>		

Criterion #1: Community Establishment	4/4 Point(s)
1-A Delineation	2/2 Point(s)
<p>The Community Priority Evaluation panel has determined that the community as defined in the application met the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community defined in the application is clearly delineated, organized and pre-existing. The application received the maximum score of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> 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.</p> <p>In its application, dotgay LLC defines its community as follows:</p>	

...individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. The Gay Community includes individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships...

The membership criterion to join the Gay Community is the process of 'coming out'. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible...

Membership in the Gay Community is not restricted by any geographical boundaries and is united by a common interest in human rights. (Application, section 20(a))

The applicant relies on the "process of coming out" to delineate its members, who are individuals with non-normative sexual orientation or gender identities, as well as their allies¹. The process of "coming out" is by nature personal, and may vary from person to person. Some individuals within the proposed community may not come out publicly, reflecting real or feared persecution for doing so. Similarly, membership in a community organization may not be feasible for the same reason. Furthermore, organizations within the applicant's defined community recognize "coming out" as a defining characteristic of individuals within the defined community.² Many such organizations advocate on behalf of individuals even though they are not members, precisely because their coming out publicly may be illegal or otherwise harmful. Therefore, the Panel recognizes that the standard of "coming out" – whether publicly or privately – as homosexual, bisexual, transgender, queer, intersex, or ally is sufficiently clear and straightforward to meet the AGB's requirements.³

In addition, the community as defined in the application has awareness and recognition among its members. There is an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies. As cited by the applicant in supporting materials, for example, the American Psychological Association recognizes the process of coming out as a key part of entering the community.⁴ For many individuals, this awareness and recognition of community is made more explicit, such as by membership in organizations, participation in events, and advocacy for the rights of individuals with non-normative sexual orientations and gender identities. As the applicant states, organizations and individuals within the community also often cohere around areas of discrimination, whether in the workplace, marketplace, the media, or other areas. Regardless of whether this awareness and recognition of shared community is explicit or rather an implicit consequence of one's coming

¹ The Panel, following the applicant's reference to "individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society", uses the phrase "non-normative sexual orientations and/or gender identities" throughout this document. The term "non-normative" is used both by the applicant as well as organizations, academics, and publications discussing the topic; it is not the Panel's terminology, nor is it considered to be derogatory in this context. This phrase refers to the same individuals usually referred to with the acronyms "LGBT", "GLBT", "LGBTQ", and others. Because issues related to these acronyms are relevant later in this document, they are not used here.

² See as examples <http://www.hrc.org/campaigns/coming-out-center> and http://www.lalgbtcenter.org/coming_out_support

³ For allies, the "coming out" process may differ from that of individuals who are acknowledging privately or sharing publicly their own non-normative sexual orientation or gender identity. Nevertheless, there are risks associated even with supporting non-heterosexual individuals; making this support explicit is how allies can mark their awareness and recognition of the wider community and their sense of belonging to it. For example, large international organizations within the applicant's defined community, such as GLAAD, HRC, and PFLAG offer concrete avenues for individuals to "come out" as allies. See <http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>,

<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>, <http://community.pflag.org/page.aspx?pid=539>

⁴ <http://www.apa.org/topics/lgbt/orientation.pdf>

out, the Panel has determined that the link among these individuals goes well beyond “a mere commonality of interest” and satisfies the AGB’s requirements for recognition and awareness.⁵

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community, and there must be documented evidence of community activities.

There are many organizations that are dedicated to the community as defined by the application, although most of these organizations are dedicated to a specific geographic area and/or segment of the proposed community. However, there is at least one entity mainly dedicated to the entire global community as defined: the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), an umbrella organization whose organizational members also include those representing allies. According to the letter of support from ILGA:

The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is the only worldwide federation of more than 1,200 lesbian, gay, bisexual, transgender and intersex (LGBTI) national and local organizations, fighting for the rights of LGBTI people. Established in 1978 in Coventry (UK), ILGA has member organizations in all five continents and is divided into six regions; ILGA PanAfrica, ILGA ANZAPI (Aotearoa/New Zealand, Australia and Pacific Islands), ILGA Asia, ILGA Europe, ILGA LAC (Latin America and Caribbean) and ILGA North America.

The community as defined in the application also has documented evidence of community activities. This is confirmed by detailed information on ILGA’s website, including documentation of conferences, calls to action, member events, and annual reports.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was active prior to September 2007. According to the application:

...in the 20th century a sense of community continued to emerge through the formation of the first incorporated gay rights organization (Chicago Society for Human Rights, 1924). Particularly after 1969, several groups continued to emerge and become more visible, in the US and other countries, evidencing awareness and cohesion among members.

Additionally, the ILGA, an organization mainly dedicated to the community as defined by the applicant, as referred to above, has records of activity beginning before 2007. Individuals with non-normative sexual orientations and/or gender identities, as well as their supporters, have been increasingly active in many countries as they work to advance their acceptance and civil rights.⁶

⁵ Although the score on Delineation is unchanged since the first evaluation, the Panel’s analysis has changed due to the applicant’s response to a Clarifying Question regarding the role of Authentication Partners (APs). Previously, the Panel had understood the APs to be a mechanism of members’ awareness and recognition, but, as above, that is no longer the case and the role of APs is correctly understood to be relevant for the purposes of Section 3.

⁶ See for example, advocacy in China, Guyana, and Argentina: <http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>, <http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>, http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html

The Community Priority Evaluation panel has determined that the community as defined in the application fulfills the requirements for pre-existence.

1-B Extension

2/2 Point(s)

The Community Priority Evaluation panel determined that the community as identified in the application met the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application demonstrates that the community meets the requirements for size and demonstrates longevity. The application received a maximum score of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size, and it must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The application cites global estimates of the self-identified population of individuals with non-normative sexual orientations and/or gender identities, but relies on a more conservative size based on the number of such individuals who are affiliated with one or more of the applicant's community organizations:

Most studies place the global gay population at 1.2% (Williams 1996), higher in countries with existing gays rights protections projected at 4-6% (eg. Australia, Canada, United Kingdom, United States). Rather than projecting the size of the community from these larger global statistical estimates, dotgay LLC has established a conservative plan with identified partners and endorsing organizations (listed in 20F) representing over 1,000 organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay Community and the minimum pool from which potential registrants will stem.

As the applicant also acknowledges, estimating the size of the defined community is difficult because, for example, of the risks of individuals self-identifying in many parts of the world. The applicant instead offers a "minimum" size based on the 7 million individuals who are members of one or more of its "Authentication Partners", organizations serving as entry points for domain registration. Regardless of the method used to produce these estimates, the Panel has determined that the size of the delineated community is considerable.⁷

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both of the conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application demonstrates longevity. The pursuits of the community defined in the application are of a lasting, non-transient nature. According to the application materials:

...one of the first movements for the human rights of the Gay Community was initiated by Magnus Hirschfeld (Scientific Humanitarian Committee, 1897).

The organization of individuals with non-normative sexual orientations and/or gender identities and their supporters has accelerated since then, especially in recent decades, and an organized presence now exists in many parts of the world. Evidence shows a clear trend toward greater visibility of these individuals,

⁷ The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally.

recognition of their civil and human rights, and community organization, both in the US and elsewhere.⁸ While socio-political obstacles to community organization remain in some parts of the world,⁹ the overall historical trend of increasing rights and organization demonstrates that the community as defined has considerable longevity.

In addition, as previously stated, the community as defined in the application has awareness and recognition among its members.

The Community Priority Evaluation panel has determined that the community as defined in the application satisfies both the conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community

0/4 Point(s)

2-A Nexus

0/3 Point(s)

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive a partial score for Nexus, the applied-for string must identify the community. According to the AGB, “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.” In addition to meeting the criterion for “identify”, in order to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.

In order to identify the community defined by the applicant as required for Nexus, the applied-for string must “closely describe the community or the community members”, i.e. the applied-for string is what “the typical community member would naturally be called” (AGB). The Panel has therefore considered the extent to which the string “gay” *describes* the members of the applicant’s defined community and has evaluated whether “gay” is what these individuals *would naturally be called*. The Panel has determined that more than a small part of the applicant’s defined community is not identified by the applied-for string, as described below, and that it therefore does not meet the requirements for Nexus.

The community as defined by the application consists of

individuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, ally and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.

The applicant’s assertion that the applied-for string (“gay”) is the “most common” term used by members of its defined community to refer to all gay, lesbian, bisexual, transgender, queer, intersex, and ally individuals is central to its demonstration of Nexus. In order to support this claim, the applicant, in its application and in supporting materials received both prior to and since its initial evaluation, has offered evidence that the Panel has evaluated. The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the

⁸ Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000.

⁹ <http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>

media¹⁰ as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider “gay” to be their “most common” descriptor, as the applicant claims. These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay”. Both within the community and outside of it, such as in the media, acronyms such as “LGBT,” “GLBT,” “LGBTQ,” or “LGBTQIA”¹¹ are used to denote a group of individuals that includes those described above, i.e. transgender, intersex and ally individuals. In fact, organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor “gay,” preferring one of the more inclusive terms¹².

The first piece of evidence offered by the applicant to support the claim that “gay” is the “most common” term used to describe the defined community is the Oxford English Dictionary (OED) and its documentation of uses of the word “gay” over hundreds of years. It summarizes the shifting meaning of “gay” in order to show how the word has become embraced by at least a part of its defined community and to support its claim that it is the “most common” term for the entirety of its defined community. According to the applicant, the OED shows that “Gay by the early 20th century progressed to its current reference to a sexuality that was non-heterosexual” (application, 20(d)). The Panel agrees that the more derogatory uses of “gay” or uses unrelated to sexuality have largely fallen away, and that the word has come to refer to homosexual women as well as men, as the applicant asserts, citing the OED. However, the Panel’s review of the OED¹³ as well as other sources (cited below) does not support the applicant’s claim that “gay” identifies or closely describes transgender, intersex, or ally individuals, or that “gay” is what these individuals “would naturally be called,” as the AGB requires. This is because “gay” refers to homosexuality (and to some extent non-heterosexuality more broadly), while transgender and intersex individuals may or may not identify as homosexual or gay, and allies are generally understood to be heterosexual.

The applicant acknowledges that its application attempts to represent several groups of people, namely lesbian, gay, bisexual, transgender, queer, intersex, and ally (LGBTQIA) individuals. It claims that all of these groups, or “sub-communities”, are identified by what it calls the “umbrella” term “gay”:

The term “gay” today is a term that has solidified around encompassing several sub-communities of individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society. Within these sub-communities even further classifications and distinctions can be made that further classify its members but are equally comfortable identifying as gay, particularly to those outside their own sub-communities. As an example, it has become commonplace for celebrities to acknowledge their homosexuality with the now routine declaration of “Yup, I’m gay” on the cover of newsmagazines as the comedienne Ellen Degeneres did when she “came out” on the cover of TIME magazine.

Notably, “gay” is used to super-identify all these groups and circumstances. Whether homosexual, bisexual, transgender, intersex or ally, all members of the Gay Community march in the “gay pride parade” read the same “gay media” and fight for the same “gay rights.” Gay has become the prevalent term in how members of this community refer to themselves when speaking about themselves as demonstrated by the large number of organizations that use the term globally.

Despite the applicant’s assertions to the contrary, its own evidence here shows that “gay” is most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others. The applicant’s “umbrella term” argument does not accurately describe, for example, the many similar

¹⁰ While a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the data in the applicant’s own analysis as well as on the Panel’s own representative samples of media.

¹¹ There is some variability to these acronyms but one or another of them is very commonly used throughout the community defined by the applicant to refer to Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Allies.

¹² While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes. Details of the Panel’s analysis follow.

¹³ See “gay, adj., adv., and n.” *OED Online*. Oxford University Press, June 2015. Web. 19 August 2015.

transgender stories in the mass media where “gay” is not used to identify the subject.¹⁴ In these cases, “transgender” is used because “gay” does not identify those individuals. With regard to the applicant’s argument that the various parts of its defined community are engaged in the same activities, such as “gay pride” events and “gay rights” advocacy, the Panel acknowledges that this is likely the case. However, transgender people’s participation in these activities no more identifies them as gay than allies’ participation in transgender rights advocacy identifies them as transgender. Indeed, there are many organizations focused on events and advocacy specific to the needs of transgender individuals¹⁵ and they often take special care to separate labels of sexual orientation from those of gender identity/expression.¹⁶ Similarly, the Panel has reviewed the literature of several organizations that advocate and provide services and support for intersex individuals and they clarify that sexual orientation is unrelated to being intersex.¹⁷ That is, while such organizations would fall within the applicant’s defined community, they explicitly differ on the applicant’s assertion that the applied-for string “gay” identifies all LGBTQIA individuals. Thus, the applicant’s assertion that even the members of its so-called sub-communities “are equally comfortable identifying as gay” is in fact often not the case.

In materials provided in support of the application¹⁸, a survey of news media articles is analyzed in an effort to show that “gay” is the most common name used to refer to the community defined by the applicant. This analysis shows that indeed “gay” is used more frequently than terms such as “LGBT” or “LGBTQIA” in reference to both individuals and communities:

In the first random sample period (April 1-8, 2013), “gay” was used 2,342 times, “LGBT” 272 times, “lesbian” 1008 times, “queer” 76 times and “LGBTQ” 19 times. “LGBTQIAA” and “GLBTQ” were not used at all, demonstrating that “gay” remains a default generic term for the community. An overwhelming amount of the time these terms beyond gay were used in articles that also used gay. Said another way, “LGBT” was used in only 35 articles that did not also use the term “gay,” “lesbian” in 43 articles, “queer” in 55, and “LGBTQ” in 3. Data shows, thus, that “gay” is both the most frequently used term when referring to non-heterosexual gender identity and sexual orientation and is used as an umbrella term to cover the diversity.

Despite this claim, the analysis fails to show that when “gay” is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities. This is the key issue for the Panel’s consideration of Nexus. That is, the greater use of “gay” does not show that “gay” in those instances is used to identify all LGBTQIA individuals, as the applicant asserts and as would be required to receive credit on Nexus. Indeed, the Panel’s own review of news media¹⁹ found that, while “gay” is more common than terms such as “LGBTQ” or “LGBTQIA”, these terms are now more widely used than ever, in large part due to their greater inclusivity and specificity than “gay”. Even several of the articles cited by the applicant in its reconsideration request²⁰ as evidence of its “umbrella term” argument do not show “gay” being used to identify the groups in question, nor is “gay” the most commonly used term to refer to the aggregate LGBTQIA community in these articles.²¹ Furthermore, researching sources from the same periods as the

¹⁴ As examples of cover stories that parallel the applicant’s own example from Time Magazine, see: <http://time.com/135480/transgender-tipping-point/> and <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>. In these two very prominent examples, the articles do not use “gay” to refer to their subjects.

¹⁵ See for instance <http://transgenderlawcenter.org/>, <http://srtp.org/>, <http://transequality.org/>

¹⁶ See National Center for Transgender Equality: <http://transequality.org/issues/resources/transgender-terminology>

¹⁷ See for example the Organization International Intersex: <http://oii-usa.org/1144/ten-misconceptions-intersex>

¹⁸ See <https://www.icann.org/en/system/files/correspondence/gudelunas-to-icann-eiu-evaluators-30apr14-en.pdf>, drafted and submitted by David Gudelunas a member of the dotGay LLC team according to its website, http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter

¹⁹ As noted above, while a comprehensive survey of the media’s language in this field is not feasible, the Panel has relied on both the applicant’s own analysis, as discussed here, as well as on the Panel’s own representative samples of media.

²⁰ See dotGay’s Reconsideration Request: <https://www.icann.org/en/system/files/request-dotgay-annexes-redacted-29nov14-en.pdf>

²¹ See <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marchesor-clever-substitutes-pride-and-prejudice>, <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>, <http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>

applicant’s analysis for the terms “transgender” or “intersex” shows again that these terms refer to individuals and communities not identified by “gay”.²² In other words, “gay” is not used to refer to these individuals because it does not *closely describe* them and it is not *what they would naturally be called*, as the AGB requires for partial credit on Nexus.

Finally, the Panel reviewed in detail the many letters of support submitted on behalf of the applicant by many LGBTQIA organizations worldwide. In addition to evaluating these letters of support, as noted in Section 4, the Panel examined how these organizations refer to their members and those for whom they advocate, noting in particular the words used to identify them. In a minority of cases, these organizations included in their letters the view that “gay” is an “umbrella term” for the LGBTQIA community, as argued by the applicant. However, even the organizations that made this claim in their letters do not use the term “gay” to identify their transgender, intersex, and/or ally members in their own organizational materials. In fact, the names of many of these organizations usually include a term other than “gay” such as “LGBTQ” or, in the case of some, “transgender” or “intersex”.

GLAAD, as an example of one of the applicant’s supporters, writes on its own website, “Transgender people have a sexual orientation, just like everyone else. Transgender people may be straight, lesbian, gay, or bisexual.”²³ Indeed, it is for this reason that GLAAD, like other organizations active in the defined community, have revised their names and use of labels specifically to be more inclusive of the individuals in their communities whom “gay” does not identify by using instead terms like LGBTQ or LGBTQIA.²⁴ Similarly, ally organizations such as PFLAG (Parents, Families and Friends of Lesbians and Gays) support the applicant and reiterate the importance of allies in the struggles facing the LGBTQIA community. However, not even these organizations use “gay” to describe allies. The Panel’s research and review of the applicant’s materials has demonstrated that even the applicant’s supporters recognize that “gay” is insufficient to identify the diversity of the LGBTQIA community, especially with regard to transgender, intersex, and ally individuals.

The Community Priority Evaluation panel has determined that the applied-for string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community. It therefore does not meet the requirements for Nexus.

2-B Uniqueness	0/1 Point(s)
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The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the “string has no other significant meaning *beyond identifying the community described in the application*,” (AGB, emphasis added) and it must also score a 2 or a 3 on Nexus. The string as defined in the application cannot demonstrate uniqueness as it does not score a 2 or a 3 on Nexus (i.e., it does not identify the community described, as above). The Community Priority Evaluation panel has determined that the applied-for string is ineligible for a Uniqueness score of 1.

Criterion #3: Registration Policies	4/4 Point(s)
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3-A Eligibility	1/1 Point(s)
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The Community Priority Evaluation panel has determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as

²² While it is not possible for the Panel to review all the articles in the LexisNexis search results cited by the applicant, the Panel reviewed a representative sample of articles from the same time periods.

²³ See <http://www.glaad.org/transgender/transfaq>

²⁴ In 2013, to be more inclusive of transgender individuals by not including them in the label “gay” or “lesbian”, the organization’s name officially was changed to GLAAD, as opposed to being an acronym for Gay and Lesbian Alliance Against Defamation (<http://www.glaad.org/about/history>). This is reflective of the trend the Panel identified among organizations within the defined community towards greater inclusivity and away from names and labels that identified only gays and lesbians.

eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by specifying that registration in “.gay is restricted to members of the Gay Community. Eligibility is determined through formal membership with any of dotgay LLC’s Authentication Partners (AP) from the community.”

According to the application, and as the applicant has confirmed in follow-up materials, in order to register a domain, the applicant requires

community members to have registered with one of our Authenticating Partners (process described in 20E). The Authentication Partners are the result of a century or more of community members voluntarily grouping themselves into gay civic organizations.

As the application explains, these Authentication Partners (APs) include some of the largest organizations dedicated to members of the defined community and these organizations will provide “the most trusted entry points into .gay” while “reducing risk to unqualified registrations”.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Eligibility.

3-B Name Selection

1/1 Point(s)

The Community Priority Evaluation panel has determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining the types of names that may be registered within the .gay top-level domain, including rules barring “[s]ensitive words or phrases that incite or promote discrimination or violent behavior, including anti-gay hate speech.” The rules are consistent with the purpose of the gTLD. The Community Priority Evaluation panel has determined that the application fulfills the requirements for Name Selection.

3-C Content and Use

1/1 Point(s)

The Community Priority Evaluation panel has determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the rules for content and use are consistent with the articulated community-based purpose of the applied-for gTLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. This includes “efforts to prevent incitement to or promotion of real or perceived discrimination based upon race, color, gender, sexual orientation or gender expression.”

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Content and Use.

3-D Enforcement

1/1 Point(s)

The Community Priority Evaluation panel has determined that the application met the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application provided specific enforcement measures and appropriate appeal mechanisms. The application received a maximum score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals

mechanisms. The application outlines policies that include specific enforcement measures constituting a coherent set. The application also outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application also outlines an appeals process, managed by the Registry, to which any party unsuccessful in registration, or against whom disciplinary action is taken, will have the right to access.

The Community Priority Evaluation panel has determined that the application fulfills the requirements for Enforcement.

Criterion #4: Community Endorsement

2/4 Point(s)

Support for or opposition to a CPE gTLD application may come in any of three ways: through an application comment on ICANN’s website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and, as applicable, attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support and opposition documents for the dotgay LLC application for the string “GAY”.

Summary of Review & Verification of Support/Opposition Materials as of 5 September 2015²⁵

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	177	0	0	0
Attachments to 20(f)	128	128	128	51
Correspondence ²⁶	152	136	136	56
Grand Total	457	264	264	107

4-A Support

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. In this context, “recognized” refers to the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application’s defined community.

²⁵ The table below reflects all comments, attachments, and pieces of correspondence received by the Panel as of the date noted pertaining to the application both during the period of its previous evaluation and the present one. The Verification Attempted column includes efforts made by the Panel to contact those entities that did not include contact information.

²⁶ The Panel reviewed 41 pieces of correspondence that contained 152 individual letters.

The Community Priority Evaluation panel has determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).

While the ILGA is sufficient to meet the AGB's requirement for an "entity mainly dedicated to the community" under Delineation (1-A), it does not meet the standard of a "recognized" organization. The AGB specifies that "recognized" means that an organization must be "clearly recognized by the community members as representative of the community." The ILGA, as shown in its mission and activities, is clearly dedicated to the community and it serves the community and its members in many ways, but "recognition" demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization's authority to represent them. There is no single such organization recognized by all of the defined community's members as the representative of the defined community in its entirety. 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. The Community Priority Evaluation Panel has determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one source. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is opposition to the application from one group of non-negligible size.²⁷ The opposition comes from a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application. The organization is of non-negligible size, as required by the AGB. The grounds of opposition are related to how the applied-for string represents the diversity of the LGBTQ community and the opposition is not made for any reason forbidden by the AGB, such as competition or obstruction. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

²⁷ The Panel has reviewed all letters of opposition and support, even when more than one letter has been received from the same organization. In those cases, as with all others, the Panel has reviewed each letter to determine the most current stance of each organization with respect to the application. In the case of this opposition, all letters have been reviewed.

Exhibit 9

**RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-3
26 JUNE 2016**

The Requester, Dotgay LLC, seeks reconsideration of the Board Governance Committee's (BGC's) denial of the Requester's previous reconsideration request, Request 15-21.

I. Brief Summary.

The Requester submitted a community application for .GAY (Application). Three other applicants submitted standard (meaning, not community-based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Application was community-based, the Requester was invited to and did participate in CPE in October 2014 (First CPE). The Requester's Application did not prevail in the First CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that the Requester had not prevailed in the First CPE (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE (Second CPE Report). As a result, the Application remains in contention with the other applications for .GAY. Just like all other contention sets, the .GAY contention set can be resolved by ICANN's last resort auction or by some other arrangement amongst the involved applicants.

The Requester sought reconsideration of the Second CPE Report and ICANN's acceptance of it (Request 15-21). After reviewing all of the relevant material, the BGC denied Request 15-21 (Determination on Request 15-21). The Requester has now submitted Reconsideration Request 16-3 (Request 16-3), challenging the Determination on Request 15-21

contending that the BGC erroneously determined that the EIU had adhered to all applicable policies and procedures in conducting the Second CPE. Request 16-3 is premised upon one, and only one, basis: the Requester argues that the EIU improperly permitted someone other than one of the “evaluators” to send verification emails to the authors of letters of support and opposition to the Application, which the Requester contends contravenes applicable policies and procedures.

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3. In response, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support. The Presentation, however, did not relate to the sole issue raised in Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application. Rather, the Presentation focused on the merits of the Second CPE Report, which is neither the subject of Request 16-3 nor a proper basis for reconsideration.

The Requester’s claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the EIU that materially or adversely affected the Requester, and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information. Instead, the Requester relies on a purely administrative step of the verification process that the EIU took in the course of administering the Second CPE. More specifically, the EIU delegated

the physical sending of verification emails for letters of support/opposition to a member of the EIU's core team to serve as a Verification Coordinator rather than one of the evaluators due to the large number of letters of support/opposition. That protocol did not affect the Requester, materially or adversely, as is required to support reconsideration. To the contrary, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation consistent with the Applicant Guidebook (Guidebook). Additionally, the substantive evaluation of the letters was performed by the evaluators in accordance with Module 4.2.3 of the Guidebook. As such, the BGC recommends that Request 16-3 be denied.

II. Facts.

A. Background Facts.

The Requester submitted a community application for .GAY.¹

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.² Those applications were placed into a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in Module 4.2 of the Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.³

¹ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

² See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

³ See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).⁴ The First CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in the First CPE.⁵

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.⁶

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.⁷ On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).⁸

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of it, and of the First DIDP Response.⁹

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.¹⁰ The BGC directed that "the CPE Panel's Report shall be set aside, and that new [CPE] evaluators will be appointed to conduct a new CPE

⁴ *Id.*

⁵ See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

⁶ <https://www.icann.org/resources/pages/14-44-2014-10-22-en>.

⁷ <https://www.icann.org/resources/pages/20141022-02-2014-10-31-en>.

⁸ See <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

⁹ See <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

¹⁰ Determination of BGC, Reconsideration Request 14-44, *available at* <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf> at Pg. 31.

for the Application.”¹¹ In addition to directing that new evaluators conduct the second CPE of the Application, the BGC also recommended that the EIU consider including new members of the core team to assess the evaluation results.¹²

In furtherance of the BGC’s Determination on Request 14-44, the EIU administered the Second CPE, appointing two new evaluators as directed by the BGC, and one new core team member as the BGC suggested.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.¹³

On 22 October 2015, the Requester submitted Reconsideration Request 15-21, seeking reconsideration of the Second CPE Report and ICANN’s acceptance of it.¹⁴

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN’s DIDP (Second DIDP Request), seeking documents related to the Second CPE Report.¹⁵ On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).¹⁶

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Request 15-21), which sought reconsideration of the Second CPE Report and ICANN’s acceptance of it, and of the Second DIDP Response.¹⁷

On 1 February 2016, the BGC issued the Determination on Request 15-21, finding that Request 15-21 should be denied.¹⁸

¹¹ *Id.*

¹² *Id.*

¹³ See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

¹⁴ <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

¹⁵ See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁶ See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁷ See generally <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

The Requester submitted Request 16-3 on 17 February 2016.¹⁹ Request 16-3 challenges the Determination on Request 15-21 on the sole basis that the person at the EIU who sent verification emails to the authors of letters of support and opposition to the Application was not a CPE “evaluator.”²⁰

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3.²¹ In response, Pursuant to Article IV, Section 2.12 of ICANN’s Bylaws, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support.²² The Requester, however, did not address the sole issue that is the basis for Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application.²³ Instead, the

(continued...)

¹⁸ Determination on Request 15-21, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

¹⁹ *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>. ICANN has also reviewed and considered several letters sent in support of Request 16-3, including one from Transgender Equality Uganda and one from Trans-Fuzja. (*See* <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.) In addition, ICANN also reviewed and considered two letters from CenterLink that the Requester submitted along with its Presentation materials, indicating CenterLink’s support of the Requester’s Application. (*See id.*)

²⁰ *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²¹ Request, § 8.7, Pg. 8.

²² *See* <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

²³ *See* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

Presentation addressed the merits of the Second CPE Report, which is not the subject of Request 16-3 and is not a proper basis for reconsideration.^{24 25}

B. Relief Requested.

The Requester asks that ICANN:

1. “[A]cknowledge receipt of this Reconsideration Request;”
2. “[D]etermine that the [Determination on Request 15-21] is to be set aside;”
3. “[I]nvite 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;”
and
4. “[D]etermine 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.”²⁶

III. The Relevant Standards For Reconsideration Requests And CPE.

A. Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a staff or Board action or inaction in accordance with specified criteria, which include a requirement that the requester has been “materially [and] adversely affected” by the challenged action or inaction.²⁷ The Requester here

²⁴ *Id.*

²⁵ The BGC also notes that it received and considered the 24 June 2016 letter from dotgay LLC, which can be found at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dotgay-to-icann-bgc-24jun16-en.pdf>.

²⁶ Request, § 9, Pgs. 8-9.

²⁷ Bylaws, Art. IV, § 2. Article IV, §§ 2.1-2 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 materially and 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

challenges both staff and Board action.²⁸

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.²⁹ In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the EIU violated any established policy or procedure.

A Board action may be subject to reconsideration where it was undertaken “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, where it was “taken as a result of the Board’s reliance on false or inaccurate material information.”³⁰ Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

B. Community Priority Evaluation.

(continued...)

(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.

²⁸ While the Requester indicated that it challenged staff action (see Request, § 2, Pg. 1), the crux of Reconsideration Request 16-3 is a challenge to the BGC’s Determination on Request 15-21, and as such, challenges both Board and staff action.

²⁹ See BGC Recommendation on Reconsideration Request 13-5, *available at*

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc>.

³⁰ Bylaws, Art. IV, § 2.

The standards governing CPE are set forth in Module 4.2 of the Guidebook. The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook's CPE provisions³¹ and summarizing those provisions.³² In addition, the EIU 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.³³

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.³⁴ CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.³⁵ A CPE panel's role is to determine whether the community-based application 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 CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

IV. Analysis And Rationale.

The Requester seeks reconsideration of the Determination on Request 15-21, arguing that the BGC should have "confirm[ed]" that the EIU did not follow applicable policies and

³¹ The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

³² CPE Panel Process Document, available at <https://newgtlds.icann.org/en/applicants/cpe>.

³³ CPE Guidelines, available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

³⁴ Guidebook, § 4.2.

³⁵ *Id.* at § 4.2.2.

procedures in conducting the Second CPE.³⁶ Specifically, the Requester claims that the EIU violated the CPE Panel Process Document because the person who sent verification emails to the authors of letters of support and opposition to the Application was a member of the core team (serving as a Verification Coordinator) and was not one of the two “evaluators” assigned to conduct the CPE.³⁷ However, the Requester fails to identify any conduct by the EIU that contradicts an established policy or procedure in a manner that materially and adversely affected the Requester.³⁸ The process of verifying letters is an administrative task.³⁹ Regardless of which person physically sent the verification emails, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation in accordance with Module 4.2.3 of the Guidebook, which included an evaluator’s substantive evaluation of the letters in compliance with the CPE Panel Process Document.

Moreover, the Requester does not identify any material information the BGC did not consider in reaching the Determination on Request 15-21, or any reliance upon false or inaccurate information.⁴⁰ The act of sending a verification email is not material, so long as the evaluators performed their task of evaluating the letters of support and opposition. There is no claim that the evaluators did not conduct the actual evaluation. As such, the Determination on Request 15-21 properly confirmed that reconsideration was not warranted based on the EIU’s decision to delegate the sending of verification emails to a Verification Coordinator, and thus the Determination on Request 15-21 does not itself warrant reconsideration.⁴¹

³⁶ Request, § 8.6, Pg. 7.

³⁷ *Id.*, § 8.4, Pgs. 5-6.

³⁸ See Bylaws, Art. IV, §§ 2.1-2.

³⁹ See <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 2.

⁴⁰ See Bylaws, Art. IV, § 2.

⁴¹ While Request 16-3 generally is styled as a request for the BGC to reconsider the Determination on Request 15-21, the Requester also argues that the “EIU ha[s] not respected the policies and processes” governing CPE. Request, § 8.6, Pg. 7.

A. The EIU’s Letter Verification Process Did Not Violate Applicable Policies And Procedures In A Manner That Materially Or Adversely Affected The Requester.

The Requester’s claims arise entirely out the CPE Panel Process Document’s provisions that an “evaluator” verifies letters of support and opposition to an application undergoing CPE, which the Requester claims did not occur here.⁴² In other words, the Requester argues that reconsideration is warranted because the EIU did not adhere to the CPE Panel Process Document insofar as the person who physically sent the emails verifying the letters of support and opposition was not an “evaluator” but, instead, was another EIU employee.⁴³ However, the EIU’s decision to delegate this administrative task to an employee cannot support reconsideration, because it did not affect the substance of the Second CPE in any fashion and did not change the fact that the evaluators conducted the actual evaluation of the letters.

To start, the Determination on Request 15-21 already addressed this argument.⁴⁴ The Determination on Request 15-21 acknowledged that the verification emails were sent by 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.”⁴⁵ The Determination on Request 15-21 also explained that the CPE Panel Process Document mandates that one of the two evaluators

⁴² CPE Panel Process Document at Pg. 5; Request, § 8.4, Pg. 5-6. Request 16-3 also contains a sentence arguing that the EIU appointed one of the same evaluators to conduct the Second CPE as performed the First CPE. Request, § 8.1, Pg. 3. The powerpoint to which the Requester referred during its Presentation also fleetingly touched upon this issue. (See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>, at Pg. 13.) However, other than in passing reference, Request 16-3 does not argue that reconsideration is warranted because the same evaluator conducted the Second CPE. Instead, that argument appears to be a vestige from the Requester’s Request 15-21, which raised that argument. (See Request 15-21, § 8.2, Pg. 5, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.) As explained in the Determination on Request 15-21, that argument fails to support reconsideration because it is factually inaccurate; ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and added a new core team member for the administration of the Second CPE. (Determination on Request 15-21 at Pgs. 28-29.)

⁴³ See Request, § 8.1, Pg. 3.

⁴⁴ Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁵ *Id.*, Pgs. 28-29.

be “responsible for the letter verification process.”⁴⁶ Here, the CPE Panel members delegated the physical sending of the verification emails to a Verification Coordinator.⁴⁷ This procedure is in accord with the CPE Panel Process Document’s provision that a letter is verified when its author “send[s] an email *to the EIU* acknowledging that the letter is authentic.”⁴⁸ While the CPE Panel Process Document indicates that an “evaluator” will contact letter authors,⁴⁹ there is no policy or procedure that forbids the EIU from delegating the administrative task of sending the verification email to someone other than the actual “evaluator,” as the Determination on Request 15-21 correctly noted.

Moreover, the Requester has not demonstrated how it was materially or adversely affected by the EIU’s decision to delegate this administrative function to an administrative employee. On that ground alone, no reconsideration is warranted.⁵⁰ The identity of the person physically sending the verification emails did not have any impact upon the results of the verification or the results of the Second CPE as a whole; the verification results were communicated to both of the evaluators and the entire core team to permit a full and complete evaluation in accordance with the Guidebook, which included an evaluator’s substantive evaluation of the verified letters in compliance with the CPE Panel Process Document.⁵¹ Nor is there anything inherently nefarious to the EIU’s decision in this regard; much as a company executive might delegate to her assistant the physical sending of emails sent on her behalf, the EIU evaluators assign the Verification Coordinator the task of physically sending the verification emails. In short, the Requester has not indicated how it was affected by the decision to delegate

⁴⁶ See CPE Panel Process Document at Pg. 5; Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁷ Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁸ CPE Panel Process Document at Pg. 5 (emphasis added).

⁴⁹ *Id.*

⁵⁰ Bylaws, Art. IV, §§ 2.1-2

⁵¹ Guidebook § 4.2.3; CPE Panel Process Document at Pg. 5.

the sending of the verification emails to a Verification Coordinator, much less how it was materially or adversely affected, as is required to support a reconsideration request.⁵²

Nonetheless, “[i]n an effort to provide greater transparency on an administrative aspect of the Community Priority Evaluation (CPE) process,” the EIU has provided “additional information regarding verification of letters of support and opposition” (EIU Correspondence).⁵³ The EIU Correspondence confirms that “the two evaluators assigned to assess a specific application review the letter(s) of support and opposition. For every letter of support/opposition received, both of the evaluators assess the letter(s) as described in the Guidebook, section 4.2.3 Criterion 4: Community Endorsement.”⁵⁴ As such, the EIU Correspondence confirms that the EIU complied with the CPE Panel Process Document’s instruction that an evaluator “assesses both the relevance of the organization and the validity of the documentation.”⁵⁵ The EIU Correspondence further explains that:

[t]he process of verification of letter(s) is an administrative task. . . . [F]or evaluations involving large numbers of letters of support or opposition, the EIU assigned its Project Coordinator, a senior member of the core team, to serve as Verification Coordinator and to take the purely administrative step of ensuring that the large volume of verification emails, as well as follow-up emails and phone calls, were managed efficiently.⁵⁶

The need for a Verification Coordinator arose when an “administrative issue[] related to the verification of letters of support” occurred, namely certain entities submitted letters of support or opposition to multiple applications.⁵⁷ Because different evaluators were assigned to conduct CPE with respect to the various applications, those entities began to receive verification

⁵² See Bylaws, Art. IV, §§ 2.1-2.

⁵³ EIU Correspondence, *available at* <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 1.

⁵⁴ *Id.*

⁵⁵ CPE Panel Process Document at Pg. 5.

⁵⁶ EIU Correspondence at Pg. 2.

⁵⁷ *Id.*

emails from different people within the EIU.⁵⁸ The EIU “received complaints from the authors of the letters, who requested that they be contacted by a single individual,” thus the EIU assigned the Verification Coordinator the administrative task of sending all verification emails.⁵⁹ As the EIU Correspondence emphasizes, “the results of the verification [a]re communicated to both of the evaluators” and it is the evaluators who score the applications.⁶⁰

In sum, the EIU Correspondence confirms that the Verification Coordinator sends the verification emails purely for administrative ease, and that the Requester was not affected (let alone materially or adversely) by the delegation of this administrative task from the evaluator to the Verification Coordinator. As such, the Requester has not identified any conduct on the part of the EIU that warrants reconsideration.

B. The Requester Has Not Shown That The Determination on Request 15-21 Was The Result Of The BGC Failing To Consider Material Information, Or Considering False Or Inaccurate Information.

The Requester argues that reconsideration of the Determination on Request 15-21 is warranted because *either*: (1) “the BGC should . . . 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”; *or* (2) the CPE Panel Process Document sets forth “a process that is more stringent than the one set forth in the Applicant Guidebook, which does not require the independent evaluator [to] perform such verification of support and objection.”⁶¹ Reconsideration is not warranted on either ground, because the Requester has not shown that the BGC failed to consider material information or

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at Pg. 1.

⁶¹ Request, § 8.6, Pg. 8.

relied on false or inaccurate information with respect to either issue. The Requester has not shown that either basis for reconsideration it poses actually took place.

First, as explained *supra*, the EIU substantively adhered to the CPE Panel Process Document and the Guidebook in administering the Second CPE, including with respect to the letter verification process. The Requester has not identified any material information the BGC failed to consider, or any false or inaccurate information it relied upon in reaching the Determination on Request 15-21 that no reconsideration was warranted with respect to the fact that an EIU administrative employee sent the verification emails during the Second CPE. As such, no reconsideration of the Determination on Request 15-21 is warranted.⁶²

Second, the Requester argues that the BGC “erred in confirming that ‘none of the CPE Materials comprise an addition or change to the terms of the Guidebook.’”⁶³ As an initial matter, as the Determination on Request 15-21 explained, any challenge to the CPE materials (including the CPE Panel Process Document) is time-barred.⁶⁴ The Requester argues that through its reconsideration requests and the Determination on Request 15-21, it has discovered that the CPE Panel Process Document “introduces a concept that has not been included in the . . . Guidebook, which only refers to ‘evaluators’.”⁶⁵ However, the CPE Panel Process Document does not in fact comprise an addition or change to the terms of the Guidebook. The Guidebook provides that “[c]ommunity priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications.”⁶⁶ The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to

⁶² See Bylaws, Art. IV, § 2.

⁶³ Request, § 8.6, Pg. 8 (quoting Determination on Request 15-21 at Pg. 12).

⁶⁴ Determination on Request 15-21 at Pgs. 11-12.

⁶⁵ Request, § 8.5, Pg. 7.

⁶⁶ Guidebook § 4.2.2.

implement the Guidebook's CPE provisions⁶⁷ and summarizing those provisions.⁶⁸ The fact that someone other than an evaluator physically sends verification emails to authors of letters of support or opposition does not mean anyone other than a "community priority panel" has "review[ed]" the Application, as the Guidebook instructs.⁶⁹

In sum, the Requester has not demonstrated that the Determination on Request 15-21 reflects a failure on the part of the BGC to consider material information, or that the BGC considered false or inaccurate information, in concluding either that the EIU substantively complied with the CPE Panel Process Document, or that the CPE Panel Process Document adheres to the Guidebook. Therefore, the BGC thinks that no reconsideration of the Determination on Request 15-21 is warranted.

V. Recommendation.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration. The BGC therefore recommends that Request 16-3 be denied. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

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, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 March 2016. However, the Requester sought, was

⁶⁷ The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

⁶⁸ CPE Panel Process Document.

⁶⁹ Guidebook, § 4.2.2.

invited to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.⁷⁰

The timing of the Presentation delayed the BGC's consideration of Request 16-3. The first practical opportunity to address Request 16-3 after receiving the Presentation was 26 June 2016.

⁷⁰ See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

Exhibit 10

ARIF HYDER ALI

Contact Information Redacted
Contact Information Redacted Direct
Fax

25 August 2016

Via E-Mail

Mr Göran Marby
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: ICANN Ombudsman Report dated 27 July 2016

Dear Mr. Marby:

I am writing on behalf of my client, dotgay LLC (“dotgay”), to request that ICANN: (1) promptly, and by no later than Monday, August 29, 2016, post the Ombudsman’s investigative reports for Case No. 16-00177 issued on 15 July 2016 and 27 July 2016, regarding ICANN and the Economist Intelligence Unit’s treatment of dotgay’s application for .GAY (the “Report” or the “Ombudsman’s Report”); and (2) include the Report amongst the briefing materials that will be provided to the ICANN Board.

Dotgay notes that the Ombudsman’s conclusion that ICANN’s Board grant community priority status to dotgay, on the basis that such a step was required under ICANN’s own Articles and Bylaws, already has been broadly publicized within the ICANN community and in media outlets.¹ The posting of the Report by ICANN, however, is crucial to promote an understanding of the issues raised by the Ombudsman regarding the treatment of dotgay’s application in the ICANN community.²

¹ See, e.g., http://www.theregister.co.uk/2016/07/29/give_gays_dot_gay/.

² See, ICANN Ombudsman Framework.

In addition, we note with concern that the Ombudsman's Report was not amongst the board briefing materials provided to ICANN's Board for consideration at its Special Meeting of 9 August 2016.

In the Recommendation to the Board issued by the Board Governance Committee ("BGC") on 26 June 2016, the BGC dismissed the request on technical grounds (improperly, in our view) and *specifically* encouraged dotgay to approach the Ombudsman with any complaints of unfairness:

"If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter" (Recommendation of 26 June 2016, § V, p.16).

Dotgay subsequently followed the BGC's Recommendation and cooperated with the Ombudsman's Investigation. The Ombudsman issued his report after completing his investigation, which included seeking comments from ICANN staff and dotgay. His conclusions vindicated dotgay's complaints about being treated unfairly and in a discriminatory manner. Accordingly, the ICANN Board must thoroughly and properly consider the Ombudsman Report during its future deliberations regarding dotgay's Reconsideration Request No. 16-3.³

We look forward to seeing the Ombudsman's Report posted on ICANN's website and included amongst the briefing materials provided to the ICANN Board when dotgay's application is tabled for consideration.



Arif Hyder Ali

³ See Reconsideration Request No. 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

cc: Steve Crocker, Chairman of the ICANN Board (steve.crocker@icann.org)
John Jeffrey, General Counsel and Company Secretary (john.jeffrey@icann.org)
Scott Seitz, Chief Executive Officer, dotgay LLC Contact Information Redacted

Exhibit 11

ARIF HYDER ALI

Contact Information Redacted

Contact Information Redacted Direct

Fax

September 13, 2016

VIA E-MAIL

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay's
Community Priority Application**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“dotgay”), to submit an independent expert opinion of Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, to the ICANN Board (“Board”) with the goal to assist the Board in evaluating dotgay’s reconsideration request (16-3) on September 15, 2016.¹ Prof. Eskridge is a world renowned expert both in legal interpretation and in sexuality, gender, and the law, and was recently ranked as one of the ten most-cited legal scholars in American history. Prof. Eskridge’s independent expert report explains, step-by-step, fundamental errors in the EIU’s reasons for denying dotgay’s community status.

Pursuant to the Independent Review Panel’s recent findings in *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (July 29, 2016) (“Dot Registry Declaration”), which was accepted by the Board by way of its Resolutions 2016.08.09.11 and 2016.08.09.13 on August 9, 2016, it is imperative that the Board carefully reviews and considers Prof. Eskridge’s expert report prior to deciding dotgay’s reconsideration request (16-3).

First, the Board Governance Committee’s (“BGC”) June 26, 2016, recommendation to the Board to deny dotgay’s reconsideration request (16-3) was

¹ Expert Report of Professor William N. Eskridge Jr., dated September 12, 2016, Exhibit 1

premised on a standard that was subsequently rejected by the Dot Registry Declaration. Specifically, the BGC rejected dotgay's request for reconsideration because dotgay did not "identify any misapplication of policy or procedure by the EIU that materially or adversely affected [dotgay], and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information." The Dot Registry Declaration, however, rejected this standard for reconsideration and held that "in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB."² At no point in dotgay's recourse to ICANN's accountability processes from 2014 to date has the Board scrutinized the CPE Report for consistency with the principles of fairness, transparency and non-discrimination; as Prof. Eskridge's Report demonstrates, the CPE Report would fail even the most lenient examination.

Second, the BGC's June 26, 2016 Recommendation improperly declined to consider dotgay's May 15, 2016, presentation and written summary of arguments because "the Presentation focused on the merits of the Second CPE Report." According to the Dot Registry Declaration, "the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations."³ The BGC's failure to recognize its responsibility to ensure the EIU's compliance with these principles infected its decision to exclude from consideration whether the EIU had in fact been correct in its application of the Articles, Bylaws and AGB. This is troubling because, as explained by Prof. Eskridge in his report, the EIU failed to comply with ICANN's Articles and Bylaws.

Specifically, Prof. Eskridge explains that the EIU made three fundamental errors in determining that dotgay did not meet the nexus requirement between the applied-for string (.GAY) and the LGBTQIA community: (1) interpretive errors by misreading the explicit criteria laid out in ICANN's Applicant Guidebook ("AGB") and ignoring ICANN's mission and core values; (2) errors of inconsistency and discrimination by failure of the EIU to follow its own guidelines and its discriminatory application to dotgay's application

² *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration, p. 34 (29 July 2016).

³ *Id.* at p.34.

when compared with other applications; and (3) errors of fact, namely, a misstatement of important empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities. Prof. Eskridge's report, after discussing EIU's egregious reasoning behind rejecting dotgay's application, concludes that the EIU "engaged in a reasoning process that remains somehow mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory."

Finally, as dotgay has amply demonstrated in its submissions to the ICANN Board, it is entitled to the full two points in relation to community endorsement,⁴ since it has the support of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) – a global human rights organization focused on the gay community with member organizations in 125 countries.

Accordingly, pursuant to the Board's obligation to exercise due diligence, due care, and independent judgment in reaching reconsideration decisions, we sincerely hope that the Board: (1) will review and agree with Prof. Eskridge's independent expert opinion that the EIU's evaluation of dotgay's community priority application was flawed, and (2) grant dotgay's community priority application without any further delay.

Sincerely,



Arif Hyder Ali
Partner, Co-Chair of International Arbitration Group

⁴ See dotgay letter to ICANN Board of Directors (September 8, 2016) pp. 5-9. See also dotgay presentation to the Board Governance Committee (May 17, 2016) pp. 7-9 and Statement of Renato Sabbadini (May 17, 2016).

EXPERT REPORT

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1. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES

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PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL**

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EXPERT REPORT**

I. EXECUTIVE SUMMARY

Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU) recommended that the application be denied; the major reason was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender. The CPE Report is fundamentally erroneous. The Report’s fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the United States. In short, the CPE Report and its recommendations should be rejected, and dotgay should be awarded full credit (4 of 4 points) for establishing the nexus of its string with the community.

II. QUALIFICATIONS OF THE EXPERT

1. I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent legal opinion on the validity of the ICANN Community Priority

Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), evaluating dotgay's community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string ".gay".

2. I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,¹ leading monographs,² and dozens of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.³
3. My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN's gTLD Applicant Guidebook (AGB), especially Module 4.2.3, "Criterion #2: Nexus Between Proposed String and Community"; (iii) the history of the terminology in dispute, especially the term "gay" and its applicability to the community of sexual and

¹ William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its third edition, with the fourth edition out next year). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, "by far," ever published in the field of legislation and suggesting that it would "alter the law school curriculum").

² For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

³ According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (viewed September 8, 2016).

gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

III. BACKGROUND

A. DOTGAY'S APPLICATION

4. Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by the Internet Corporation for Assigned Names and Numbers (ICANN).

B. THE GOVERNING RULES: ICANN'S BYLAWS AND ITS APPLICANT GUIDEBOOK

5. The governing legal materials include ICANN's Bylaws and its Applicant Guidebook. The Bylaws establish ICANN's mission “to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN's “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).
6. Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

7. ICANN's Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay's application. See AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant "community," nexus between the proposed string and the community, registration policies, and community endorsement. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The CPE Panel of EIU awarded dotgay a score of 10 of 16 points, including a score of 0 of 4 points for Criterion #2, the nexus requirement that will be the focus of this Expert Report.

C. THE ICANN REQUIREMENTS FOR MEETING THE NEXUS BETWEEN THE APPLIED-FOR STRING AND THE COMMUNITY

8. Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay's application. Dotgay's petition lost 4 of 4 possible points on Criterion #2, and I shall focus on that criterion, "Nexus Between Proposed String and Community (0-4 Points)." More particularly, I shall focus on the nexus requirement, which is responsible for 3 of the 4 points. (A uniqueness requirement accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)
9. An application merits **3 points** for the nexus requirement if "[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community." AGB, 4-12 (emphasis added). "Name" of the community means "the established name by which the community is commonly known by others." AGB, 4-13. "[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, 4-13.

10. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.

11. An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, 4-13.

D. THE CPE REPORT’S REASONS FOR DENYING DOTGAY ANY POINTS FOR THE COMMUNITY-NEXUS REQUIREMENT

12. In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus requirement. CPE Report, 4-6. Because dotgay secured 10 points from the remaining Criteria and needed 14 points for approval, Criterion #2 was the critical reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.

13. Recall that an application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, 5.

14. The CPE Report does not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not a “well known short-form or abbreviation of the community” defined in dotgay’s application, but it does read into the explicit requirement (“well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement is taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation.

15. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender,

intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

16. The Report did not identify the methodology the EIU followed to support these sweeping empirical statements. Instead, the Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, 5 note 12.
17. Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The CPE Report conceded this point (CPE Report, 7) but nevertheless claimed that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are “many similar transgender stories in the media where ‘gay’ is not used to identify the subject.” CPE Report, 6-7 and note 14.
18. The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, 7. The EIU Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, 7 and note 19.

19. The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, 8.
20. Based upon this reasoning, the CPE Report awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the CPE Report awarded 0 of 1 point for uniqueness. CPE Report, 8.

IV. FUNDAMENTAL ERRORS IN THE CPE REPORT’S REASONING

21. The CPE Report compiled by the EIU Panel is fundamentally incorrect in its approach to the nexus criterion and in its evaluation of the evidence of community nexus. The fundamental errors fall into three different groups: (i) **interpretive errors**, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring ICANN’s mission and core values; (ii) **errors of inconsistency and discrimination**, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay’s application when compared with other applications; and (iii) **errors of fact**, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world.

A. THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

22. Recall the requirements ICANN has set forth, explicitly, for the nexus requirement in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’ AGB, 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
23. An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, 4-13.
24. As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.⁴ As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes.

1. The CPE Report Substantially Ignored The Primary Test: Is the Proposed String a “well known short-form or abbreviation of the community”?

⁴ The proposition in text is explained and defended in Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

25. To begin with, a major problem is that the EIU Panel systematically ignored the Applicant Guidebook's focus on whether the proposed string (".gay") is "a well known short-form or abbreviation of **the community**" (3 points) or "closely describes **the community**" (2 points) (emphasis added in both quotations). Notice the precise language, especially the language I have set **in bold**. The proposed string does not have to be "**the only** well known short-form or abbreviation of the community" and does not have to be "**the only term that** closely describes the community" (bold type for language I am adding for contrast). More important, the primary focus is "the community," not just "community members" (who are an alternative focus for the 2-point score).
26. The overall community is sexual and gender nonconformists. This is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely embraced natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. "Gay" is a "well known short-form or abbreviation of the community" (the requirement for 3 points) and also "closely describes the community" (the requirement for 2 points). There is no requirement that "gay" must be the only umbrella term for the community or even that it be the most popular term—but in fact "gay" remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that "gay" has been a popular word for more than a century, but also demonstrates that once "gay rights" became ascendant in the 1990s, the term's dominance increased and consolidated.

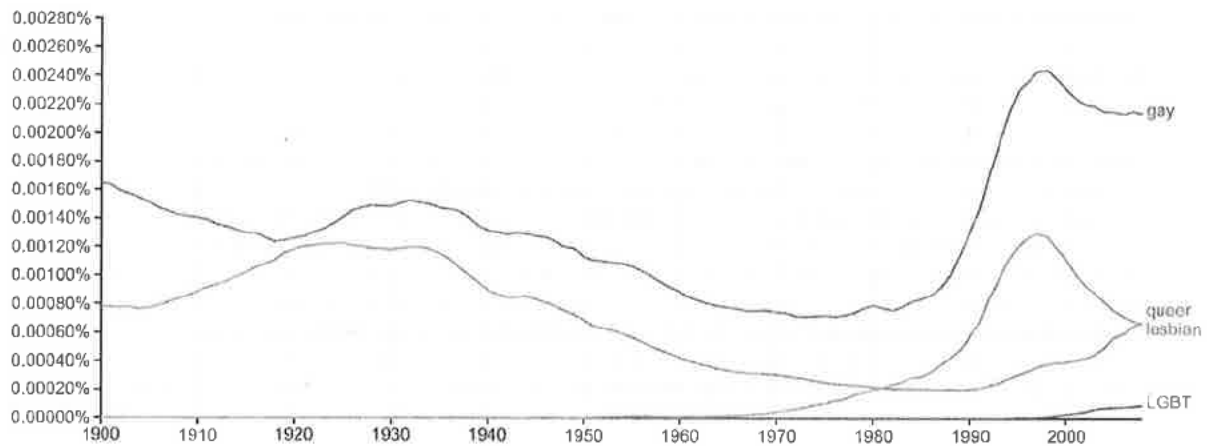


Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008

2. The CPE Report Created an “Under-Reach” Criterion Not Found in or Supported by the Applicant Guidebook and Applied the Novel Criterion to create a *Liberum Veto* Inconsistent with ICANN’s Rules and Bylaws

27. In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus criteria. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The CPE Report created a similar *Liberum Veto*, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some**

members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, 5 (emphasis added).

28. Where did this *Liberum Veto* come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, 4-12, nor was it taken from the Guidebook’s Definitions of “Name” or “Identify,” AGB 4-13. Yet the EIU Panel quoted the Applicant Guidebook for its statement of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake.

29. According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, 5 (quoting the AGB). Notice that the first part [1] of the CPE Report’s requirement is taken from the Guidebook’s nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so the Panel ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a *Liberum Veto*.

30. Moreover, the EIU Panel's Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that the Guidebook defines "Identify" to mean that "the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**" AGB, 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application, like this:

ICANN AGB Concern: Applied-For String > Community Defined in Application

But that's not the concern identified by the EIU Panel's Liberum Veto analysis, which claims that the applied-for string ("gay") "under-reaches" substantially short of the whole community. The Panel's "under-reaching" concern flips the "over-reaching" concern of the Applicant Guidebook. The Panel's worry that the applied-for string is much narrower than the community defined in the application, looks like this:

EIU Panel Concern: Applied-For String < Community Defined in Application

31. Although I shall document how the EIU Panel is mistaken in its application of its "under-reaching" analysis, note that this analysis and the Liberum Veto are errors by the EIU Panel and are contrary to the ordinary meaning of ICANN's Applicant Guidebook. The "under-reaching" analysis and the Liberum Veto are also inconsistent with the CPE Guidelines, Version 2.0, prepared by the EIU itself. See EIU, CPE Guidelines, 7-8 (Version 2.0), analyzed below.

3. The CPE Report Ignored and Is Inconsistent with ICANN's Bylaws

32. Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN's mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support "broad, informed participation reflecting the * * * cultural diversity of the Internet." ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.
33. There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—.gay—is ideally suited for these purposes.
34. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), "suicide.gay" (one of the community-operated websites proposed in the application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Expert Report) would think "suicide.gay" before they would think "suicide.lgbt" or "suicide.lgbtqia." See Figure 1, above. Indeed, many educated people (including the author of this Expert Report) cannot easily remember the correct order of the letters in the latter string ("lgbtqia"). Does a

Liberum Veto make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). Figure 2, below, is a dramatic illustration of this point: “gay suicide” is a common locution; the search of books published between 1950 and 2008 does not register significant usage for “LGBT suicide” or “LGBTQIA suicide.”

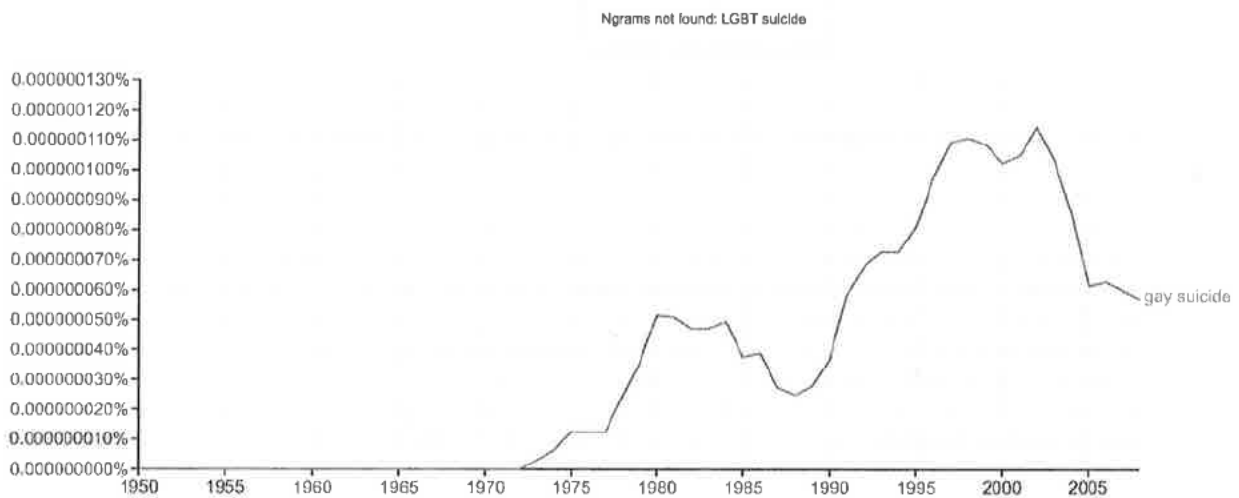


Figure 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the Corpus of Books published between 1950 and 2008

35. Not least important, recall that “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU has arbitrarily created an “under-reaching” test or requirement, without any notice in its own guidelines. Needless to say, other EIU Panel evaluations have ignored that criterion in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian

manner, namely, creating a Liberum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

B. THE CPE REPORT IS INCONSISTENT WITH THE EIU'S OWN GUIDELINES AND PREVIOUS REPORTS AND THEREFORE VIOLATES ICANN'S DUTY OF NON-DISCRIMINATION

1. The CPE Report Is Inconsistent with the EIU's Own Guidelines

36. Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string “identifies” the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full (3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application “identified” the community.
37. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, 5.
38. Based upon this revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the

applicant’s defined community, in particular transgender, intersex, and ally individuals.”
CPE Report, 5-6.

39. As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Indeed, this CPE Report’s unauthorized test is also directly inconsistent with the EIU’s own published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the EIU’s Guidelines quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, at 7 (emphasis added). The EIU’s Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

40. The EIU Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?

Does the string capture a wider geographic/thematic remit than the community has?

EIU, CPE Guidelines, Version 2.0, at 8 (emphasis in original).

41. Given these Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE Report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka”. “Members 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.” Osaka CPE Report, 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, 2.
42. The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to this application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka probably self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. *Liberum Veto?*
43. Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular AirBnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” Dotgay CPE Report, 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

44. I must say that this kind of Libero Veto evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for “.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the Dotgay CPE Report.

45. By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of 3 points for nexus. Osaka CPE Report, 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, 4. Yes, but the applicant defined the community much, much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Libero Veto in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

2. The CPE Report Is Inconsistent with the EIU’s Own Previous Reports

46. Dotgay’s application may not have been the first time the EIU has performed a nexus analysis suggesting an “under-reach” of an applied-for string, compared with the identified

community. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

47. An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether “.hotel” should be approved as a top-level domain. The EIU Panel may have performed a kind of “under-reach” analysis—but it was nothing as critical as that which it performed for dotgay’s application, even though the “.hotel” name was a much more dramatic illustration of “under-reach.”
48. The applicant wanted a domain that would serve the “global Hotel Community.” It defined its community in this way: “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” Hotel CPE Report, 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.
49. In the discussion of the nexus requirement, the EIU Panel observed that “the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s

sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

50. The EIU’s “under-reach” analysis of the Hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the Panel’s tolerant analysis in the Hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the dotgay CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in the current Expert Report (reported below).

51. Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 points, including 4 of 4 points for nexus and uniqueness. Like the “.hotel” applicant, the “.spa” applicant has more significant problems of “under-reach” than dotgay’s application has.

52. The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, 2. The EIU Panel awarded the

applicant 4 of 4 points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa” and would not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

C. THE CPE REPORT IGNORED IMPORTANT HISTORICAL AND EMPIRICAL EVIDENCE THAT STRONGLY SUPPORTS DOTGAY’S APPLICATION

53. Assume, contrary to any sound analysis, that the CPE Report correctly stated the Applicant Guidebook’s requirements for Criterion #2 (community nexus and uniqueness). Even under the EIU Panel’s excessively restrictive understanding of ICANN’s requirements, dotgay’s application would merit 4 of 4 points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

54. Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community

described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, 5-6.

55. The CPE Report makes no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor does it identify the methodology the EIU Panel followed to support these sweeping empirical statements. The remainder of this Expert Report will attempt to do that. The analyses contained in Appendix 2 will explain the methodology my research team and I followed for each of the Figures used below.

1. From Stonewall to Madrid: “Gay” as an Umbrella Term for Sexual and Gender Minorities, as Well as a Term for Homosexual Men

56. In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”⁵ European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.⁶

⁵ E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

⁶ Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, 46-49.

57. Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he describes as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common is that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological, feminine woman) and procreative sexual practices that were socially expected in this country. See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908). Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.
58. Most of these terms were at least somewhat derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.
59. An early literary example is Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicts a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a

woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed or posed as a man. (Such an explicit book would have been subject to immediate censorship.) Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

60. Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. (As the twentieth century progressed, meaning (1) has been almost completely eclipsed by meanings (2) and (3).) There was in this early, closeted era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity.

61. An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sends his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asks why the handsome leading man is thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line highly amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.⁷

62. In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. See Figure 1, above. Indeed, in many countries, "queer" to this day carries more negative connotations than "gay," which continues to make "queer" a less attractive generic term.

⁷ For a provocative analysis of the bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

63. A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City's Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the "Gay Revolution."⁸ Sympathetic accounts of the Stonewall riots mobilized the popular term "gay" to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the "Gay Revolution." For example, Carter's account reports that this "Gay Revolution" began when a "butch dyke" punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that "special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. * * * A common theme links those who resisted first and fought the hardest, and that is gender transgression."⁹

64. Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts almost universally described as a "gay bar." The patrons of the gay bar included homosexual and bisexual men who were insisting they be called "gay" and not the disapproved Greek terms ("homosexual" and "bisexual") that had been devised by the doctors. Many of the people in the "gay bar" were not homosexual men, but were lesbians,

⁸ David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

⁹ *Id.* at 261; see *id.* at 150-51 (describing the first punch thrown by the "butch dyke," who floored a police officer).

gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends of these gender and sexual nonconformists.¹⁰

65. Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”¹¹ In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other “gay” groups. These groups included “gay” men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

66. Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many times since, Katz’s *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called “hermaphrodites” and “man-women”;¹² poet Walt Whitman, who celebrated “the love of

¹⁰ See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

¹¹ Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

¹² *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

comrades,” which he depicted as male bonding and intimate friendships;¹³ “male harlots,” or prostitutes, on the streets of New York;¹⁴ Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;¹⁵ lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.¹⁶ More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.¹⁷

67. Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.
68. Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as “LGB” (lesbian, gay, and bisexual) persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and

¹³ Id. at 509-12 (Whitman).

¹⁴ Id. at 68-73 (male prostitutes, called “harlots” in a contemporary report).

¹⁵ Id. at 317-90 (dozens of women who “passed” as men, many of whom marrying women).

¹⁶ Id. at 118-27 (Smith), 787-97 (Goldman).

¹⁷ Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of “Gay Los Angeles”); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the “gay male world” bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community. I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgendered people.”¹⁸ Although many readers were taken aback that “gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

69. In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

70. Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? Not at all. Recall that the requirement for the nexus requirement

¹⁸ William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“gay”) “is a well-known short-form or abbreviation of the community.” AGB, 4-12.

There are many, many specific examples indicating that it is.

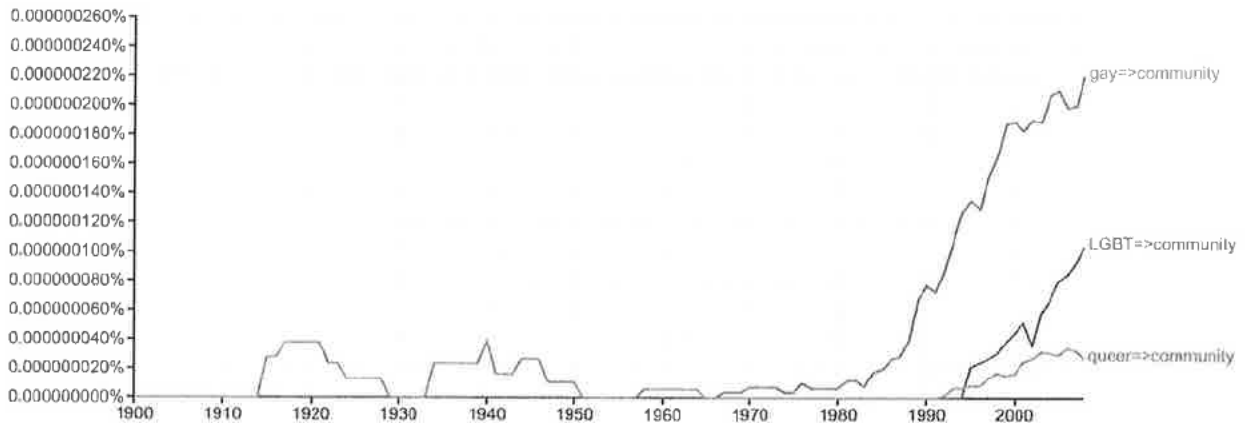


Figure 3. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

71. Figure 3, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (As with the other Figures, the methodology for the search is contained in Appendix 2.)

72. There are other corpuses that can be searched, and we have done so to check the reliability of the data in Figure 3. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed

Sept. 9, 2016). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. Specifically, we had 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

73. Does “gay community” generate a comparable number of hits? In our search of the BYU Corpus, we found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3A provides an illustration of these results.

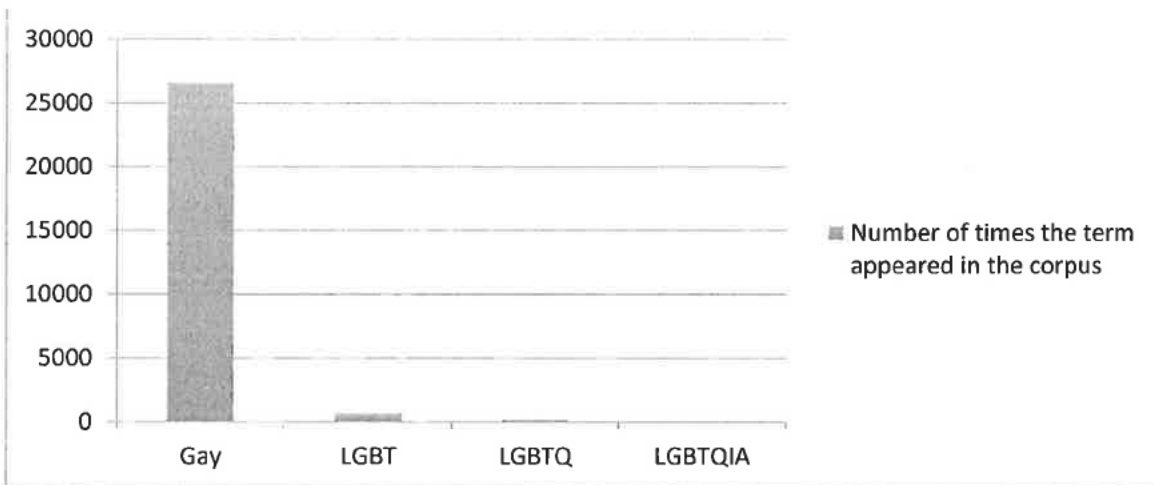


Figure 3A. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

74. How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points

for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

75. Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this unprecedented mass assault by a single person on American soil.¹⁹ Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and “allies,” as well as many gay men.

76. Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.²⁰ Most of the victims were

¹⁹ We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

²⁰ For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed 9/2/16).

homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

77. Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”²¹

78. Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events”

²¹ E.g., *Highlights from New York's Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

all over the world, <https://www.nighttours.com/gaypride/> (viewed Sept. 9, 2016). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

79. There are also international gay pride events. In 2017, it will be World Pride Madrid, celebrating Spain's leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid's annual pride celebration was voted "best gay event in the world" by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as "Gay World Pride."²² Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use "gay" **both** as a generic, umbrella term for sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

2. "Gay" Is an Umbrella Term for the Community That Includes Transgender, Intersex, and "Allied" Persons

80. As illustrated by the accounts of the Orlando "gay bar" and the world-wide "gay pride" events, the term "gay" remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that "gay people," the generic term, remains the most popular use of the term "gay," with "gay men" and "gay women" also popular, but much less so.

²² E.g., *Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

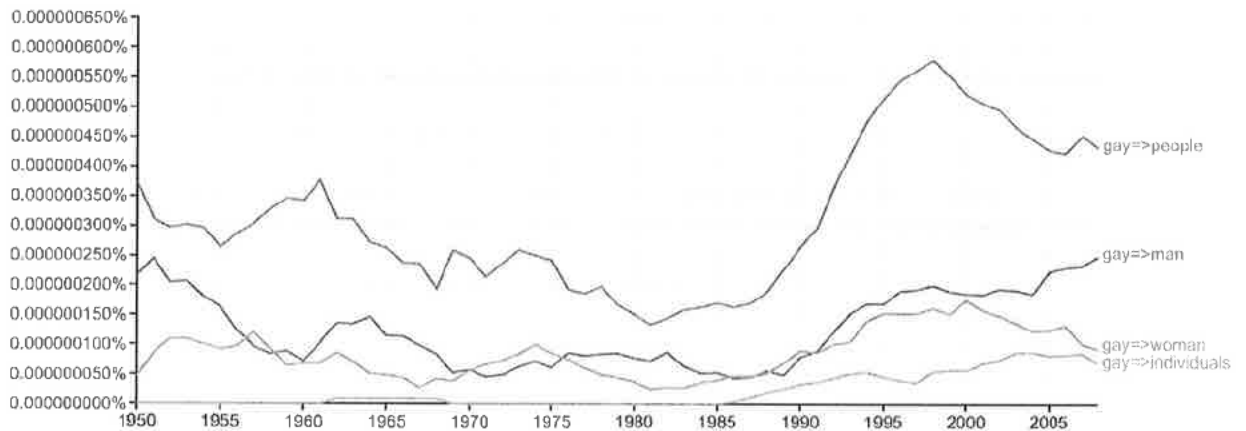


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

81. The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition, aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing. As I shall show, the EIU Panel did not browse very extensively.
82. To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term

makes it perfect for an Internet domain (".gay") for the community that consists of sexual and gender minorities.

83. Thus, almost all of the CPE Report's examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay's claim that "gay" is a "well known short-form or abbreviation for the community." The EIU Panel objected that dotgay's analysis "fails to show that when 'gay' is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities." CPE Report, 7. Although I do not believe the EIU Panel fairly characterized dotgay's application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

84. Consider the famous "Gay Games," an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. The stated purpose of the Gay Games is to foster "self-respect of lesbian, gay, bisexual, transgender, and all sexually-fluid or gender-varient individuals (LGBT+) throughout the world."²³ The mission of the Federation is "to promote equality through the organization of the premiere international LGBT and LGBT-friendly sports and cultural event known as the Gay Games."²⁴ Notice how the Federation uses the term "gay" as both a generic, umbrella term ("Gay Games") and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly,

²³ Federation of Gay Games, *Purpose and Mission Statement*, ¶ 1, <https://gaygames.org/wp/about-the-fgg/about-the-federation/purpose-and-mission-statement-2/> (viewed Sept. 9, 2016).

²⁴ *Id.*, ¶ 2.

LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

85. Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

86. The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy.²⁵ “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted

²⁵ CPE Report, 7; *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (viewed Sept. 9, 2016) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”²⁶

87. In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.²⁷ *Gay Star News* is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.²⁸

88. Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’ * * *. But, as she affirms, there is a

²⁶ E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

²⁷ Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

²⁸ Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

panoply of identities from which to choose in an expansive **gay L.A.**”²⁹ These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

89. Consider another recent example, James Franco. He is a famous actor who is as coy about his sexual orientation and gender identity as he is friendly and “allied” with the gay community. He is often asked whether he is “gay,” and his characteristic (and current) answer is that, yes, he is “gay,” even though he does not have sex with men and is neither transgender nor intersex.³⁰ In a March 2015 interview with himself, “Gay James Franco” said this: “Well, I like to think that I’m gay in my art and straight in my life. Although, I’m also gay in my life up to the point of intercourse, and then you could say I’m straight.”³¹ James Franco is a friend, an ally, a co-explorer with sexual and gender nonconformists of all sorts. Like Raquel Gutierrez, he is part of a larger “gay community.” Both people illustrate how “gay” can be **both** a popular term referring to sexual orientation and activity **and** a generic, umbrella term referring to a sensibility or a community whose members do not conform to traditional gender and sexual norms.

²⁹ Faderman & Timmons, *Gay L.A.*, 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

³⁰ *Understanding James Franco*, Rolling Stone, April 7, 2016 (account and quotations in text).

³¹ J. Bryan Lowder, *James Franco Is Gay—Well, At Least Half of Him Is*, Slate, March 16, 2015.

Another example is Miley Cyrus, an announced “pansexual” who has recently been sporting clothes with the slogan “Make America Gay Again.”³²

90. As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. My research associates and I have run a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” becomes associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.

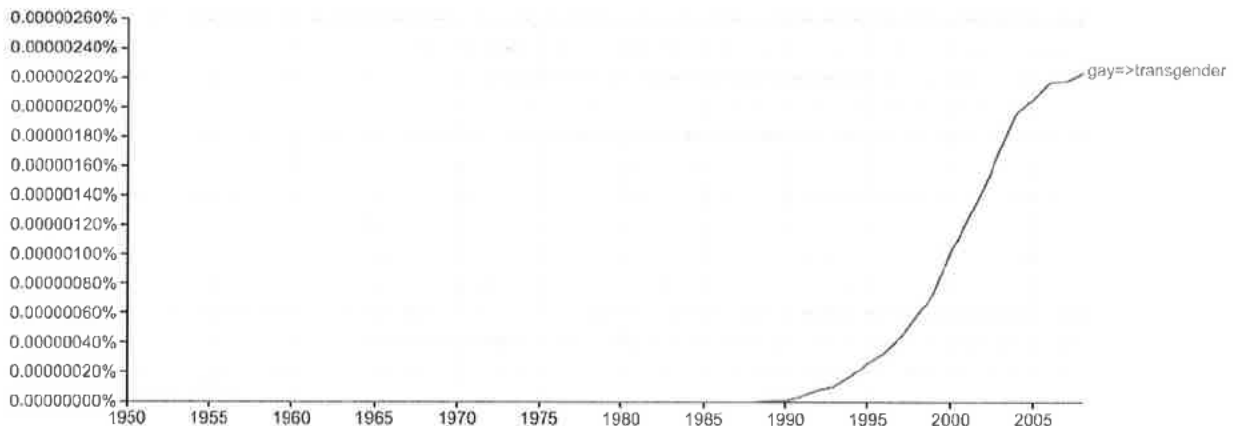


Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

³² Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (viewed Sept. 9, 2016).

91. The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer and still-mysterious term, and it is not clear how many acknowledged intersex persons there are in the world. Most discussion of intersexuality in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon.

92. Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.³³

93. Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website,

³³ Federation of Gay Games, “Gender in Sport,” <https://gaygames.org/wp/sport/sports-policiesd/gender/> (viewed Sept. 9, 2016).

Everyone Is Gay.³⁴ The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.³⁵ While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

V. CONCLUSION AND SIGNATURE

94. Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

95. Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly,

³⁴ *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (viewed Sept. 9, 2016).

³⁵ E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (viewed Sept. 9, 2016).

ICANN's requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay's application. Indeed, dotgay's application more than meets the requirements actually laid out in the Applicant Guidebook.

96. Moreover, ICANN "shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." ICANN Bylaws, Art. II, § 3 ("Non-Discriminatory Treatment"). And ICANN "and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN Bylaws, Art. III, § 1.

97. Evaluating dotgay's application, the EIU has not acted in a completely "open and transparent manner," nor has it followed "procedures designed to ensure fairness." To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU's own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

98. Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and to grant dotgay's application, for it legitimately deserves at least 14 of 16 points (i.e., including 4 of 4 points for Criterion #2, the community nexus requirement).

Respectfully submitted,

Date, September 13, 2016



William N. Eskridge Jr.

John A. Garver Professor of Jurisprudence
Yale Law School

APPENDICES

APPENDIX 1

CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

EDUCATION

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

POSITIONS HELD

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995

Stanford, 1995

Toronto, 1999, 2001

Vanderbilt, 2003

Columbia, 2003

Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011

Fordham, 2008

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998

Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 - 1979

(SELECTED) PUBLICATIONS

Books

Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016)

Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

A Republic of Statutes: The New American Constitutionalism (Yale 2010) (co-authored with John Ferejohn)

"Dishonorable Passions": Sodomy Law in America, 1861-2003 (Viking 2008)

Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale)

Equality Practice: Civil Unions and the Future of Gay Rights (Routledge 2002)

Legislation and Statutory Interpretation (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999)

Constitutional Tragedies and Stupidities (NYU 1998) (co-authored and edited with Sanford Levinson)

Sexuality, Gender, and the Law (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment? (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

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Centennial Visitor, Public Lecture, Chicago-Kent College of Law, "Administrative Constitutionalism," March 5, 2009

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APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008*

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 2. A Comparison of the Frequency of “Gay Suicide” compared to “LGBT Suicide” in the English Corpus of Books published in the United States from 1950 to 2008

This Figure is a comparison of the frequency of “gay suicide” and “LGBT suicide” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/uniforms in the sample of books, what percentage of them are “gay suicide” and what percentage of them are “LGBT suicide.”

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 3. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”*

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

Exhibit 12

ARIF HYDER ALI

October 17, 2016

VIA E-MAIL

ICANN Board of Directors
c/o Mr. Steve Crocker, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**Re: Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's
Community Priority Application No: 1-1713-23699**

Dear Chairman Crocker and Members of the ICANN Board:

We are writing on behalf of our client, dotgay LLC (“**dotgay**”), to submit the **independent Expert Opinion** of **Professor M.V. Lee Badgett**, the Director of the Center for Public Policy and Administration, and Professor of Economics at the University of Massachusetts Amherst. Professor Badgett is also co-founder and Distinguished Scholar at the Williams Institute on Sexual Orientation, Gender Identity Law and Public Policy at the UCLA School of Law, a research center recognized worldwide for LGBTI research and expertise. Professor Badgett has published widely, including having written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports. She has testified on her research before the U.S. Congress, several U.S. state legislatures, and in litigation. She has also been a consultant and contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues.


Professor Badgett’s Opinion will assist the ICANN Board (“**Board**”) in evaluating dotgay’s pending application (Application No: 1-1713-23699) for community priority status.¹ Prof. Badgett explains that withholding community priority status from dotgay llc would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay community. She relies upon her research to show that the stigma, discrimination and violence faced by the community is real and leads to lower

¹ Exhibit 1, Expert Report of Professor M.V. Lee Badgett, dated October 17, 2016.

incomes, poverty and lower mental and physical health among other unattractive outcomes. She notes that the internet has become the predominant safe space where members of the community can meet, share ideas and engage in collective action to create a more equal world. The .GAY TLD (as envisaged by the community applicant) is part of the effort to create that safe space for economic activity and social change. Prof. Badgett identifies the many and real benefits to the community from dotgay's Public Interest Commitments and registration policies. She also considers the harm that would befall the community in the absence of a community .GAY TLD (which is the likely outcome if dotgay's application for community priority status is unsuccessful).

In short, her reports adds another dimension of support to dotgay's application for community priority status, which has already been substantiated by dotgay's presentation and submissions to the ICANN Board, the **Expert Opinion of Professor William Eskridge Jr of Yale Law School**, and **ICANN Ombudsman's Report**, all of which conclusively demonstrate that dotgay's application is entitled to community priority status under ICANN's Articles, Bylaws and Applicant Guidebook. We urge ICANN to consider Professor Badgett's Expert Opinion together with the existing support on record.

Sincerely,



Arif Hyder Ali

**EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT IN
SUPPORT OF DOTGAY'S COMMUNITY PRIORITY APPLICATION
OCTOBER 17, 2016**

EXPERT OPINION OF PROFESSOR M.V. LEE BADGETT

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EXPERT OPINION

I. EXPERT OPINION

ICANN's failure to grant dotgay's community priority application for the .GAY top level domain name would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay economic community. That global economic community, made up of LGBTIA individuals exchanging ideas, knowledge, goods, and services, is a central priority of dotgay's application and mission. Below I describe the challenges and needs of the LGBTIA community and how .GAY could support or hinder efforts to achieve their full social and economic inclusion.

a. LGBTIA people experience stigma, discrimination, and violence around the world.

A growing body of evidence demonstrates that LGBTIA people continue to face stigma, discrimination, and violence around the world. While some countries have moved closer to legal equality than others, many governments, employers, educational institutions, faith communities, families, and other social settings in every country continue to treat lesbian, gay, bisexual, transgender, and intersex people as less than fully equal in market, personal, and social interactions. These individual and institutional forms of exclusion from full and equal participation in life reduce access to education, employment, health care, and government services and increase exposure to unhealthy stress. Thus exclusion contributes to lower incomes, poverty, poorer mental and physical health, and other negative outcomes. These disparities are well documented in my own research cited below, and by research by many other scholars, governments, NGOs, and private research organizations. Much of this research is described in my books and reports (fully cited in Section II), including *Money, Myths, and Change: The Economic Lives of Lesbian and Gay Men*, *Sexual Orientation Discrimination: An International Perspective*, and "The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies."

b. To fight social exclusion, LGBTIA people need to create safe spaces to meet each other.

In this context of exclusion, it is essential for LGBTIA people to be able to create spaces for themselves that enable them to survive and to expand safe spaces into the broader community. They need to meet and support each other, share ideas and knowledge, and engage in collective action to move toward a more equal world. In some countries at different moments in history, we know that markets have allowed the development of such

meeting places. Bookstores, newspapers, magazine, bars, and restaurants emerged in commercial spaces and became important locations that drew LGBTIA people together. More recently in some countries, such spaces have also been found in corporate employee resource groups or gay-straight alliances in educational settings. In many places, LGBTIA organizations have used such settings to create a social movement, economic opportunities, and a community of individuals, bound together in common interest and common challenges.

c. The internet is now one of the most important spaces for LGBTIA people.

Since the early 1990's, the internet has become that meeting space. Over time, the internet has largely replaced some physical locations and products—particularly gay newspapers, gay magazines, and gay bookstores—and greatly influenced others. The internet has proven to be conducive to creating cyberspace locations for LGBTIA people to meet and share their lives and knowledge. Organizations around the world have been able to use the privacy afforded Internet users and new technologies to grow their membership and to connect LGBTIA people with each other online and in person.

In the future, the global gay community will continue to be a creative source of new businesses and organizations that will be tied to the Internet. The community built around the life reality of being seen as “gay”—whether for lesbians, gay men, transgender men and women, intersex individuals, or bisexual people, along with the allies who support them—has developed that term that is recognizable and a form of common property. The .GAY TLD could be used on the internet to promote greater community-building that would lead to social change under the right circumstances.

d. Of all of the applicants for the .GAY TLD, only dotgay has made public commitments to community accountability.

Of the three .GAY applicants that filed public interest commitments, only one—dotgay—made public commitments specific to the gay community, and those commitments to community accountability are significant. Only dotgay expressed an intention and plan to proactively ensure that only members of the community will be allowed to register, an important consideration to prevent abuse that might be likely to occur if a commercial applicant owns .GAY, as discussed further below in section (f). In addition, only dotgay pledged to share a substantial proportion of profits with the community, and only dotgay committed to including members of the community in the development of policies for .GAY. Neither of the other two applicants filing public commitments expressed any knowledge of the challenges and potential concerns of the gay or LGBTIA community, much less any intention to promote the interests of the gay community. Indeed, the only time the word “gay” even appears in the public commitments of the other two applicants is in the term “.GAY”.

e. Community accountability will be essential if .GAY is to enhance the economic, social, and legal well-being of LGBTIA individuals around the world.

More specifically, .GAY has enormous potential to promote equality and prosperity for LGBTIA people if the development of .GAY is guided by dotgay, a community organization that would include the broad involvement of the gay community. Indeed, .GAY is highly unlikely to be a powerful platform for LGBTIA people if there is no community accountability. The value of .GAY would be diminished—or even negative—without community ownership.

As suggested by the analysis of public commitments in section (d), commercial ownership of the .GAY TLD would likely not balance community needs with stockholder goals. The failure to weigh community needs would greatly reduce the value of .GAY to LGBTIA organizations and businesses. Without community interaction and oversight, the pricing decisions, marketing strategies, and development of .GAY would not prioritize community benefit. For example, a purely financial incentive would exist to auction or sell domains like Pride.gay, Center.gay, Hate.gay, Lesbian.gay, Transgender.gay and Lambda.gay, Legal.gay, Health.gay to those willing to pay the most for it without considering the community's best interest. Such sales would likely price out existing and new organizations or businesses in the global LGBTIA community. It is highly unlikely that the winning bidders, lacking community oversight, would use such spaces as community resource hubs, as planned by dotgay. Commercial owners' lack of a vision for meeting the community's needs in developing .GAY would simply perpetuate the current economic and social disadvantages of LGBTIA people.

f. Without community oversight, .GAY could become a source of activity that would harm LGBTIA people.

If ICANN rejects dotgay's community priority application, effectively eliminating community oversight of .GAY, the platform would be highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people. For example, the very active efforts in many countries to commit LGBTIA people to coercive (but professionally discredited) "conversion therapies" could be greatly aided by a site that appears to be gay-supportive but is actually feeding personal information to anti-gay organizations or law enforcement. Such information could be used to publicly disclose someone's sexual orientation or to blackmail them into coercive and harmful treatment.

Such outcomes are not mere speculation. Research has uncovered many examples of police, governmental, and individual efforts to entrap, blackmail, or extort LGBTIA people, where consensual same-sex activity is criminalized, such as in countries as diverse as Zimbabwe, Iran, Kuwait, Kenya, Nigeria, India, and (historically) the United States. For examples, see "Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa," International Gay and Lesbian Human Rights Commission, 2011 (<https://www.outrightinternational.org/sites/default/files/484-1.pdf>). Today, at least 75 countries criminalize same-sex sexual activity, with a death penalty possible in 13 of those countries. In countries that have criminalized advocacy for homosexuals or for certain gay issues, such as Russia or Nigeria, allies participating in .GAY online forums might also be targeted. Thus an online platform seemingly tied to the gay community—while completely unaccountable to actual vital community interests—would be ripe for abuse by people,

organizations, and agencies that would use it to further the oppression of LGBTIA people. Such outcomes would both reduce the economic value of .GAY to its legitimate users in the community and would result in severe personal and economic harms to the individuals targeted.

If ICANN continues to reject dotgay's community priority application, which would provide community oversight of .GAY, these potential negative outcomes are plausible predictions and would make it harder for LGBTIA businesses and organizations to form and to operate effectively. While specific research has not been done to estimate the social and economic cost of these outcomes to the LGBTIA community, those costs would be real and would add to the existing stigma and discrimination faced by LGBTIA people around the world.

II. QUALIFICATIONS

I offer my opinion as an expert on the economic impact of stigma, discrimination, and exclusion of the LGBTI people and on the larger economy. I base this opinion about .GAY on twenty-five years of research as a professor of economics, currently at the University of Massachusetts Amherst. For nine years I was also director of the School of Public Policy at UMass Amherst. My Ph.D. in economics is from the University of California, Berkeley. I am a cofounder of and Distinguished Scholar at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law, a research center that is recognized worldwide for LGBTI research and expertise.

Published Works and Global Consulting: I have written or co-edited three books on economics and LGBT life, along with many academic articles and policy reports, all of which are listed on my CV below. This body of research includes work on many different countries. I have testified on my research to the U.S. Congress, several state legislatures, and in litigation. I have been a consultant or contractor to the World Bank, USAID, the UN Development Programme, and the U.S. Department of State on these issues, and I have attended numerous global conferences on LGBTI human rights and development. I have done speaking tours on these topics in Australia, Vietnam, Philippines, China, South Korea, and Peru, among other countries. I have been asked to speak to the ambassadors of the OECD and the board of directors of the Inter-American Development Bank, as well as numerous business audiences around the world.



Signed: _____

M. V. Lee Badgett

Date: October 17, 2016

Full Curriculum Vitae of Professor M.V. Lee Badgett

M. V. LEE BADGETT



HOME ADDRESS:

Contact Information Redacted

CAMPUS ADDRESS:

Department of Economics
University of Massachusetts
Amherst, MA 01003
Contact Information Redacted
Contact Information Redacted

CURRENT POSITION and AFFILIATIONS:

Professor	Dept of Economics, Univ. of Massachusetts Amherst
Faculty	School of Public Policy, Univ of Mass Amherst
Williams Distinguished Scholar	Williams Institute, UCLA School of Law
Scholar-in-residence	Equal Employment Opportunity Commission
Fellow	Salzburg Global Seminar, LGBT Forum

EDUCATION:

	DEGREE	DATE	FIELD
University of California, Berkeley	Ph.D.	1990	Economics
Dissertation title: "Racial Differences in Unemployment Rates and Employment Opportunities"			
University of Chicago	A.B.	1982	Economics

PREVIOUS POSITIONS:

Director, School of Public Policy (formerly Center for Public Policy and Admin.) (2007-2016 name change), UMass Amherst
Research Director, Williams Institute, UCLA School of Law (2006-2013)
Assistant & Associate Professor, Dept. of Economics, University of Massachusetts-Amherst (1997-2008)
(Adjunct) Professor, Whittier Law School (Summer 2011)
Visiting Professor, UCLA School of Law (2005-2007; Summer 2008)
Visiting Researcher, Amsterdam School for Social Science Research, University of Amsterdam (2003-2004)
Co-founder & Research Director, Institute for Gay and Lesbian Strategic Studies (1994-2006)

Visiting Assistant Professor, Women's Studies and Lesbian and Gay Studies, Yale University (1995-1996)

Research Analyst, National Commission for Employment Policy, U.S. Department of Labor (Summer 1994)

Assistant Professor, School of Public Affairs, University of Maryland, College Park (1990-1997)

CURRENT RESEARCH TOPICS:

Connections between inclusion of LGBT people and economic development
Sexual orientation and gender identity discrimination in labor markets and impact of public policy

Poverty in LGBT community

COURSES TAUGHT:

Economics: Microeconomics (University of Massachusetts)

Microeconomics and Public Policy (University of Massachusetts-Amherst)

Political Economy of Sexuality (University of Massachusetts-Amherst)

Labor Economics--undergraduate and Ph.D. level (University of Massachusetts-Amherst)

Feminist Economics (co-taught as part of Traveling Course at University of Minnesota)

Policy: Policy Analysis (University of Massachusetts-Amherst), Capstone course (University of Massachusetts-Amherst)

Social Inequality and Social Justice: Problems and Solutions (University of Massachusetts-Amherst)

Social Science and Public Policy on LGBT Issues (Whittier Law School Barcelona program; UMass Online)

Public Policy Seminar: Global LGBT Human Rights and Criminal Justice Reform in U.S. (Univ. of Mass.)

BOOKS:

The Public Professor: How to Use Your Research to Change the World, NYU Press, 2016.

When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage, New York University Press, 2009. Distinguished Book Award, American Psychological Assoc., Division 44, 2010; Korean translation published, Minumsa, 2016.

Sexual Orientation Discrimination: An International Perspective, co-edited by M. V. Lee Badgett and Jeff Frank, Routledge, 2007.

Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men, University of Chicago Press, 2001.

INSTITUTION-BUILDING PROJECTS

- Led growth and transition into School of Public Policy from Center for Public Policy & Administration at UMass Amherst

- Co-founder, Institute for Gay and Lesbian Strategic Studies, merged with Williams Institute in 2006
- Co-builder of the Williams Institute on SOGI Law and Public Policy as founding research director
- Co-PI, *EEO DataNet*, Equal Employment Opportunity Network of academics and EEOC, funded by NSF grant.
- Co-founder and steering committee member, LGBT Poverty Collaborative (U.S.)

JOURNAL ARTICLES:

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"The Economic Impact of Extending Marriage to Same-Sex Couples in Washington," Angeliki Kastanis, M. V. Lee Badgett, and Jody L. Herman, January 2012.

"Estimating the Economic Boost of Marriage Equality in Iowa: Sales Tax," Angeliki Kastanis, M. V. Lee Badgett, and Jody L. Herman, December 2011.

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"Spending on Weddings of Same-Sex Couples in the United States," By Craig J. Konnoth, M.V. Lee Badgett, Brad Sears, Williams Institute, July 2011.

"The Impact of Creating Civil Unions for Same-Sex Couples on Delaware's Budget," By Jody L. Herman, Craig J. Konnoth, M.V. Lee Badgett, Williams Institute, March 2011.

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"The Impact on Rhode Island's Budget of Allowing Same-Sex Couples to Marry," By Jody L. Herman, Craig J. Konnoth, M.V. Lee Badgett, February 2011, Williams Institute.

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"The Economic Impact of Extending Marriage to Same-Sex Couples in the District of Columbia," by Christopher Ramos, M. V. Lee Badgett, and Brad Sears, Williams Institute, April 2009.

"Fact Sheet: Tax Implications for Same-Sex Couples," by Naomi Goldberg and M. V. Lee Badgett, Williams Institute, April 2009.

"The Economic Impact of Extending Marriage to Same-sex Couples in Vermont," By M. V. Lee Badgett, Christopher Ramos, and Brad Sears, Williams Institute, March 2009.

"Poverty in the Lesbian, Gay, and Bisexual Community," by Randy Albelda, M.V. Lee Badgett, Gary Gates, and Alyssa Schneebaum, Williams Institute, March 2009.

"Florida Adoption Ban/ Cost Estimate," by Naomi Goldberg and M. V. Lee Badgett, Williams Institute, February 2009.

"Kentucky Foster Care/Adoption Ban Cost Estimate," By Naomi Goldberg and M. V. Lee Badgett, Williams Institute, February 2009.

“The Economic Impact of Extending Marriage to Same-sex Couples in Maine,” By M. V. Lee Badgett, Christopher Ramos, and Brad Sears, Williams Institute, February 2009.

“Evidence of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity: Complaints Filed with State Enforcement Agencies 1999-2007,” By M. V. Lee Badgett, Christopher Ramos, and Brad Sears, Williams Institute, November 2008.

“The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners,” Naomi G. Goldberg, Christopher Ramos, and M.V. Lee Badgett, September 2008.

“Marriage, Registration and Dissolution by Same-sex Couples in the U.S.,” Gary J. Gates, M.V. Lee Badgett, and Deborah Ho, Williams Institute, July 2008.

“The Impact of Extending Marriage to Non-Resident Same-Sex Couples on the Massachusetts Budget,” By M. V. Lee Badgett and R. Bradley Sears, Williams Institute memo to Massachusetts Secretary of Housing and Economic Development, June 2008.

“The Impact of Extending Marriage to Same-Sex Couples on the California Budget,” Brad Sears and M.V. Lee Badgett, Williams Institute, June 2008.

“The Impact on Iowa's Budget of Allowing Same-Sex Couples to Marry,” M.V. Lee Badgett, Amanda K. Baumle, Adam P. Romero and Brad Sears, Williams Institute, April 2008.

“The Impact on Oregon's Budget of Introducing Same-Sex Domestic Partnerships,” By M.V. Lee Badgett, R. Bradley Sears, Elizabeth Kukura, and Holning Lau, Williams Institute, February 2008.

“Implications of HB 9 for Businesses in New Mexico,” M.V. Lee Badgett, Williams Institute, January 2008.

“Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits,” M.V. Lee Badgett, Center for American Progress and Williams Institute, December 2007.

“The Impact on Maryland's Budget of Allowing Same-Sex Couples to Marry,” M.V. Lee Badgett, Amanda Baumle, Shawn Kravich, Adam P. Romero, and R. Bradley Sears, Williams Institute, November 2007.

Amici curiae brief, in re Marriage Cases, Supreme Court of California, September 2007, M. V. Lee Badgett and Gary J. Gates.

“Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination,” by Lee Badgett, Holning Lau, Brad Sears, and Deborah Ho, Williams Institute, UCLA, June 2007.

Census Snapshot series: 50 state reports; Williams Institute, UCLA, with various co-authors, 2007.

“Methodological Details for Census Snapshot,” August 2007, Danielle MacCartney, M. V. Lee Badgett, and Gary Gates.

“Adoption and Foster Care by Gay and Lesbian Parents in the United States,” Williams Institute and Urban Institute, March 2007, Gary Gates, Lee Badgett, Jennifer Macomber, and Kate Chambers.

“The Financial Impact of Domestic Partner Benefits in New Hampshire,” Williams Institute, December 2006.

“Economic Benefits from Same-Sex Weddings in New Jersey,” Williams Institute, December 2006.

“Frequently Asked Questions about Providing Domestic Partner Benefits,” M. V. Lee Badgett and Michael A. Ash, Williams Institute, October 2006.

“The Impact of the Colorado Domestic Partnership Act on Colorado's State Budget,” M.V. Lee Badgett, R. Bradley Sears, Roger Lee, and Danielle MacCartney, Williams Institute, October 2006

“The Effect of Marriage Equality and Domestic Partnership on Business and the Economy,” M.V. Lee Badgett and Gary J. Gates, Williams Institute, October 2006.

“The Impact on Washington’s Budget of Allowing Same-Sex Couples to Marry,” M.V. Lee Badgett, R. Bradley Sears, Elizabeth Kukura, and Holning Lau, IGLSS and Williams Institute, 2006.

“The Impact on New Mexico’s Budget of Allowing Same-Sex Couples to Marry,” M.V. Lee Badgett, R. Bradley Sears, Steven K. Homer, Patrice Curtis, and Elizabeth Kukura, IGLSS and Williams Institute, 2006.

“Positive Effects on State of Alaska from Domestic Partnership Benefits,” Williams Institute, 2006.

“The Cost to Ocean County of Providing Pension Benefits to Employees’ Domestic Partners,” Williams Institute, 2006.

“The Impact on New Hampshire’s Budget of Allowing Same-Sex Couples to Marry,” R. Bradley Sears, M. V. Lee Badgett, and Elizabeth Kukura, IGLSS and Williams Institute, 2005.

“Counting on Couples: Fiscal Savings from Allowing Same-Sex Couples in Connecticut to Marry,” M.V. Lee Badgett, R. Bradley Sears, Patrice Curtis, and Elizabeth Kukura, IGLSS and Williams Project on Sexual Orientation and the Law, 2005.

“Will Providing Marriage Rights to Same-sex Couples Undermine Heterosexual Marriage? Evidence from Scandinavia and the Netherlands,” Discussion paper, Council on Contemporary Families and the Institute for Gay and Lesbian Strategic Studies, July 2004.

“The Business Cost Impact of Allowing Same-sex Couples to Marry,” co-authored with Gary Gates. Human Rights Campaign and Institute for Gay and Lesbian Strategic Studies, 2004.

“Same-sex Couples and Their Children in Massachusetts: A View from Census 2000,” co-authored with Michael Ash, Nancy Folbre, Lisa Saunders, and Randy Albelda, *Angles*, Institute for Gay and Lesbian Strategic Studies, Amherst, MA, February 2004.

Sears, R. Bradley, and M. V. Lee Badgett. “The Impact on California’s Budget of Allowing Same-Sex Couples to Marry,” Institute for Gay and Lesbian Strategic Studies and Williams Project of UCLA Law School, May 2004.

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“The Bottom Line on Family Equality: The Impact of AB205 on California Businesses,” M. V. Lee Badgett and R. Bradley Sears, Institute for Gay and Lesbian Strategic Studies and Williams Project, August 2003.

“Supporting Families, Saving Funds: A Fiscal Analysis of New Jersey’s Domestic Partnership Act,” M.V. Lee Badgett and R. Bradley Sears, Institute for Gay and Lesbian Strategic Studies and Williams Project of UCLA Law School, December 2003.

“Equal Rights, Fiscal Responsibilities: The Impact of AB205 on California’s Budget,” M.V. Lee Badgett and R. Bradley Sears, Institute for Gay and Lesbian Strategic Studies and Williams Project of UCLA Law School, May 2003.

“Left Out of the Count: Missing Same-sex Couples in Census 2000,” M. V. Lee Badgett and Marc A. Rogers, Institute for Gay and Lesbian Strategic Studies, Amherst, MA, 2003.

“Calculating Costs with Credibility: Health Care Benefits for Domestic Partners,” *Angles*, Vol. 5, Issue 1, 2000.

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"Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination," *Angles: The Policy Journal of the Institute for Gay and Lesbian Strategic Studies*, Vol. 2, No. 1, September 1997.

"For Richer, For Poorer: The Cost of Nonrecognition of Same Gender Marriages," M. V. Lee Badgett and Josh A. Goldfoot, *Angles: The Policy Journal of the Institute for Gay and Lesbian Strategic Studies*, Vol. 1, No. 2, May 1996.

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"The Impact of the Construction of Luz SEGs VIII on California and the Project Area," William T. Dickens, Lee Badgett, and Carlos Davidson, February 1989.

OP-EDS AND OTHER PUBLICATIONS:

Laura E. Durso and M. V. Lee Badgett, "Policymakers should take seriously the need to make all LGBT stories visible through data," *The Hill*, Congress Blog, Sept. 20, 2016, http://thehill.com/blogs/congress-blog/civil-rights/296727-policymakers-should-take-seriously-the-need-to-make-all-lgbt#disqus_thread.

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"Handling the Hot Water," *Inside Higher Ed*, <https://www.insidehighered.com/advice/2016/01/27/tips-managing-controversies-result-research-essay>, Jan. 27, 2016.

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"The Next Irish Revolution: Same-sex Marriage," *Time*, May 20, 2015, <http://time.com/3882869/ireland-same-sex-marriage/>, *Pacific Standard*, <http://www.psmag.com/politics-and-law/the-next-irish-revolution>, Originally published

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“The Economic Benefits of Gay Marriage,” March 29, 2013, PBS News Hour Blog, The Business Desk, <http://www.pbs.org/newshour/businessdesk/2013/03/the-economic-benefits-of-gay-m.html>

“The Books that Inspired Lee Badgett,” blog post, LSE Review of Books, November 2012. <http://blogs.lse.ac.uk/lsereviewofbooks/2012/11/25/the-books-that-inspired-lee-badgett/>

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“Gay Marriage Good for Family and Economy,” *The Drum Opinion*, ABC Online (Australian Broadcasting Corp.), March 6, 2012.

“What Obama Should Do About Workplace Discrimination,” *New York Times*, February 6, 2012. <http://www.nytimes.com/2012/02/07/opinion/what-obama-should-do-about-workplace-discrimination.html>

“High Costs of Discrimination,” *Worcester Telegram*, M. V. Lee Badgett and Jody Herman, May 11, 2011.

Featured guest column, *The Economist* debate on marriage for same-sex couples, January 6, 2011, <http://www.economist.com/debate/days/view/638>.

“Summer of Love and Commitment,” *The Huffington Post*, September 3, 2008.

“Sexual Orientation, Social and Economic Consequences,” in *International Encyclopedia of the Social Sciences, 2nd Edition*, ed. William A. Darity, Jr., Macmillan Reference USA, 2008.

“The Wedding Economy,” *The New York Times*, January 7, 2007.

"The Closet Door's Open: What's Behind Hartford's Surge in Gay Population?" *The Hartford Courant*, Gary J. Gates and M. V. Lee Badgett, November 5, 2006.

"The Future of Same-Sex Marriage," *Social Work Today*, November 2006.

"The Gay Health Insurance Gap," www.alternet.org, October 26, 2006.

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Book review of *Inheritance Law and the Evolving Family*, by Ralph Brashear, *Feminist Economics*, vol. 12, no. 1-2, 2006.

"Equality Doesn't Harm 'Family Values'", with Joop Garssen, *National Post* (Canada), August 11, 2004.

"Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia?" *Slate Magazine*, May 20, 2004, <http://slate.msn.com/id/2100884/>.

Brad Sears and Lee Badgett, "Tourism and Same-sex Marriage," *San Diego Union-Tribune*, June 2, 2004.

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"Equality Is Not Expensive," *Connecticut Law Tribune*, April 19, 2004.

"Domestic Partner Bill Won't Be Burden to Business," *Orange County Register*, April 18, 2004, with Brad Sears.

"Economics" and "Boycotts", entries for *Encyclopedia of Gay, Lesbian, Bisexual, and Transgender History*, ed. by Marc Stein, Scribners, forthcoming December 2013.

"Recognizing California Couples: Domestic-Partner Law Attacked by Anti-Gay Senator Could Boost Flow of Cash to State," M. V. Lee Badgett and R. Bradley Sears, *Daily Journal*, October 14, 2003.

"A Win at Cracker Barrel," *The Nation*, February 10, 2003.

"Why I was a Dem for a Day," *Daily Hampshire Gazette*, June 2002.

Commentary on Boy Scouts of America, WFCR, Amherst, MA, August 13, 2001.

"Sexual Orientation," Richard Cornwall and M. V. Lee Badgett, entry for *Encyclopedia of Feminist Economics*, ed. by Meg Lewis and Janice Peterson, Edward Elgar, 2000.

"Lesbians, social and economic situation," entry for *International Encyclopedia of the Social and Behavioral Sciences*, forthcoming.

"One Couple's 'Penalty' remains another's privilege", with James Alm and Leslie A. Whittington, *Boston Globe*, September 3, 2000, p. E2.

"Domestic partner status unfair to gay couples," *Springfield Sunday Republican*, op-ed April 2, 2000, p. B3.

"Do Sexual Orientation Policies Help Lesbians?" in *Women's Progress: Perspectives on the Past, Blueprint for the Future*, Institute for Women's Policy Research, Fifth Policy Research Conference Proceedings, Washington, DC, 1998.

"Census Data Needed," letter to the editor, *The Washington Blade*, November 7, 1997, p. 37.

"Same-sex partners bring nurturing--and financial benefits--to the altar," op-ed piece with Gregory Adams, *Chicago Sun-Times*, June 8, 1996, p. 16.

"The Last of the Modernists: A Reply," *Feminist Economics*, Vol. 1, No. 2, 1995.

"Domestic Partner Recognition: Doing the Right--and Competitive--Thing," *Synthesis: Law and Policy in Higher Education*, Vol. 6, No. 4, Spring 1995.

"Equal Pay for Equal Families," *Academe*, May/June 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," in *Higher Education Collective Bargaining During a Period of Change*, Proceedings, Twenty-Second Annual Conference, April 1994, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, 1994.

"Beyond Biased Samples: Challenging the Myths on the Economic Status of Lesbians and Gay Men," pamphlet published by National Organization of Gay and Lesbian Scientists and Technical Professionals and the Institute for Gay and Lesbian Strategic Studies, 1994. (Early version of book chapter of same title.)

Co-author and co-editor, *Labor and the Economy*, published by the Center for Labor Research and Education, Institute of Industrial Relations, UC Berkeley, 1989.

"Looking for the Union Label: Graduate Students at U.C.," *California Public Employee Relations*, No. 85, June 1990.

"Rusted Dreams: Documenting an Economic Tragedy," *Labor Center Reporter*, No. 219, October 1987.

"How the Fed Works," *Labor Center Reporter*, No. 177, November 1986.

EXPERT WITNESS EXPERIENCE (LITIGATION 2009-2014):

Written testimony, *Birchfield and Mocko v. Armstrong and Jones*, March 2016 (challenge to Florida's policies on death certificates for same-sex spouses)

Written testimony, *Whitewood et al. v. Wolf et al.*, February 2014 (challenge to Pennsylvania's marriage equality prohibition)

Written testimony, *Harris v. McDonnell*, No. 5:13-cv-00077 (W.D. Va.), December 2013 (challenge to Virginia's marriage equality prohibition)

Written testimony, *DeLeon v. Perry*, No. 5:13-cv-00982 (S.D. Tex.), November 2013 (challenge to marriage equality prohibition in Texas)

Written testimony, *Kitchen v. Herbert*, No. 2:13-cv-00217 (D. Utah), October 2013 (challenge to Utah's marriage equality prohibition)

Written testimony, *Darby/Lazaro v. Orr*, No. 12 CH 19718 (Ill. Cir. Ct., Cook Cnty.), April 2013 (challenge to Illinois' marriage equality prohibition)

Written testimony, *Sevcik v. Sandoval*, No. 2:12-cv-00578 (D. Nev.), 2012 (challenge to Nevada's marriage equality prohibition)

Written testimony and deposition, *Bassett v. Snyder*, No. 2:12-cv-100382012 (E.D. Mich.), 2012 and 2013 (challenge to Michigan's Domestic Partner Benefit Restriction Act).

Written testimony, *Glossip v. Missouri Dep't of Transp. and Highway Patrol Employees' Ret. Sys.*, No. 10-CC00434 (Mo. Cir. Ct., Cole Cnty.), 2011 (challenge to denial of death benefit to state trooper's surviving same-sex partner).

Written testimony, *Collins v. Brewer* (later *Diaz v. Brewer*), No. 2:09-cv-02402 (D. Ariz.), 2010 (challenge to Arizona's cancellation of domestic partner benefits).

Deposition and trial testimony, *Perry v. Schwarzenegger* (later *Perry v. Brown, Hollingsworth v. Perry*), No. 3:09-cv-02292 (N.D. Cal.), 2010 (challenge to California's Proposition 8).

LEGISLATIVE WITNESS EXPERIENCE (Selected):

U.S. Senate Committee on Health, Education, Labor, and Pensions, S.811, The Employment Non-Discrimination Act of 2011, June 12, 2012.

Written testimony, S. 598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families, M. V. Lee Badgett, Ilan H. Meyer, Gary J. Gates, Nan D. Hunter, Jennifer C. Pizer, Brad Sears. July 2011.

U.S. House of Representatives, Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Postal Service, and the District of Columbia on HR 2517: Domestic Partnership Benefits and Obligation Act of 2009, July 2009.

U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Health, Employment, Labor, and Pensions, Testimony on Employment Non-Discrimination Act (HR 2015), September 2007.

Written and oral testimony on legislation or regulations in Alaska, California, Hawaii, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, Vermont.

SELECTED MEDIA APPEARANCES AND PROFILES:

Featured solo panelist, *The Economist* "Pride and Prejudice: The Business and Economic
Featured economist, "Gay Myths Derailed by Economist Badgett's Data Research," by
Jeanna Smialek, *Bloomberg*, June 20, 2014,
<http://www.bloomberg.com/news/articles/2014-06-20/gay-myths-derailed-by-economist-badgett-s-data-research>

Featured guest, *Tell Me More*, NPR, June 10, 2013.

Featured guest, *Encounter*, Radio National, ABC (Australian Broadcasting Corp), October 9, 2011.

Featured guest, *Faith Middleton Show*, January 13, 2011.
<http://www.yourpublicmedia.org/content/wnpr/faith-middleton-show-when-gay-people-get-married>

Featured guest, "Same-Sex Marriage, Five Years On," *On Point*, National Public Radio, May 27, 2009. <http://www.onpointradio.org/2009/05/same-sex-marriage-five-years-on>

Featured guest, "Gay Commerce," *Talk of the Nation*, National Public Radio, 1997.

Featured guest, "Gay Market," *Odyssey: A Daily Talk Show of Ideas*, NPR nationally syndicated show, 2005.
http://www.chicagopublicradio.org/DWP_XML/od/2005_05/od_20050512_1200_4906/episode_4906.ram

Interviewed on *All Things Considered*, "Gay Marriage in Massachusetts, One Year Later," May 2005. <http://www.npr.org/templates/story/story.php?storyId=4655621>

Featured guest, *CNN American Morning*: "The Future of Marriage," June 2006.
http://www.law.ucla.edu/williamsinstitute/images/CNN_AmericanMorning_FutureOfMarriage_LeeBadgett_062006.mov

SELECTED PRESENTATIONS OF PAPERS SUBMITTED TO ACADEMIC CONFERENCES:

“Assessing the best policy approach for reducing LGBT poverty,” M. V. Lee Badgett and Alyssa Schneebaum, APPAM research conference, Nov. 2015, Miami.

Invited panelist, Roundtable on Marriage Equality, American Political Science Association, Sept. 4, 2015, San Francisco.

Invited panelist, Roundtable on Employment Discrimination Against LGBT People, American Sociological Association meeting, August 25, 2015, Chicago.

“The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies,” Amherst College conference, LGBT Rights in the Americas and Beyond (May 2015), International Associate for Feminist Economics (Berlin, July 2015); Williams Institute Webinar, Feb. 25, 2015; Allied Social Science Associations (economist orgs) meeting, SF, January 2016

Roundtable participant at Institute for Development Studies (UK) panel, “Sexuality, law, and economic development: what are the key conversations and alliances?” Mar. 6, 2015.

“Assessing the effect of nondiscrimination policies related to sexual orientation and gender identity,” Badgett and Samantha Schenck. Presented at: Sexual Orientation Discrimination in the Labor Market, University of Paris 1 Pantheon-Sorbonne, 6/20/2012; International Association for Feminist Economics, Barcelona Spain. 6/27/2012; APPAM conference, November 2012.

“Waves of Change: Is Latin America Really Following Europe in Same-Sex Couples?,” at 8th Annual Update, Williams Institute, “Global Arc of Justice: Sexual Orientation Law Around the World, March 14, 2009.

“Gay poverty,” Presented at 2009 Allied Social Science Association Meeting; 2009 Association for Public Policy Analysis and Management Research Conference; 2008 IAFFE Research Conference, Torino, Italy, June 2008; Williams Institute Annual Update, February 2008.

“Registered Domestic Partnerships Among Gay Men and Lesbians: The Role of Economic Factors,” (with Gary J. Gates and Natalya Maisel), presented at 2007 APPAM Meeting, Washington, DC; 2008 Allied Social Science Associations Annual meeting, New Orleans.

“Predicting Same-Sex Marriage in Europe & the US,” Presented at 2008 IAFFE Research Conference, Torino, Italy, June 2008.

“Social Lab Outcomes: Same-Sex Couples and Legal Recognition,” Temple University Law School, “States as Social Laboratories,” October 20, 2007.

“The Double-Edged Sword in Gay Economic Life: Marriage and the Market.” Washington & Lee School of Law, Feb 2008.

“Why Marry?” Presented at 2006 IAFFE Research Conference, Sydney, Australia, July 2006; New School for Social Research, October 2006; Sociology Family Working Group, UCLA, 2006.

“An exploration of foster care and adoption among lesbians and gay men,” joint work with Jennifer Macomber, Kate Chambers, Gary Gates. Family Pride conference, Philadelphia, PA, May 2006.

“Survey Data on Sexual Orientation: Building a Professional Consensus,” presented at 2005 Joint Statistical Association Meetings, August 2005. Also presented to Canadian Population Society, June 2005; Williams Project Annual Update, UCLA Law School, February 2005.

“Alternative Legal Statuses for Same-sex couples and other families: Can Separate Be Equal Enough?” Presented at International Association for Feminist Economics, Washington DC, July 2005; APPAM, Washington, DC, November 2005; UCLA Law School 2006.

“Looking into the European Crystal Ball: What Can the U.S. Learn About Same-Sex Marriage?” Tulsa Gay and Lesbian History Project, October 2004; University of Connecticut, October 2004; Yale University, February 2005; American Psychological Association, August 2005; National Council of Family Relations (invited special session), 2005.

“Predicting Partnership Rights: Applying the European Experience to the United States,” Yale University Law School, March 5, 2005.

“Asking the Right Questions: Making the Case for Sexual Orientation Data,” Joint Statistical Meetings of the American Statistical Association, Toronto, August 2004; Williams Project Annual Update, UCLA, February 2005; Canadian Population Society, June 3, 2005.

“A New Gender Gap: Sex Differences in Registered Partnerships in Europe,” International Association for Feminist Economics research conference, London, August 2004.

“Variations on an Equitable Theme: International Same-sex Partner Recognition Laws,” Research Conference of International Associate for Feminist Economics, July 2002. Stockholm University, September 2003; University of Linz, Austria, November 2003; University of Amsterdam, June 2004; American Political Science Association, Chicago, September 2004.

“The Myth of Gay Affluence and Other Tale Tales: The Political Economy of Sexual Orientation,” University of California, San Diego, June 2002.

“A Family Resemblance: Legal Recognition of Same-Sex Partners in the United States,” Research Conference of International Association for Feminist Economics, Oslo, Norway, June 2001; University of Southern Maine, October 2001; University of Massachusetts, February 2002; Washington University Political Science Department, March 2002; University of Wisconsin, LaCrosse, April 2002.

"A Movement and a Market: GLBT Economic Strategies for Social Change," University of Wisconsin, LaCrosse, April 2002; Macalester College, April 2002.

"Job Gendering: Occupational Choice and the Marriage Market," Research Conference of International Association for Feminist Economics, Ottawa, CA, June 1999.

"Tolerance, Taboos, and Gender Identity: The Occupational Distribution of Lesbians and Gay Men," Research Conference of International Association for Feminist Economics, Amsterdam, The Netherlands, June 1998.

"The Impact of Affirmative Action on Public-Sector Employment in California," ASSA Meetings, 1997.

"Tolerance or Taboos: Occupational Differences by Sexual Orientation," presented at American Economic Association Meetings, January 1996, and American Psychological Association convention in Toronto, August 1996.

"A Race, Ethnicity, and Gender Analysis of the 1990-91 Recession," ASSA Meetings 1995.

"Choices and Chances: Is Coming Out at Work a Rational Choice?" The Sixth North American Lesbian, Gay, and Bisexual Studies Conference, University of Iowa, November 18, 1994.

"Civil Rights and Civilized Research: Constructing a Sexual Orientation Policy Based on the Evidence," Association for Public Policy Analysis and Management Research Conference, October 27, 1994

"Where the Jobs Went in the 1990-91 Downturn," National Conference on Race Relations and Civil Rights in the Post Reagan-Bush Era, The Roy Wilkins Center, Humphrey Institute, University of Minnesota, October 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," The American Political Science Association meeting, September 1994.

Panelist, "Developing Lesbian/Gay Studies in Economics," ASSA Meetings, 1994.

"The Rainbow at Work: Differences in the Economic Status of Women Workers in the United States," presented at the 5th International Interdisciplinary Congress on Women, 1993.

"The Economic Well-Being of Lesbians and Gay Men: Pride and Prejudice," December 1992, presented at 1993 ASSA Meetings.

"Affirmative Action in a Changing Legal and Economic Environment," revised, December 1992, presented at 1993 ASSA Meetings.

"The Effects of Structural Change on the Race and Gender Distribution of Employment," with Rhonda M. Williams, presented at Eastern Economic Association Meeting, 1992.

"Changes in Racial Inequality Among Women: Evidence from Unemployment Rates," presented at AEA Meetings, 1992.

"Labor Market Discrimination--Economic and Legal Issues for Gay Men and Lesbians," presented at AEA Meetings, 1992.

"Rising Black Unemployment: Changes in Job Stability or in Employability?" presented at National Economic Assoc., 1992.

"Rising Black Unemployment and the Role of Affirmative Action Policy," presented at APPAM Research Conference, October 1990.

INVITED KEYNOTES AND OTHER PRESENTATIONS (Selected):

"The Public Professor," book talks at University of Massachusetts Amherst, Duke University, University of North Carolina-Chapel Hill, Odyssey Bookstore, UCLA, Hunter College, Vanderbilt University, Georgia State University, University of Washington, January-May 2016; "Author meets critics" session at Southern Sociological Society, April 2016.

"The Marriage Equality Experience—An International Perspective," East China Normal University, Shanghai; Renmin University Beijing; Ewha University, Seoul; Korea University School of Law; March 2016.

"The Business Case for LGBT Equality and Inclusion," Sookmyung Women's University (SMU) Entrepreneurship Center, Seoul, Korea, March 11, 2016.

"Left Out—Lesbian, Gay, and Bisexual Poverty in the U.S." Franklin and Marshall College, Oct 21, 2015; Colorado State Univ, Nov 2015; Univ of Minnesota, Feb 2016.

"The Economic Cost of Stigma and Exclusion of LGBT People," Board of Directors of Inter-American Development Bank, Oct. 2, 2015 and March 6, 2015; Boston Consulting Group, Oct. 7, 2015; Salzburg Global LGBT Forum, June 14-18, 2015; Clinton Global Initiative learning call, April 8, 2015, World Bank Fall Meeting, Nov. 9, 2014; UN Development Programme Experts Meeting, Sept. 16-17, 2015.

US State Department Speaker Program: Oct. 12-18, 2014: Series of talks to government ministries, American Chamber of Commerce, universities, community groups, international agencies, Lima, Peru. August 12-21, 2015: Series of talks to Congress, universities, municipal policymakers, community groups, and other government agencies, The Philippines.

“Sexual Orientation and Gender Identity Diversity in Entertainment: Experiences and Perspectives of SAG-AFTRA Members,” Gender, Sexual Orientation, and Labor in Entertainment Panel at conference of UCLA Institute for Research on Labor and Employment, April 18, 2015.

Dublin City University, School of Applied Language and Intercultural Studies, and Marriage Equality; Keynote speaker for The Marriage Equality Experience: An International Perspective, my talk: When Gay People Get Married Dublin, Ireland, March 19, 2015.

Presentation at Overseas Development Institute and Kaleidoscope Trust meeting, London (by skype), “The Relationship between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies” , Feb. 12, 2015.

Panelist, USAID Frontiers in Development, Sept. 2014.

Invited keynote speaker, “The Economic Cost of Homophobia,” The World Bank, March 12, 2014.

Invited speaker, “The Impact of LGBT Inclusion on Economic Outcomes,” OECD, Paris, February 12, 2014.

Invited Keynote Speaker, “Workshop on Comparative Experiences in Protection of LGBT Rights in the Family and Marriage Relations,” hosted by Ministry of Justice, Viet Nam, and UNDP, December 20-21, 2012, Hanoi.

“When Gay People Get Married,” London School of Economics and Politics, Keynote for LSE Pride Week, November 2012; Bryant University, November 2013; University of Pennsylvania Dept of Sociology, March 2014.

Keynote speaker at Roundtable, "Taking Poverty Out of the Closet," Horizons Foundation, San Francisco, March 19, 2012.

“The Impact of Allowing Same-sex Couples to Marry,” Australian National University College of Law. March 1, 2012; Gough Whitlam Institute, Sydney Australia, March 2, 2012.

Australian Parliament, Canberra, "The Impact of Allowing Same-Sex Couples to Marry," February 27, 2012.

Keynote lunch speaker, E-Marriage Symposium, Michigan State University Law School, “My Marriage, No Marriage,” November 11, 2011.

“When Gay People Get Married,” University of North Carolina Chapel Hill, October 13, 2011.

IAFFE, 2011, Hangzhou China: Roundtable on Sexuality and the Economy, Roundtable on Enhancing IAFFE's Vision in the 21st Century. June, 2011.

Panelist, "Same-Sex Marriage: Past, Present and Future," M. V. Lee Badgett, David Boies, and Nancy Cott, UCLA History Department, February 24, 2011.

Janus Lecture, Debate on same-sex marriage, Brown University, February 17, 2011.

Panelist, "Queering Where We Work: Bridging LGBTQ Policy Advocacy, Front-Line Activism, and Research," University of Toronto, Rotman School of Management, November 5, 2010.

"The Economic Value of Marriage," Drake Constitutional Law Center's Annual Symposium, The Same-Sex Marriage Divide, Drake University, Iowa. April 10, 2010.

Keynote address, "Out and Equal in the Workplace: Sexual Orientation Discrimination, Univ of Pittsburgh School of Law. March 18, 2010.

"When Gay People Get Married": Portland State Univ Portland, OR. 4/23/2010; University of Chicago Alumni Weekend, Chicago, IL; University of Chicago, June 3, 2010; Kennesaw State University, Atlanta, GA, March 24, 2010; Andrew Young School of Public Affairs; Georgia State University, March 25, 2010; and many other bookstores and locations.

"Challenges for LGBT Workers" Department of Labor at invitation of Assistant Secretary for Policy, January 29, 2010.

Keynote Address on Sexual orientation and economics, University of Illinois-Chicago, September 30, 2009.

Multiple talks, University of Minnesota, Duluth, April 2009.

"On the Road to Equality: Health Care for LGBT Americans," Opening address, 2007 National LGBT Health Expo, Washington, DC, November 2, 2007.

"Does diversity make a difference? A view from the marketplace." *Keynote Address*, 7th annual international conference on diversity in organizations, communities, and nations, Amsterdam, The Netherlands, July 1, 2007.

"Not-So-Gay Divorce: A Reason for Marriage," Gay Divorce Conference, King's College London, May 20, 2006.

"Thinking for Change/Changing our Thinking: Effective Research in GLBT Policy Debates", Presidential Invited Address, Division 44, American Psychological Association Convention, August 2005.

"Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men," University of Toronto, March 16-17, 2005.

Panelist, "Aging in the Gay Community," American Association of Retired Persons, June 2000.

"Money and Our Discontents," Keynote speech, Smart Women/Smart Money conference by the Astraea Foundation. November 1999.

"Homo Economics: The Myth of Gay Affluence and Other Tall Tales," University of Connecticut, March 1999; American University, October 1999.

Same-Sex Couples and Public Policy, panel member, University of Maryland, College Park, October 1999.

"A Bridge to the Future or the Road to Nowhere? Respectability and Lesbian and Gay Think Tanks," Remarks prepared for the Politics of Respectability Conference, University of Chicago, April 1999

Panelist, Unifying Anti-Subordination Theories, DePaul University Law School, February 1999.

"Lesbians, Gays, and Bisexuals in a Gender Agenda," Roundtable on Feminism and Public Policy, 1998 ASSA Meetings, Chicago, IL.

"Economic Issues for Lesbians," Workshop on Lesbian Health Research Priorities, Institute of Medicine, Board on Neuroscience and Behavioral Health, Washington, DC, October 6, 1997.

"Lesbians, Gays, Bisexuals, and Transgenders: Who Gives, How Much, and Why," OutGiving Conference, Aspen, CO, September 1997; Horizons Foundation and United Way, San Francisco, CA, October 1997; NGLTF Creating Change conference, San Diego, November 1997; Cream City Foundation Milwaukee, WI; Chicago, IL; Boston Foundation, February 1998.

"Lesbian and Gay Money: Is There a Gender Gap?" Towson State University, March 1997.

Panelist, "Out in the Workplace," University of Pennsylvania, February 10, 1997.

"Workplace Policy Issues for Lesbian, Gay, and Bisexual People," Gender, Race, Economics, and Public Policy Conference of the New School for Social Research, April 5, 1996.

Panelist, "Compensating for Gender, Race, and Class Inequalities: Is Affirmative Action the Means to Social Justice," A Future of Equality: Feminist Rethinkings of the Affirmative Action and Welfare Debates, Yale University Women's Center, March 30, 1996.

"Equal Pay for Equal Work," University of Delaware Lavender Scholars Series, March 7, 1996.

"Lesbian and Gay Think Tanks," Center for Lesbian and Gay Studies, CUNY Graduate School, February 9, 1996.

Panelist, Affirmative Action in the 21st Century, Chicago United, February 15, 1996.

"The Economic Status of Lesbians and Gay Men: Discrimination, Data, and Debate," Bureau of Labor Statistics, U.S. Department of Labor, June 15, 1995; Institution for Social and Policy Studies, Yale University, September 1995; University of Massachusetts, Boston, May 1996.

Panelist, "Gay Money: Power of the Purse," National Lesbian & Gay Journalists Association, October 19, 1995.

Panelist, Domestic Partner Benefits and Other Gay Rights Policy Issues: Creating Change on Campus, American Association of University Professors, June 9, 1995.

Prepared testimony, Select Education and Civil Rights Subcommittee, Committee on Education and Labor, U. S. House of Representatives, Testimony on the 30th Anniversary of the Equal Pay Act, 1994. (Hearing cancelled at the last minute.)

"Economic Evidence of Sexual Orientation Discrimination," Gay, Lesbian, and Bisexual Studies Faculty Seminars, Univ. of Massachusetts, Amherst, Dept. of Economics and Program for Gay, Lesbian, and Bisexual Concerns, May 11, 1994.

"The Economics of Being Lesbian, Gay, or Bisexual: Pride, Prejudice and Politics," Brown Bag Series in Gay, Lesbian, and Bisexual Studies, University of Massachusetts, Amherst, May 11, 1994.

"Thinking Homo/Economically," conference presentation, Center for Lesbian and Gay Studies, CUNY Graduate School, May 7, 1994.

"Lesbian and Gay Campus Organizing for Domestic Partner Benefits," Annual Conference, The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, April 19, 1994. Also presented at the American Political Science Association meeting, September 1994.

"The Changing Contours of Discrimination: Race, Gender, and Structural Economic Change," presented at University of Michigan, School of Social Work, Profs. Mary Corcoran and Sheldon Danziger, March, 15, 1994.

"Redefining Families: Research and Policy," American Political Science Association meetings, Washington, D.C., September 3, 1993.

"A Cost/Benefit Analysis of Coming Out," presented at OUT Magazine press conference, broadcast on CSPAN, April 21, 1993.

GRANTS:

U.S. Department of State, Speaker's Grants for trip to Peru, October, 2014; Trip to The Philippines, August, 2015.

National Science Foundation, "Building an Interdisciplinary Equal Employment Opportunity Research Network and Data Capacity," 7/1/13 to 6/30/16 (\$245,216), co-PI.

Five Colleges Inc (from Mellon Foundation): Bridging the Liberal Arts and Professional Training in Public Policy & Social Innovation (\$178,000)

Five Colleges Inc: Social Justice Public Policy Practitioners-in-Residence (\$95,000)

Ford Foundation, 2003-2006 (2 grants), Data on Sexual Orientation (total \$600,000)

2002 Wayne F. Placek Award, American Psychological Foundation, "Health Insurance Inequality for Gay, Lesbian, and Bisexual People," with Michael A. Ash.

1995 Wayne F. Placek Award, American Psychological Foundation, "The Impact of Attitudes on Lesbian and Gay Male Earnings and Occupations." (\$15,000)

The Aspen Institute, Nonprofit Sector Research Fund, "Lesbian, Gay, and Bisexual Giving and Volunteering," 1996. (\$40,000)

CONSULTANCIES: World Bank; UN Development Programme; Pew Research Center

BOARDS, PANELS, AND COMMITTEES:

Board, Interdisciplinary Studies Institute, UMass Amherst, 2013-2016

Co-convenor of LGBT economists network, American Economic Association, 2016

Board, International Association for Feminist Economics, 2015-2017

Board member and Co-chair of Board, Wellspring Cooperative Corporation, 2014-present.

Chair, Diversity Committee, International Association for Feminist Economics, 2011-2013.

Association for Public Policy Analysis and Management (APPAM): Institutional representative, 2007-present and Vice Chair of Inst. Reps 2011-12; Program Committee for 2010 conference.

Nat'l Association of Schools of Public Administration and Affairs (NASPAA): Leslie Whittington Teaching Award Committee, 2010.

Advisory Committee for "Real Families, Real Facts: Research Symposia on LGBT-headed Families," Family Pride, held May 2006.

Planning committee and facilitator for research meeting held at Out & Equal Workplace conference, September 2005.

Reviewer, Wayne F. Placek Award, American Psychological Foundation

Women's Funding Network, Lesbian Donor Research Project Advisory Committee, 1997-1998

Visiting Lecturer and co-designer, Traveling Feminist Economics Ph.D. Course, Univ. of Minnesota, 1997-1998

FELLOWSHIPS AND HONORS:

School of Public Policy faculty created an annual "M. V. Lee Badgett Social Justice Award" for a graduating student, 2016

Women in Leadership Award, Williams Institute, UCLA School of Law, 2015.

Samuel F. Conti Faculty Fellowship, University of Massachusetts Amherst, 2013-2014.

“When Gay People Get Married,” Distinguished Book Award, American Psychological Association, Division 44, 2010; chosen for Diversity Book Club, Kennesaw State University, 2010.

Distinguished Faculty Lecture, University of Massachusetts-Amherst, November 9, 2009, and Chancellor’s Medal (the highest honor bestowed on individuals for exemplary and extraordinary service to the campus)

Named one of twenty most influential lesbians in academia, *Curve Magazine*, 2008

Rockwood Leadership Fellow in Lesbian, Gay, Bisexual, and Transgender Community & Advocacy, 2008-09

2005 Dukeminier Award for Best Sexual Orientation Law Review Article

College Outstanding Teacher Award, Social and Behavioral Sciences, University of Massachusetts, 2000-2001

Out 100, *Out Magazine*, 2001.

One of Our Best and Brightest Activists, *The Advocate*, 2000.

Lilly Fellow, Center for Teaching, University of Massachusetts- Amherst, 1999-2000

Certificate of Appreciation, Stonewall Center, 1999.

Certificate of Recognition, University of Maryland at College Park Diversity Initiative, 1994-95

Graduate Opportunity Fellowship, 1985-86, UC Berkeley

A.B. with General Honors, University of Chicago

Maroon Key Society, University of Chicago

Abram L. Harris Prize, 1978-79, 1979-80, University of Chicago

AFFILIATIONS

Association for Public Policy Analysis & Management

American Economic Association

Editorial Board (and past Associate Editor), *Feminist Economics*

International Association for Feminist Economics (past and present board member)

Past editorial boards, *Sexuality Research and Social Policy*; *Sexuality & the Law (Social Science Research Network)*; *Law and Social Inquiry*

REFEREE:

Quarterly Journal of Economics, *Industrial Relations*, *Journal of Human Resources*, *Feminist Economics*, *Journal of Policy Analysis & Mgmt.*, *Amer. Sociological Review*, *Review of Social Economy*, *Review of Economics and Statistics*, Columbia University Press, National Science Foundation, *Qualitative Sociology*, *Social Problems*, *Social Forces*, University of Wisconsin Press, *Journal of Population Economics*, Routledge Press, Princeton University Press, *Industrial and Labor Relations Review*, *Demography*, *American Journal of Sociology*, *Contemporary Economic Policy*, *Journal of Marriage and the Family*, *Cambridge Journal of Economics*, *Social Forces*, *Health Affairs*, and others

Exhibit 13

ARIF HYDER ALI



12 March 2017

VIA E-MAIL

Mr. Göran Marby President and Chief Executive Officer ICANN 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094	ICANN Board of Directors c/o Steve Crocker, Chair 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094
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Dear President Marby and Members of the Board:

We write on behalf of our client, dotgay LLC (“dotgay”), to inquire when the ICANN Board (the “Board”) will issue its final decision on the 26 June 2016 Recommendation of the Board Governance Committee (“BGC”) on dotgay’s Reconsideration Request 16-3 regarding the .GAY top-level domain (the “Reconsideration Request”).¹ We further write to protest ICANN’s lack of transparency in its treatment of dotgay’s application and ICANN’s failure to provide any sort of response to dotgay’s various inquiries about that status of its application. ICANN’s actions and inaction continues to cause harm to the gay community, which today more than ever is need of a safe space on the Internet to protect and promote the ideals, principles and interests of the community.

Dotgay submitted its Reconsideration Request *more than one year ago* and *nearly nine months* have passed since the BGC issued its Recommendation. As we noted in our most recent correspondence of 30 January 2017, we find ICANN’s protracted delays in reaching a decision on dotgay’s Reconsideration Request and ICANN’s continued lack of

¹ Reconsideration Request 16-3 (17 February 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

responsiveness to dotgay's inquiries about the status of its request troubling, particularly in light of ICANN's commitments to transparency enshrined in its governing documents.²

Although we understand that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"³ and that the BGC may have requested from the CPE provider "the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports,"⁴ ICANN cannot indefinitely delay resolving dotgay's Reconsideration Request. ICANN owes affected parties, like dotgay, a response to their inquiries regarding the nature and status of the independent review and information request. Again, we find ICANN's lack of communication disappointing and inconsistent with its duties of transparency.

With this letter, we renew our request that ICANN extend dotgay, and the global community that dotgay represents through its application, the common courtesy of a response to its inquiries regarding the anticipated resolution of dotgay's Reconsideration Request and disclosure of information about the nature of the independent review ICANN apparently has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. We are unaware of any rule of law, administrative procedure or corporate governance that would justify ICANN's silence and delays.

We look forward to your prompt response.

² See letter from Arif H. Ali, to Göran Marby, ICANN President and CEO, and the ICANN Board of Directors (30 January 2017).

³ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures (17 September 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

⁴ Minutes of the Board Governance Committee (18 October 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

Dotgay reserves all of its rights at law or in equity before any court, tribunal, or forum of competent jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif Hyder Ali', with a long horizontal stroke extending to the right.

Arif Hyder Ali

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)

Exhibit 14



The Internet Corporation for Assigned Names and Numbers

26 April 2017

Re: Update on the Review of the New gTLD Community Priority Evaluation Process

Dear All Concerned:

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of the Community Priority Evaluation (CPE) process. Recently, we discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board decided it would like to have some additional information related to how ICANN interacts with the CPE provider, and in particular with respect to the CPE provider's CPE reports. On 17 September 2016, we asked that the President and CEO, or his designee(s), undertake a review of the process by which ICANN has interacted with the CPE provider. ([Resolution 2016.09.17.01](#))

Further, during our 18 October 2016 meeting, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests pursuant to which some applicants are seeking reconsideration of CPE results. Among other things, the BGC noted that certain complainants have requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC's determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course.

The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests.



Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: [14-30](#) (.LLC), [14-32](#) (.INC), [14-33](#) (.LLP), [16-3](#) (.GAY), [16-5](#) (.MUSIC), [16-8](#) (.CPA), [16-11](#) (.HOTEL), and [16-12](#) (.MERCK).

For more information about CPE criteria, please see ICANN's [Applicant Guidebook](#), which serves as basis for how all applications in the New gTLD Program have been evaluated. For more information regarding Reconsideration Requests, please see ICANN's [Bylaws](#).

Sincerely,

A handwritten signature in black ink, which appears to read 'Chris Disspain'. The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Chris Disspain
Chair, ICANN Board Governance Committee

Exhibit 15

ARIF HYDER ALI

Contact Information Redacted

18 May 2017

VIA E-MAIL DIDP@ICANN.ORG

ICANN
c/o Steve Crocker, Chairman
Goran Marby, President and CEO
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

**Re: Request under ICANN's Documentary Information Disclosure Policy concerning
Community Priority Evaluation for .GAY Application ID 1-1713-23699**

Dear ICANN:

This request is submitted under ICANN's Documentary Information Disclosure Policy by dotgay LLC ("dotgay") in relation to ICANN's .GAY Community Priority Evaluation ("CPE"). The .GAY CPE Report¹ found that dotgay's community-based Application should not prevail. Dotgay has provided ICANN with numerous independent reports identifying dotgay's compliance with the CPE criteria, as well as the human rights concerns with ICANN's denial of dotgay's application.²

ICANN's Documentary Information Disclosure Policy ("DIDP") is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.³ In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's*

¹ .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>

² See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>

³ See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>

*Documentary Information Disclosure Policy (DIDP) Requests.*⁴ According to ICANN, staff first identifies all documents responsive to the DIDP request. Staff then reviews those documents to determine whether they fall under any of the DIDP's Nondisclosure Conditions.

According to ICANN, if the documents do fall within any of those Nondisclosure Conditions, ICANN staff determines whether the public interest in the disclosure of those documents outweighs the harm that may be caused by such disclosure.⁵ We believe that there is no relevant public interest in withholding the disclosure of the information sought in this request.

A. Context and Background

Dotgay submitted its RR 16-5 to ICANN more than one year ago. Moreover, nearly a year has passed since dotgay delivered a presentation to the Board Governance Committee (the "BGC").⁶ Dotgay has sent several letters to ICANN noting that ICANN's protracted delays in reaching a decision and ICANN's continued lack of responsiveness to dotgay's inquiries about the status of dotgay's request represent a violation of ICANN's commitments to transparency enshrined in its governing documents.

It is our understanding that ICANN is conducting "an independent review of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider"⁷ and that the BGC may have requested from the CPE provider "the materials and research

⁴ Process for Responding to DIDP Requests, <https://icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

⁵ *Id.*

⁶ <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; See also *dotgay's* powerpoint presentation:

⁷ Resolution of the ICANN Board 2016.09.17.01, President and CEO Review of New gTLD Community Priority Evaluation Report Procedures, September 17, 2016, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>

relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.”⁸

However, ICANN has not provided *any* details as to how the evaluator was selected, what its remit is, what information has been provided, whether the evaluator will seek to consult with the affected parties, etc. Other community applicants have specifically requested that ICANN disclose the identity of the individual or organization conducting the independent review and investigation and informed ICANN that it has not received any communication from the independent evaluator.⁹ Dotgay endorses and shares those concerns which equally affect dotgay, and has already requested a full explanation.¹⁰

Dotgay has received a letter from ICANN’s BGC Chair Chris Disspain (“BGC Letter”) indicating that the RR is “on hold” and inter alia that:¹¹

The BGC decided to request from the CPE provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs. This will help inform the BGC’s determinations regarding certain recommendations or pending Reconsideration Requests related to CPE. This material is currently being collected as part of the President and CEO’s review and will be forwarded to the BGC in due course. The review is currently underway. We recognize that ensuring we fulfill all of our obligations means taking more time, but

⁸ Minutes of the Board Governance Committee, October 18, 2016, <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

⁹ Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, April 28, 2017, <https://www.icann.org/en/system/files/correspondence/ali-to-marby-28apr17-en.pdf>

¹⁰ Letter from Arif Ali to ICANN CEO Göran Marby and the ICANN Board, 12 March 2017, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-12mar17-en.pdf>

¹¹ Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

we believe that this is the right approach. The review will complete as soon as practicable and once it is done, the BGC, and Board where appropriate, will promptly consider the relevant pending Reconsideration Requests. Meanwhile, the BGC's consideration of the following Reconsideration Requests is on hold: 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Similarly, we received a letter from ICANN's attorney, Jeffrey A. LeVee, on 15 May 2017 purporting to provide a "status update on Reconsideration Request 16-3. . . ." ¹² According to Mr. LeVee's letter:

As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials.

Accordingly, both the BGC Letter and Mr. LeVee's letter fail to provide *any* meaningful information besides that there is a review underway and that the RR is on hold.

B. Documentation Requested

The documentation requested by dotgay in this DIDP includes all of the "material currently being collected as part of the President and CEO's review" that has been shared with ICANN and is "currently underway."¹³ Further, dotgay requests disclosure of information about the nature of the independent review that ICANN has commissioned regarding the Economist Intelligence Unit's handling of community priority evaluations. In this regard, we request ICANN to provide, forthwith, the following categories of information:

¹² Letter to Arif H. Ali from Jeffrey A. LeVee, dated May 15, 2017

¹³ Letter to dotgay from ICANN BGC Chair Chris Disspain (Received April 28, 2017) <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>

1. All documents relating to ICANN’s request to “the CPE provider [for] the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”¹⁴
2. All documents from the EIU to ICANN, including but not limited to: (a) ICANN’s request for “the materials and research relied upon by the CPE panels in making their determinations with respect to certain pending CPE reports;”¹⁵ and (b) all communications between the EIU and ICANN regarding the request;
3. All documents relating to requests by ICANN staff or Board Members to access the research provided by the EIU or the ongoing evaluation or any comments on the research or evaluation;
4. The identity of the individual or firm (“the evaluator”) undertaking the Review;
5. The selection process, disclosures, and conflict checks undertaken in relation to the appointment;
6. The date of appointment of the evaluator;
7. The terms of instructions provided to the evaluator;
8. The materials provided to the evaluator by the EIU;
9. The materials provided to the evaluator by ICANN staff/legal, outside counsel or ICANN’s Board or any subcommittee of the Board;
10. The materials submitted by affected parties provided to the evaluator;
11. Any further information, instructions or suggestions provided by ICANN and/or its staff or counsel to the evaluator;

¹⁴ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

¹⁵ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>

12. The most recent estimates provided by the evaluator for the completion of the investigation; and


13. All materials provided to ICANN by the evaluator concerning the Review

dotgay reserves the right to request further disclosure based on ICANN's prompt provision of the above information.

C. Conclusion

There are no compelling reasons for confidentiality in disclosing the requested documents; rather, full disclosure will serve the global public interest and ensure the integrity of ICANN's deliberative and decision-making process concerning the CPE process. On the other hand, ICANN's failure to provide this information would raise serious questions concerning ICANN's accountability and compromise the transparency, independence and credibility of such an independent review.

Sincerely,



Arif Hyder Ali

Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Waye, ICANN Ombudsman (herb.waye@icann.org)

Exhibit 16



Community Priority Evaluation Process Review Update

2 June 2017

The following is an update on the ongoing Community Priority Evaluation (CPE) process review.

Background on CPE Process Review

At various times in the implementation of the New gTLD Program, the ICANN Board has considered aspects of CPE process, including certain concerns that some applicants have raised regarding the process. On [17 September 2016](#), the ICANN Board directed the President and CEO, or his designees, to undertake a review of the process by which ICANN has interacted with the CPE provider. In his [letter of 26 April 2017 to concerned parties](#), Chris Disspain, the Chair of the Board Governance Committee, provided additional information about the scope and status of the review. Below is additional information about the review, as well as the current status of the CPE process review.

CPE Process Review and Current Status

The scope of the review consists of: (1) review of the process by which the ICANN organization interacted with the CPE provider related to the CPE reports issued by the CPE provider; (2) review of the consistency in which the CPE criteria were applied; and (3) review of the research process undertaken by the CPE panels to form their decisions and compilation of the reference materials relied upon by the CPE provider to the extent such reference materials exist for the evaluations which are the subject of pending [Requests for Reconsideration](#).

The review is being conducted in two parallel tracks by [FTI Consulting Inc.'s \(FTI\)](#) Global Risk and Investigations Practice (GRIP) and Technology Practice. The first track focuses on gathering information and materials from the ICANN organization, including interviews and document collection. This work was completed in early March 2017. The second track focuses on gathering information and materials from the CPE provider. This work is still ongoing. FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests. Once the underlying information and data collection is complete, FTI anticipates that it will be able to inform ICANN of its findings within two weeks.

FTI was chosen to assist in the CPE review following consultation with various candidates. FTI was selected because FTI has the requisite skills and expertise to undertake this investigation. FTI's GRIP and Technology Practice teams provide a multidisciplinary approach to business-critical investigations, combining the skill and experience of former prosecutors, law enforcement officials and regulators with forensic accountants, professional researchers, anti-corruption investigators, computer forensic, electronic evidence and enterprise data analytic specialists.

For more information about the CPE process, please visit <https://newgtlds.icann.org/en/applicants/cpe>.

Exhibit 17

10 June 2017

VIA E-MAIL

Chris Disspain
Chair, ICANN Board Governance
Committee
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Jeffrey A. LeVee, Esq.
Jones Day
555 South Flower Street
Los Angeles, CA 90071 2300

Re: ICANN's 2 June 2017 Community Priority Evaluation Process Review Update

Dear Messrs. Disspain and LeVee:

We write on behalf of our clients, DotMusic Limited (“DotMusic”) and dotgay LLC (“dotgay”), regarding ICANN’s 2 June 2017 Community Priority Evaluation Process Review Update (“CPE Process Review Update”).

Our review of ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.¹ As you are aware, after the ICANN Board announced in September 2016 that it is conducting “an *independent review* of the process by which ICANN staff interacted with the community priority evaluation provider, both generally and specifically with respect to the CPE reports issued by the CPE provider,”² we sent multiple requests to ICANN seeking, among others, the disclosure of the identity of the organization conducting the independent review, the organization’s remit, the information it had been provided,

¹ See e.g., Art. III, Section 3.1, ICANN Bylaws, effective 11 February 2016 (“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”); Art. I, Section 2 (8) (“Make decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

² Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

whether the evaluator will seek to consult with the affected parties, etc.³ In fact, at one of the sessions during the ICANN GDD Madrid Summit Meeting, Constantine Roussos, the Founder of DotMusic, directly asked the ICANN CEO, Staff and Chair of the BGC Chris Disspain to disclose the name of the independent investigator retained by ICANN to review the CPE Process. However, no one from ICANN disclosed any information about the independent investigator.⁴ At the same GDD Madrid Summit Meeting, DotMusic also made the same inquiry with the ICANN Ombudsman Herb Waye. The ICANN Ombudsman stated that ICANN also did not disclose the name of the independent investigator to him, despite DotMusic's formal complaint with the Ombudsman that, *inter alia*, requested such information to be disclosed in a transparent and timely manner. ICANN continued to operate under a veil of secrecy; even Mr. Disspain's 28 April 2017 letter and Mr. LeVee's 15 May 2017 letter, failed to provide any meaningful information in response to our requests.

It was only on 2 June 2017—*after* DotMusic and dotgay filed their requests for documentary information⁵ and *two weeks* before the investigator's final findings are due to ICANN—that ICANN issued the CPE Process Review Update. We now understand that ICANN selected FTI Consulting, Inc. ("FTI") seven months ago in November 2016 to undertake a review of various aspects of the CPE process and that FTI has *already* completed the "first track" of review relating to "gathering information and materials from the ICANN organization, including interview and document collection."⁶

This is troubling for several reasons. ***First***, ICANN should have disclosed this information through its CPE Process Review Update back in November 2016, when it first selected FTI. By keeping FTI's identity concealed for several months, ICANN has failed its commitment to transparency: there was no open selection of FTI through the

³ See e.g., Letter from Arif Ali to Goran Marby regarding DotMusic, dated 30 January 2017; Letter from Arif Ali to ICANN regarding DotMusic, dated 28 April 2017; and Letter from Arif Ali to ICANN regarding DotMusic, dated 21 May 2017.

⁴ ICANN Madrid GDD Summit, May 9, 2017.

⁵ See Documentary Disclosure Information Policy (DIDP) Request 20170505-1 by Arif Ali on Behalf of DotMusic Limited.

⁶ 2 June 2017 CPE Process Review Update.

Requests for Proposals process, and the terms of FTI's appointment or the instructions given by ICANN to FTI have not been disclosed to the CPE applicants. There is simply *no reason* why ICANN has failed to disclose this material and relevant information to the CPE applicants. **Second**, FTI has already completed the "first track" of the CPE review process in March 2017 without consulting the CPE applicants. This is surprising given ICANN's prior representations that the FTI will be "digging very deeply" and that "there will be a full look at the community priority evaluation." Specifically, ICANN (i) "instructed the firm that is conducting the investigation to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in *very deeply* and [] trying to understand the complex process of the new gTLD program and the community priority evaluation process," and that (ii) "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a *full look* at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."⁷

Accordingly, to ensure the integrity of FTI's review, we request that ICANN:

1. Confirm that FTI will review all of the documents submitted by DotMusic and dotgay in the course of their reconsideration requests, including all of the documents listed in Annexes A and B;
2. Identify ICANN employees, officials, executives, board members, agents, etc. who were interviewed by FTI for the purposes of completing its "first track" review;
3. Disclose the details of FTI's selection process, including the Requests for Proposals process, and the terms under which FTI currently operates for ICANN; and
4. Confirm that ICANN will disclose FTI's final report and findings to the CPE applicants, including DotMusic and dotgay, immediately after FTI completes its review.

⁷ ICANN 58 Copenhagen Meeting, Public Forum 2 Transcript, March 16, 2017. http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf, pp. 10 – 14.

We remain available to speak with FTI and ICANN. We look forward to ICANN's response to our requests by 15 June 2017.

Sincerely,

A handwritten signature in black ink, appearing to be 'Arif Hyder Ali', with a long horizontal stroke extending to the right.

Arif Hyder Ali
Partner

cc: Krista Papac, ICANN Complaints Officer (krista.papac@icann.org)
Herb Wayne, ICANN Ombudsman (ombudsman@icann.org)

Annex A

DotMusic Limited

Key Documents

	Description
1.	Expert Legal Opinion of Honorary Professor Dr. Jørgen Blomqvist (17 June 2016)
2.	Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016)
3.	Joint Organisation Experts' Opinion, prepared for ICANN, Organized Alliance of Music Communities Representing over 95% of Global Music Consumed, and DotMusic by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016)
4.	Council of Europe, "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (3 November 2016)

Other Relevant Documents

	Description
1.	Letter from Constantine Roussos to Christine Willet (12 July 2013)
2.	Letter from Christine Willet to Constantine Roussos (14 August 2013)
3.	Letter from Constantine Roussos to Christine Willet (8 October 2013)
4.	Letter from Christine Willet to Constantine Roussos (22 October 2013)

	Description
5.	Reconsideration Request 14-8 (4 March 2014)
6.	Revised Reconsideration Request 14-8 (5 March 2014)
7.	Board Governance Committee Determination on Reconsideration Request 14-8 (22 March 2014)
8.	Reconsideration Request 14-28 (7 June 2014)
9.	Letter from Constantine Roussos to ICANN (13 June 2014)
10.	Board Governance Committee Determination on Reconsideration Request 14-28 (24 June 2014)
11.	Letter from Constantine Roussos to ICANN (1 July 2014)
12.	Letter from Jason Schaeffer to Robin Bew, Steve Crocker, Fadi Chehadé, Akram Atallah, and Christine Willett (19 August 2014)
13.	Letter from Rich Bengloff to ICANN (7 March 2015)
14.	Letter from Constantine Roussos to ICANN and the EIU regarding FIM's Support Letter (31 March 2015)
15.	Letter from Constantine Roussos to ICANN and the EIU regarding ISME's Support Letter (31 March 2015)
16.	Letter from Constantine Roussos to ICANN and the EIU regarding JMI's Support Letter (31 March 2015)
17.	Letter from Danielle M. Aguirre to ICANN and the EIU (14 April 2015)
18.	Letter from John Snyder to ICANN and the EIU (14 April 2015)

	Description
19.	Letter tom ASCAP and BMI to ICANN (24 April 2015)
20.	Letter from Stephen M. Marks to ICANN (12 May 2015)
21.	Letter from Francis Moore to ICANN (18 May 2015)
22.	Letter from Jo Dipple to ICANN (19 May 2015)
23.	Letter from Rakesh Nigam to ICANN and the EIU (21 May 2015)
24.	Letter from Joe Lamond to ICANN and the EIU (30 July 2015)
25.	Letter from Thomas Theune to ICANN and the EIU(5 August 2015)
26.	Letter from Gilles Daigle to Steve Crocker and Fadi Chehadé (6 August 2015)
27.	Letter from Casey Rae to ICANN and the EIU (11 August 2015)
28.	Letter from Constantine Roussos to ICANN and the EIU (12 August 2015)
29.	Letter from Jason Schaeffer to ICANN regarding the CPE Analysis (12 August 2015)
30.	Letter from Jason Schaeffer to ICANN regarding an Opposition Letter (12 August 2015)
31.	Letter from Paul Zamek to ICANN and the EIU (17 August 2015)
32.	Letter from Dr. Florian Drücke and René Houareau to ICANN (18 August 2015)
33.	Letter from Sarah Gardner to ICANN (26 August 2015)
34.	Letter from Paul Zamek to ICANN and the EIU (2 September 2015)

	Description
35.	Letter from Paul Zamek to ICANN and the EIU (16 September 2015)
36.	Letter from Molly Neuman to ICANN (1 October 2015)
37.	Letter from Benoit Machuel to ICANN and the EIU (5 October 2015)
38.	Letter from Alison Wenham to ICANN and the EIU (6 October 2015)
39.	Letter from Jim Mahoney to ICANN (12 October 2015)
40.	Letter from Helen Smith to ICANN (13 October 2015)
41.	Letter from Paul Zamek to ICANN and the EIU (31 October 2015)
42.	Letter from Jason Schaeffer to ICANN (3 November 2015)
43.	Letter from Patrick Charnley to Steve Crocker and Fadi Chehadé (9 November 2015)
44.	Letter from Paul Zamek to ICANN and the EIU (9 November 2015)
45.	Letter from Paul Zamek to ICANN and the EIU (23 November 2015)
46.	Letter from Paul Zamek to ICANN and the EIU (1 December 2015)
47.	Letter from Christine Willet to Constantine Roussos and Paul Zamek (4 December 2015)
48.	Letter from Imogen Heap to ICANN and the EIU (9 December 2015)
49.	Letter from the International Artist Organization to ICANN and the EIU (11 December 2015)

	Description
50.	Letter from Paul Zamek to ICANN and the EIU (11 December 2015)
51.	Letter from Roxanne De Bastion to ICANN and the EIU (15 December 2015)
52.	Letter from Fran Healy to ICANN and the EIU (15 December 2015)
53.	Letter from Katie Melua to ICANN and the EIU (15 December 2015)
54.	Letter from Rumer Shirakbari to ICANN and the EIU (15 December 2015)
55.	Letter from Ed O'Brien to ICANN and the EIU (15 December 2015)
56.	Letter from Hal Ritson to ICANN and the EIU (15 December 2015)
57.	Letter from Imogen Heap to ICANN and the EIU (16 December 2015)
58.	Letter from Constantine Roussos to ICANN and the EIU (16 December 2015)
59.	Letter from Paul Zamek to ICANN and the EIU (22 December 2015)
60.	Letter from Sandie Shaw to ICANN and the EIU (4 January 2016)
61.	Letter from Paul Zamek to ICANN and the EIU (11 January 2016)
62.	Letter from Amanda Palmer to ICANN and the EIU (19 January 2016)
63.	Letter from Paul Zamek to ICANN and the EIU (25 January 2016)
64.	Letter from DotMusic Limited to ICANN and the EIU regarding ICANN Board Governance Committee Determinations & Inconsistent Policies (10 February 2016)

	Description
65.	Community Priority Evaluation Report regarding DotMusic Limited (10 February 2016)
66.	Reconsideration Request 16-5 (24 February 2016)
67.	Letter from Patrick Charnley of IFPI copying ICANN Board Governance Committee regarding .MUSIC Community Priority Evaluation Report Application ID. 1-1115-14110 (24 February 2016)
68.	Letter from International Federation of Phonographic Industry (IFPI) to ICANN (24 February 2016)
69.	Letter From DotMusic Limited to ICANN Board Governance Committee regarding Reconsideration Request 16-5: ICANN Board and NGPC Policy Resolutions set precedent for BGC (17 March 2016)
70.	Letter from DotMusic Limited to ICANN BGC Chair Chris Disspain, ICANN BGC and ICANN Board regarding Response to .MUSIC LLC's ("Far Further") Letter; International Law and Conventions (28 March 2016)
71.	Letter from National Music Council to Messrs. Chehadé, Crocker, and Disspain regarding ICANN decision to reject DotMusic's application (28 March 2016)
72.	Letter from Jena L. Hoffman to ICANN and the EIU (5 May 2016)
73.	DotMusic Documentary Information Disclosure Policy Request (29 April 2016)
74.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
75.	DotMusic Reconsideration Request 16-7 (30 May 2016)
76.	Letter from Arif Ali to Mr. Göran Marby regarding the ICANN Ombudsman Report (25 August 2016)

	Description
77.	Letter from DotMusic Limited to ICANN regarding DotMusic Limited's Notice Invoking the Cooperative Engagement Process (14 September 2016)
78.	DotMusic Presentation to ICANN Board Governance Committee (17 September 2016)
79.	DotMusic's Additional Responses to Question by BGC during presentation of 17 September 2016 (19 September 2016)
80.	Letter from Arif Ali to John Jeffrey and Amy Stathos regarding IRP related to Reconsideration Request 16-7 and resolution of Reconsideration Request 16-5 (10 November 2016)
81.	Letter from DotMusic Limited to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: .MUSIC's Economic Implications and Effects on the Music Community's Business Model and Global Public Interest (6 December 2016)
82.	Letter from Arif Ali to Chairman Disspain and members of the BGC regarding DotMusic Limited's Reconsideration Request 16-5: the Council of Europe Report DGI (2016)17 (15 December 2016)
83.	ICANN Webinar on Community gTLD Applications and Human Rights moderated by Terri Agnew (18 January 2017)
84.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) REDACTED
85.	Letter from Arif Ali to President Göran Marby and members of the BGC regarding BGC delay of recommendation with regard to Reconsideration Request 16-5 (30 January 2017) UNREDACTED
86.	Letter from ICANN regarding Update on the Review of the new gTLD Community Priority Evaluation Process (26 April 2017)

	Description
87.	Letter from Arif Ali to President Marby and Members of the Board re Dot Music Reconsideration Request concerning .MUSIC (28 April 2017)
88.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of DotMusic Limited (5 May 2017)
89.	Letter from Jeffrey A. Levee to Arif Ali regarding status update on Reconsideration Request 16-5 (15 May 2017)
90.	Letter from Arif Ali to Jeffrey A. Levee regarding ICANN 15 May 2017 Letter Concerning DotMusic (21 May 2017)

Annex B **dotgay LLC**

Key Documents

Tab	Description
1.	Chris LaHatte, former ICANN Ombudsman, Dot Gay Report (27 July 2016)
2.	Expert Opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
3.	Expert Opinion of Prof. M.V. Lee Badgett (17 October 2016)
4.	Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (3 November 2016)

Other Relevant Documents

Tab	Description
1.	Letter from Centrelink to ICANN Board regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) (24 March 2011)
2.	Letter from Jamie Baxter to ICANN (10 October 2013)
3.	Letter from Centrelink to ICANN regarding support of ICANN’s consideration to create the proposed .gay top-level-domain (TLD) under the community model submitted by dotgay LLC (7 March 2014)
4.	Letter from David Gudelunas to ICANN and the EIU Evaluators (30 April 2014)

Tab	Description
5.	Letter from Scott Seitz to ICANN regarding Background on Community gTLDs (5 May 2014)
6.	Letter from Scott Seitz to ICANN regarding Shared Concerns of the Gay Community (5 May 2014)
7.	Letter from Jamie Baxter to ICANN regarding Supporting Evidence (5 May 2014)
8.	Letter from Jamie Baxter to ICANN regarding Additional Endorsements (5 May 2014)
9.	Letter from Jamie Baxter to ICANN regarding Updated Endorsements (5 May 2014)
10.	Letter from Jamie Baxter to ICANN (7 May 2014)
11.	Letter from Jamie Baxter to ICANN (27 May 2014)
12.	Original Request 14-44, along with Annexes (22 October 2014)
13.	Letter from International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (17 November 2014)
14.	Letter from National Gay & Lesbian Chamber of Commerce (NGLCC) (17 November 2014)
15.	Letter from Federation of Gay Games to ICANN and Board Governance Committee (28 November 2014)
16.	Revised Request 14-44 (29 November 2014) • Annexes (29 November 2014)
17.	Letter from David Gudelunas to ICANN and Board Governance Committee (15 December 2014)

Tab	Description
18.	Letter from International Gay & Lesbian Travel Association (IGLTA) to ICANN and Board Governance Committee (18 December 2014)
19.	Letter from COC Nederland to ICANN and Board Governance Committee (14 January 2015)
20.	Letter from Durban Gay & Lesbian Film Festival (DGLFF) to ICANN and Board Governance Committee (15 January 2015)
21.	Letter from KwaZulu-Natal Gay and Lesbian Tourism Association (KZNGALTA) to ICANN and Board Governance Committee (18 January 2015)
22.	Letter from Gay Business Association (GBA) to ICANN and Board Governance Committee (18 January 2015)
23.	BGC Determination on Reconsideration Request 14-44 (20 January 2015)
24.	Letter from Kelley Daniel Mukwano to ICANN And the EIU (1 February 2015)
25.	Letter from Anne Stockwell to ICANN and the EIU (1 February 2015)
26.	Letter from Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings, Ltd. to ICANN Board Governance Committee (3 February 2015)
27.	Letter from Peter Prokopik to ICANN and the EIU (5 February 2015)
28.	Letter from Jamie Baxter to ICANN regarding Update on Expressed Opposition to dotgay LLC (5 February 2015)
29.	Letter from Jamie Baxter to ICANN regarding Comments for CPE Panel (5 February 2015)
30.	Letter from Jamie Baxter to ICANN regarding Contention Set Recognition of Nexus between GAY and LGBTQIA (5 February 2015)

Tab	Description
31.	Letter from Jamie Baxter to ICANN regarding Expert Opinion on GAY Community .GAY (5 February 2015)
32.	Letter from Jamie Baxter to ICANN regarding Clarifications for CPE Panel (5 February 2015)
33.	Letter from Jamie Baxter to ICANN (6 February 2015)
34.	Letter from Jamie Baxter to ICANN (14 April 2015)
35.	Letter from Jamie Baxter to ICANN (29 May 2015)
36.	Letter from Jamie Baxter to ICANN (22 June 2015)
37.	Letter from Jamie Baxter to ICANN (23 June 2015)
38.	Letter from Jamie Baxter to ICANN (24 June 2015)
39.	Letter from Jamie Baxter to ICANN (29 June 2015)
40.	Letter from Jamie Baxter to ICANN (18 August 2015)
41.	Letter from Jamie Baxter to ICANN (3 September 2015)
42.	Reconsideration Request 15-21 (22 October 2015)
43.	Letter from dotgay LLC to Board Governance Committee (28 October 2015)
44.	Letter from UN-GLOBE to ICANN and the Board Governance Committee (12 January 2016)

Tab	Description
45.	Letter from dotgay LLC to ICANN and the Board Governance Committee (13 January 2016)
46.	Board Governance Committee Determination on Reconsideration Request 15-21 (1 February 2016)
47.	Letter from Jay Boucher to Akram Atallah and Chris Disspain (3 February 2016)
48.	Reconsideration Request 16-3 (17 February 2016)
49.	Letter from Transgender Equality Uganda to ICANN Board Governance committee regarding outcome of community scoring evaluation (24 February 2016)
50.	Letter from Trans-Fuzja to ICANN and Board Governance Committee regarding concerns about dotgay application (6 March 2016)
51.	Dotgay's Presentation to the Board Governance Committee (15 May 2016)
52.	DotGay's Written Summary of Its Oral Presentation to the BGC (17 May 2016)
53.	DotGay's Written Summary of Renato Sabbadini's Statement to the BGC (17 May 2016)
54.	"Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" Council of Europe report DGI(2016)17 (27 May 2016)
55.	Letter from dotgay LLC to ICANN and Board Governance Committee Re: Reconsideration Request 16-3 (24 June 2016)
56.	Board Governance Committee Recommendation on Reconsideration Request 16-3 (26 June 2016)
57.	Letter from Renato Sabbadini to the ICANN Board (8 August 2016)

Tab	Description
58.	Letter from Michael Bach to the ICANN Board (8 August 2016)
59.	Letter from Michael Rogers to the ICANN Board (16 August 2016)
60.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN President & CEO Göran Marby (25 August 2016)
61.	Letter from Scott Seitz to Steve Crocker regarding Letter from United TLD Holdco Ltd., Top Level Domain Holdings, Ltd., and Top Level Design, LLC to ICANN dated August 24, 2016 (8 September 2016)
62.	Letter from Dechert LLP on behalf of dotgay LLC to ICANN Board, enclosing expert opinion of Prof. William N. Eskridge, Jr. (13 September 2016)
63.	Letter from Statton Hammock to the ICANN Board (12 October 2016)
64.	Letter from Arif Ali to Chairman Crocker and Members of the ICANN Board regarding Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay's Community Priority Application No: 1-1713-23699 (17 October 2016)
65.	Letter from Arif Ali to Chairman Crocker and Board of Directors re: Council of Europe Report DGI(2016) 17 - .GAY TLD (15 November 2016)
66.	ICANN Webinar moderated by Terri Agnew (18 January 2017)
67.	Letter from Arif Ali to President Marby and BGC regarding ICANN Board's failure to issue its final decision on the Board Governance Committee's Recommendation on Reconsideration Request 16-3 (30 January 2017)
68.	Letter from LGBT Denmark to ICANN Board Members regarding support to correct discriminatory treatment of .GAY (14 February 2017)
69.	Letter from Mario Paez to the ICANN Board (8 March 2017)

Tab	Description
70.	Letter from Arif Ali to President Marby and Members of the Board regarding inquiry about final decision on 26 June 2016 recommendation (12 March 2017)
71.	Email from Jamie Baxter to Steve Crocker regarding the Blog Post on the CPE Investigation (17 April 2017)
72.	Letter from Chris Disspain regarding update on the review of the new gTLD CPE process (26 April 2017)
73.	Letter from Jeffrey Levee to Arif Ali regarding Application of dotgay LLC (15 May 2017)
74.	Letter from Christine Willett to Scott Seitz and Jamie Baxter regarding Reconsideration Request 16-3 (16 May 2017)
75.	Documentary Information Disclosure Policy Request by Arif Ali on behalf of dotgay (18 May 2017)

Exhibit 18

Dotgay's Presentation to the Board Governance Committee

15 May 2016

Dechert
LLP

The EIU Contradicted ICANN's Policies in Evaluating Dotgay's Application

EIU is Bound by the AGB

- **Bylaws, Art. I, § 2(8)**

- “Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”

- **CPE Guidelines, p. 1**

- “The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.”

- **AGB, Module 1**

- “This Applicant Guidebook is the implementation of the Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

EIU Egregiously Misapplied the AGB (I)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to truly consider whether the applied for string “matches the name of the community” as the “name by which the community is commonly known by **others.**”
- The EIU **misapplied Module 4.2.3 of the AGB** by failing to consider whether the applied-for string “closely describes **the community**” and not “the community members.”
- The EIU **misapplied Module 4.2.3 of the AGB** by adding a non-established nexus requirement, i.e., by requiring that the name of the community apply to each community member.

EIU Egregiously Misapplied the AGB (II)

- The EIU **misapplied Module 4.2.3 of the AGB** by failing to distinguish the “community” from the “community members”, making clear that the string need not be applied to each community member, but simply “match the community name’ for a score of 3, or alternatively, closely “describe the community” for a score of 2.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community endorsement criterion to require that the endorsing organization have community recognition beyond membership.
- The EIU **misapplied Module 4.2.3 of the AGB** by altering the community opposition criterion to include a local community center as an organization of non-negligible size when this community center is merely one out of hundreds of community centers that are members of a global organization that endorsed the Dotgay application.
- The EIU **misapplied Module 4.2.3 of the AGB** in relation to the letter of opposition filed by the Q Center, even though the Center had been influenced by a competing applicant for .GAY, and the EIU should have discounted it as “filed for the purpose of obstruction” within the meaning of the AGB.

EIU is Prohibited from Discriminating

- **Bylaws, Art. II, § 3**

- “ICANN shall not apply its standards, policies, procedures, or practices **inequitably or single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.”

- **CPE Guidelines, p. 22**

- “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and **non-discrimination**. Consistency of approach in scoring Applications will be of particular importance.”
- *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

EIU Discriminated against Dotgay (I)

- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the EIU had found sufficient in other instances that a member self-identify as having a tie to the community. [E.g., .OSAKA]
- The EIU **discriminated against Dotgay** by requiring that the name of the community apply to each community member when the inclusion of other members “not automatically associated with the gTLD” did not prevent the EIU from establishing nexus in other instances. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by rejecting the ILGA as a representative organization when the EIU had found in other instances that a community may have more than one such organization. [E.g., .HOTEL and .RADIO]
- The EIU **discriminated against Dotgay** by accepting that a local community center is an organization of non-negligible size when the EIU had found in the instance of the International Radio Emergency Support Coalition that it was not. [E.g., .RADIO]

EIU Discriminated against Dotgay (II)

- The EIU **discriminated against Dotgay** by deeming it had insufficiently representative support despite support from equivalent organizations being sufficient for other community strings:
 - The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) is a global organization dedicated to promoting gay rights composed of over 1,100 member organizations covering countless individuals in 125 countries. It is recognized by the United Nations. [.GAY]
 - The International Hotel & Restaurant Association (IH&RA) is an umbrella trade organization that is composed of national hotel and trade organizations for the hotel and restaurant industries in over 100 countries. It is recognized by the United Nations. [.HOTEL]
 - The World Broadcasting Unions (WBU) is an umbrella organization that is composed of eight regional broadcasting organizations and is dedicated to coordinating international broadcasting. [.RADIO]

EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (I)

- The EIU would have granted Dotgay Community Priority Status had it applied the same standard to .GAY that it applied to other Community Applications with equivalent facts:
 - .OSAKA received the maximum score for nexus despite the fact that the community was identified not only as those who are within the OSAKA geographical area, but those “who self-identify as having a tie to OSAKA, or the culture of OSAKA.” In the case of .GAY, the EIU applied a new and heightened standard for nexus in requiring the name of the community apply to each specific individual or sub-group to that may self-identify and use the applied-for string. It is irrelevant to the analysis that OSAKA is a geographic region.
 - .HOTEL was found to “closely describe the community, without overreaching substantially” despite the fact that the hotel community included entities that “may not be automatically associated with the gTLD,” such as marketing associations. If the same standard had been applied to .GAY, the outcome would have been different. The BGC cannot accept the EIU's conclusion that “more than a small part” of the community would not be automatically associated with .GAY without further due diligence. It is clear that the EIU did not ask the right questions and made no efforts to quantify the part of the community that supposedly is not described as gay.

EIU's Discriminatory Treatment Denied Dotgay Community Priority Status (II)

- .RADIO was found to “closely describe[s] the community, without overreaching substantially beyond the community” despite the EIU acknowledging that “the community, as defined in the application, also includes some entities that are only tangentially related to radio, such as companies providing specific services or products to radio broadcasting organizations.” The EIU further accepted that these companies “would not likely be associated with the word RADIO. However, these entities are considered to comprise only a small part of the community and . . . public will generally associate the string with the community as defined by the applicant.” If the EIU had asked whether the public generally associated the string with the community as defined by the applicant, .GAY would have been as successful as .RADIO.

EIU is Bound to Act Fairly and Openly

- **Bylaws Art. I, § 2(8)**
 - “Making decisions by **applying documented policies [i.e. the AGB] neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. III, § 1**
 - “ICANN and its constituent bodies shall operate to the **maximum extent feasible** in an **open and transparent manner** and **consistent with procedures designed to ensure fairness.**”
- **CPE Guidelines, p. 22**
 - “The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.”
 - *See similarly* CPE Panels and Processes, p. 1; EIU Expression of Interest, p. 5.

EIU Acted Unfairly and Opaquely (I)

- The EIU **ignored the ICC Expert Determination** that found the name of the string .GAY matches Dotgay's definition of the gay community.
- The EIU **did not disclose any due diligence**, including any research, it may have conducted when evaluating the Application **nor did ICANN provide documents from the EIU in response to Dotgay's DIDP Requests.**
- The EIU presented no support for and made no quantification effort to justify its finding that the alleged overreach extends to “more than a small part” of the identified community.

EIU Acted Unfairly And Opaquely (II)

- The EIU **asked only one clarifying question** unrelated to Nexus or Community Support/Opposition Criteria and **thus denied Dotgay the opportunity** to address EIU misunderstandings and mistakes.
- The EIU involved the same personnel in the Second CPE as in the First CPE, raising serious doubts as to who evaluated the application and giving rise to a potential **conflict of interest**.
- ICANN's refusal to disclose the names of the evaluators based on a confidentiality provision is not consistent with **ICANN's and the EIU's transparency obligations**.

The Duties of the Board Governance Committee

The Bylaws Demand the BGC to Ensure Correct Application of the AGB and Correct Finding of Material Facts

- **Bylaws, Art. IV, §2(1)**

“Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction (“Reconsideration Request”) to the extent that he, she, or it have 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.”

The Bylaws Demand the AGB to Independently Assess the CPE Report and Make a Recommendation to the Board

- **Bylaws, Art. IV. §2(3)**

“The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to: (a) evaluate requests for review or reconsideration; (b) summarily dismiss insufficient requests; (c) evaluate requests for urgent consideration; (d) conduct whatever factual investigation is deemed appropriate; (e) request additional written submissions from the affected party, or from other parties; (f) make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and (g) make a recommendation to the Board of Directors on the merits of the request, as necessary.”

The Bylaws Demand that the BGC Conduct its Review with Care and Independent Judgment

- Duty to evaluate the due diligence performed by the EIU and independently conduct due diligence as appropriate.
- **Bylaws Art. I, § 2(8)**

“Making decisions by **applying documented policies neutrally and objectively, with integrity and fairness.**”
- **Bylaws, Art. IV, § 3(4)(b)**

“did the Board exercise **due diligence and care** in having a reasonable amount of facts in front of them?”
- **Bylaws, Art. IV, § 3(4)(c)**

“did the Board members exercise **independent judgment** in taking the decision... ?”

IRP Panel Confirmed the BGC's Duty to Review Underlying Facts and Ensure Correct Application of ICANN policies

- *Despegar* IRP Panel, ¶ 69

“The Panel agrees that **if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied.** It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. **The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.**”

The BGC Must Ensure the Correct Application of the AGB and Correct Finding of Material Facts (I)

- Duty to **correct the EIU's misapplication** of the AGB in requiring the name of the community to apply to each community member in order for nexus to be established.
- Duty to ensure that the EIU determined nexus in **the precise manner** set out in the AGB and by **applying the standard set out in the AGB.**
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from an organization with “reciprocal recognition on the part of the community members of the organization’s authority to represent them” beyond membership in the organization.
- Duty to ensure the EIU **does not rewrite the AGB** by requiring support from a “single [] organization recognized by all of the defined community’s members as the representative of the defined community in its entirety.”

The BGC Must Ensure Correct Application of the AGB and Correct Finding of Material Facts (II)

- Duty to **independently assess** the Determination of the ICC Expert, which found that the string .GAY matches Dotgay's definition of the gay community.
- Duty to **independently assess** whether a local gay community is an organization of "non-negligible size," particularly when the organization is a member of a global organization that supported the application, and to assess whether its opposition raises serious conflict of interest issues.

The BGC Has the Duty to Ensure Non-Discrimination

- The BGC must ensure **non-discriminatory treatment** by applying the same standard for community support applied by other CPE Panels (e.g., .OSAKA, .HOTEL, .RADIO) for Dotgay.
- **Bylaws, Art. II, § 3**

“ICANN shall not apply its standards, policies, procedures, or practices **inequitably or single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.”
- ***Despegar* IRP Panel, ¶¶ 146-147**

“**ICANN itself has no quality review or control process**The Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations **[T]here needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.**”

The BGC Must Ensure Procedural Fairness

- Duty to **ensure fairness in the CPE process** in light of the findings of the ICC Independent Expert that the string .GAY matches Dotgay’s definition of the gay community.
- ***ILGA v. Afilias* Expert Determination, ¶ 13:**

“ILGA's standing has not been doubted by Afilias and is not to be doubted. To have standing the objector has to be an established institution associated with a clearly delineated community (Module 3.2.2.4 of the Guidebook), i.e. with a group that is publicly recognized as a community at a local **and/or** global level and has formal boundaries that enable a determination of what persons or entities form the community (Module 3.5.4 of the Guidebook, first test). **The gay community is a clearly delineated community. It is publicly recognized as such in the language of the media, scholarship, and common usage, formed by millions of individuals whose gender identities and sexual orientations are outside of the societal norms for heterosexual behavior** and who, whether they are more or whether they are less organized, share the awareness of their special status. During the last century, the gay community has grown out of individuals with that special awareness into a community in its own right and is now a worldwide presence.”

ICANN Has a Duty to Foster Diversity and Safety of the Internet Community

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate **for the benefit of the Internet community as a whole**”

- **Bylaws Art. III, § 1**

“Seeking and supporting broad, informed participation reflecting the ***functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.***”

The Denial of a .GAY Community gTLD will Undermine Diversity and Public Interest

- ICANN has a **positive obligation to foster diversity** on the Internet. The Community gTLD program is an attempt to fulfil that obligation.
- This includes ensuring vulnerable and deserving communities are empowered and protected in the public interest.
- Dotgay is the **only applicant** for the **.GAY gTLD with Public Interest Commitments**, including:
 - Pledging to provide a minimum of **67% profits** from domain name registrations to a separate foundation to support gay community initiatives.
 - Appropriate **Authentication Policies** to ensure community-appropriate material.
 - Reserving key domain names as a community resource and support websites: **Rights.gay; HIV.gay; Safe.gay; Suicide.gay; Health.gay; Ally.gay; Transgender.gay, Lesbian.gay; Queer.gay; Pride.Gay.**

The Bylaws and Articles Demand That the BGC Ensure Transparency

- **Articles of Incorporation, Art. IV**

“The Corporation shall operate for the benefit of the Internet community . . . **through open and transparent processes**”

- **Bylaws Art. III, § 1**

“ICANN and its constituent bodies shall operate to the **maximum extent feasible** in an **open and transparent manner** and **consistent with procedures designed to ensure fairness.**”

IRP Panel and ICANN Board Confirmed Transparency Duty

- *Despegar* IRP Panel, ¶ 145

“The Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and objects to be achieved by ICANN, transparency and administrative due process should be applicable.”

- **Board Resolution dated 19 March 2016**

“Board accepts the findings of the Panel’s Final Declaration . . . The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes”

The BGC Must Ensure Transparency

- EIU and ICANN staff **have not disclosed** the underlying materials from the EIU analysis.
- The EIU withheld documents from both the BGC and Dotgay, preventing Dotgay from knowing how its Application was treated and the BGC from independently reviewing whether the principles of fairness and non-discrimination were satisfied.