DETERMINATION

OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-29

22 AUGUST 2014

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The Requester, DotKids Foundation Limited, seeks reconsideration of ICANN's decision to partially defer the Requester's change request seeking to modify portions of its Application for the gTLD .KIDS.

I.   Brief Summary.

The Requester submitted a community application for .KIDS ("Application") and was placed into a contention set with the other applicant for that string, Amazon E.U. S.à.r.l. The Requester then accepted ICANN's invitation to participate in a Community Priority Evaluation ("CPE") for its Application. In preparing for CPE, the Requester submitted a change request to ICANN, seeking both to revise portions of its Application and to supplement its Application with various third-party letters of support. ICANN permitted the submission of the additional letters of support and posted them online along with the Application for comment. ICANN, however, deferred making any decision regarding the proposed revisions to the Requester's Application, specifically deferring this decision until after the CPE process for the Requester's Application is completed.

On 11 June 2014, the Requester filed the instant request for reconsideration ("Request"), seeking reconsideration of ICANN's decision to defer the Requester's change request to modify portions of its Application. Specifically, the Requester claims ICANN violated applicable policies because it contends that: (i) the Requester's proposed changes are minor and necessary because the CPE Panel was not made up of experts, as the Requester had expected; (ii) ICANN

has acted inconsistently in deferring the Requester's change request while permitting other applicants to modify their applications; (iii) the Requester had a reasonable expectation its change request would be granted based on the Applicant Guidebook ("Guidebook")[1] and other ICANN resources; and (iv) the Requester's change request was timely and the factors used to assess change requests should have weighed in favor of granting the change request. The Requester therefore asks ICANN to reconsider its decision to defer part of the change request and instead to grant the change request in full and publish it in its entirety for public comment.

The Requester's claims do not support reconsideration. There is no support in the Guidebook or otherwise for the Requester's expectation that the CPE Panel would include experts in the kids community. ICANN is acting consistently in deferring this change request – all change requests seeking to update a community's definition and registration policies have been deferred until after the completion of CPE. There is no support in the Guidebook or otherwise for the Requester's expectation of a unilateral right to submit changes to its Application prior to CPE. There was no violation of any policy or procedure in ICANN's application of the change request evaluation factors.

As such, the Requester has failed to demonstrate that ICANN's partial deferral of the change request violates any ICANN policy or procedure. Moreover, the Requester has not demonstrated it has been materially adversely affected by the partial deferral of its change request. The BGC[2] therefore concludes that Request 14-29 be denied.

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[1] The Guidebook is available at http://newgtlds.icann.org/en/applicants/agb.
[2] Board Governance Committee.

II.   Facts.

A.   Background Facts.

On 13 June 2012, the Requester filed the Application.

The Application was placed in a contention set along with the other applicant, Amazon E.U. S.à.r.l,'s application for .KIDS.

On 16 April 2014, ICANN invited the Requester to participate in CPE – a method to resolve string contention, which is described in section 4.2 of the Guidebook. CPE occurs only if a community application is in a contention set and the applicant elects to pursue CPE.

The Requester accepted that invitation.

On 2 May 2014, the Requester submitted a change request seeking to add third-party letters of support to its Application and to revise numerous portions of the Application.

On 28 May 2014, the Requester received a letter from ICANN granting the change request insofar as it sought to add letters of support, but deferring any decision regarding the revisions to the Application until after CPE is completed.

On 11 June 2014, the Requester filed its Request seeking reconsideration of ICANN's decision to defer any ruling upon the proposed revisions to the Application until after the Requester completes CPE.

B.   The Requester's Claims.

The Requester contends that reconsideration is warranted because:

(i) The change request did not seek to make any material changes to the Application but instead consisted of minor clarifications that were necessary only because the CPE Panel was not made up of experts, as the Requester had expected based on unspecified portions of the Guidebook;

(ii) ICANN has acted inconsistently in deferring the Requester's change request while permitting other applicants to modify their applications;

(iii) The Requester had a reasonable expectation the change request would be granted based on Sections 1.2.3.1 and 4.2.1 of the Guidebook, as well as the policies set forth in CPE Frequently Asked Questions ("FAQs") page on ICANN's website[3]; and

(iv) The change request was timely and the factors ICANN must use to assess change requests found on ICANN's website[4] and relating to Section 1.2.7 of the Guidebook should have weighed in favor of granting the change request.

C.   Relief Requested.

The Requester asks ICANN to reconsider its decision to defer part of its change request and instead to grant it in full and publish the entire change request for public comment.[5] (Request § 9, Pg. 9.)

III.   Issues.

In view of the claims set forth in Request 14-29, the issues for reconsideration are:

A.   Whether ICANN violated any established policy or procedure in any of the following ways:

1.   Whether ICANN violated any policy or procedure by deferring part of the change request even though the Requester claims that its proposed changes are minor and

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[3] *See* http://newgtlds.icann.org/en/applicants/cpe.
[4] *See* http://newgtlds.icann.org/en/applicants/customer-service/change-requests.
[5] As ICANN informed the Requester, ICANN will post all *approved* changes in a change log on the gTLD microsite. Relevant changes made to public portions of the application will be posted. Changes made to confidential portions of the application will not be posted, but only summarized to protect confidentiality of the applicant. Posting will occur once the applicant confirms that changes made are correct as requested.

necessary because the CPE Panel did not include "experts in the kids community" as the Requester expected and alleges is required by the Guidebook, (Request, § 8, Pg. 5.)

2.   Whether ICANN inconsistently applied its policies and procedures by granting change requests submitted by other applicants that involved material changes but deferring that of the Requester, (Request, § 8, Pgs. 5-6.);

3.   Whether ICANN violated Sections 1.2.3.1 or 4.2.1 of the Guidebook, or the procedures set forth on the CPE FAQs page on ICANN's website[6] (from which the Requester had an expectation that his change request would be granted) in deferring its decision on part of the Requester's change request, (Request, § 8, Pgs. 6-7.); or

4.   Whether ICANN violated Section 1.2.7 of the Guidebook or failed to evaluate the factors ICANN must use to assess change requests[7] when it deferred its decision on part of the change request, (Request, § 8, Pgs. 7-9.); and

B.   Whether the Requester was materially and adversely affected by the decision to defer part of its change request until after completion of the CPE process on the Application.

IV.   **The Relevant Standards for Evaluating Reconsideration Requests.**

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[8] (Bylaws, Art. IV, § 2.) Dismissal of a request for

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[6] *See* http://newgtlds.icann.org/en/applicants/cpe.
[7] *See* http://newgtlds.icann.org/en/applicants/customer-service/change-requests
[8] Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:
   (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
   (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
   (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC[9] agrees to the extent the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. The BGC's review is limited to whether ICANN violated any established policy in reaching its decision with regard to the Requester's change request. (Bylaws, Art. IV, § 2.)

V.   **Analysis and Rationale.**

        A.   **The Requester Failed To Demonstrate ICANN Violated Any Established Policy or Procedure.**

The Requester claims ICANN failed to follow applicable policies or procedures in partially deferring its change request because: (i) the CPE Panel does not include "experts in the kids community" as the Requester alleges the Guidebook requires, and ICANN erred in determining the proposed revisions were material when they were in fact only adjustments needed to make the Application suitable for non-expert review; (ii) ICANN acted inconsistently in granting change requests filed by other applicants that involved material changes and deferring that of the Requester; (iii) ICANN violated Sections 1.2.3.1 or 4.2.1 of the Guidebook, or the procedures set forth on the CPE FAQs page on ICANN's website, in deferring its decision on part of the Requester's change request; and (iv) ICANN violated Section 1.2.7 of the Guidebook or failed to evaluate the factors ICANN must use to assess change requests when it deferred its decision on a portion the Requester's change request. (Request, § 8, Pgs. 4-9.) As discussed in detail below, the Requester has provided no support for its contention that ICANN incorrectly applied any process or procedure, and the Requester has also failed to demonstrate it has been materially affected by the partial deferral of its change request.

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[9] New gTLD Program Committee.

1. The Guidebook Does Not Require the CPE Panel to Include Experts in the Particular Subject Matter of Each Community Application.

The Requester claims there was an "expectation set in the [Guidebook]" that the CPE Panel will include "members who are experts in the kids community" or have experience with the subject community. (Request, § 8, Pg. 5.) The Requester cites no particular portion of the Guidebook that might give rise to this expectation. The Guidebook confers wide latitude upon ICANN in selecting a CPE Panel, and the word "expert" is not used at all: "Community priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications." (Guidebook, § 4.2.2.) Moreover, the Guidebook specifies that scoring in a CPE "will be performed by a panel and be based on information provided in the application plus other relevant information available (such as public information regarding the community represented). The panel may also perform independent research, if deemed necessary to reach informed scoring decisions." (Guidebook, § 4.2.3.) In other words, a party to a CPE bears the burden of providing *in its application* the information upon which it seeks the CPE panel to base its decision. While the Guidebook contemplates the CPE panel may look outside an application if necessary, it does not require the constitution of a CPE panel with particularized knowledge of the issues involved with each proposed community. As such, the Requester has failed to demonstrate ICANN has violated any policy or procedure by its alleged failure to appoint a CPE Panel with expertise in the "kids community." Therefore, the Requester's claim that the Application revisions proposed in the change request are only necessary as a result of some unfulfilled promise to provide a CPE panelist who is an expert in the "kids community" lacks merit, and ICANN's partial deferral of its decision on the change request does not violate any policy or procedure in this regard.

The Requester also contends ICANN wrongly determined its proposed revisions were material, when in fact they were minor adjustments only necessary because the CPE Panel was not expert in the "kids community" as the Requester had expected. (Request, § 8, Pgs. 4-5.) However, ICANN's letter setting forth its grounds for partially deferring the change request did not mention (let alone rest upon) any determination of whether the proposed changes were material. (Request, Ex. B, Pg. 4.) Moreover, given that ICANN did not promise a CPE panel comprised of experts in the "kids community," ICANN has no obligation to permit changes, material or immaterial, that purport to be aimed at making the Application suitable for review by a non-expert CPE Panel.

2. ICANN Has Consistently Handled Change Requests from Applicants with Applications in CPE.

The Requester argues that because other change requests have been "accepted and encouraged by ICANN (even when such applications are within contention sets)," ICANN is violating established policy in partially deferring its decision on the Requester's change request. In support, the Requester cites two examples it contends demonstrate ICANN's inconsistency with regard to permitting changes to applications. First, the Requester cites ICANN's implementation of the Public Interest Commitments ("PICs"), where applicants were provided "the opportunity to submit PICs based on statements made in their applications and/or additional commitments that were not included in their applications but to which they intend to commit."[10] Second, the Requester notes that ICANN accepted many change requests from applicants seeking to convert an application from a "closed generic" registry to an "open registry."[11]

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[10] *See* ICANN, Posting of Public Interest Commitments (PIC) Specifications Completed, *available at* http://newgtlds.icann.org/en/announcements-and-media/announcement-06mar13-en.
[11] *See* ICANN, GAC Category 2 Advice Implementation, *available at* http://newgtlds.icann.org/en/applicants/advisories/gac-cat2-advice-19mar14-en.

(Request, § 8, Pg. 5.) The Requester contends that because ICANN permitted these other

applicants to amend their applications via change requests, ICANN violated its own established

policy in failing to approve the entirety of the Requester's change request. Specifically, the

Requester claims that partially deferring the decision is "inconsistent with established reasonable

expectations and ICANN policies based on precedents already set." (Request, § 8, Pg. 6.)

This reasoning is unavailing. Neither example submitted is applicable to the current

circumstances and the Requester failed to cite any instance where another applicant that

participated in CPE was granted a change request to the relevant application. As the Requester

recognizes (*see* Request, § 8, Pg. 6), there is a significant difference between ICANN's decision

to defer portions of the Requester's change request and the above-listed instances where ICANN

permitted applicants to amend their applications. Requested changes to community definition

and registration policies are consistently deferred until after the completion of CPE. Approval of

a change request to update a community definition and registration policies would allow a CPE

applicant to update its application based on learnings from previously posted CPE results. This

causes issues of unfairness to the first applicants that went through CPE and did not have the

benefit of learning from others. As ICANN's responsibilities are to ensure fair and equitable

treatment for all applicants, all change requests of these types have been deferred until after CPE.

As such, ICANN has not violated any policy or procedure. To the contrary, ICANN's

established procedures mandate that ICANN defer the revisions portion of the Requester's

change request and, as set forth in Section A.4 below, ICANN followed all applicable procedures

in doing so.[12]

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[12] *See* ICANN, New gTLD Application Change Request Process and Criteria,
http://newgtlds.icann.org/en/applicants/customer-service/change-requests

3. **ICANN's Decision to Defer a Portion of the Change Request Did Not Violate Any Policy or Procedure Even Though the Requester Expected a Different Result.**

The Requester contends the Guidebook and other ICANN statements concerning the CPE process "set[] a reasonable expectation that information supporting the application can be provided prior to the CPE either as application comments or through a change request[.]" (Request, § 8, Pg. 6.) In other words, the Requester contends that every change request that is intended to support CPE should be approved, and any denial of such a change request is a violation of ICANN policies and procedures. This assertion is unfounded.

The Requester first cites Guidebook sections 1.2.3.1 and 4.2.1, both of which state that applicants may be asked to provide additional information prior to a CPE. (Request, § 8, Pg. 6.) These provisions do not, however, grant any applicant the unilateral right to submit additional information prior to a CPE. Nor do those provisions guarantee ICANN will approve any change request the applicant seeks without any prior request from ICANN or the CPE panel. Similarly, the Requester cites to ICANN's CPE website and specifically its FAQs,[13] but does not point to any statement therein that would obligate ICANN to grant a change request simply because the Applicant is engaging in a CPE. No such obligation exists.

Because the Requester has identified no policy or procedure ICANN violated in deciding to defer ruling on the change request until the after CPE concludes, reconsideration is unsupported.

4. **ICANN Properly Applied the Factors Used to Assess Change Requests.**

The Requester argues ICANN staff violated policy or procedure because it failed to properly apply and balance the established criteria for change requests in deferring portions of

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[13] Both are available at http://newgtlds.icann.org/en/applicants/cpe.

the Requester's change request. In determining whether to approve a change request, ICANN

staff considers the following factors:

a. *Explanation* – Is a reasonable explanation provided?

b. *Evidence that original submission was in error* – Are there indicia to support

an assertion that the change merely corrects an error?

c. *Other third parties affected* – Does the change affect other third parties

materially?

d. *Precedents* – Is the change similar to others that have already been approved?

Could the change lead others to request similar changes that could affect third

parties or result in undesirable effects on the program?

e. *Fairness to applicants* – Would allowing the change be construed as fair to

the general community? Would disallowing the change be construed as unfair?

f. *Materiality* – Would the change affect the evaluation score or require re-

evaluation of some or all of the application? Would the change affect string

contention or community priority consideration?

g. *Timing* – Does the timing interfere with the evaluation process in some way?

ICANN reserves the right to require a re-evaluation of the application in the

event of a material change. This could involve additional fees or evaluation in

a subsequent application round.[14]

The Requester contends all of these factors weigh in favor of approving the Requester's

change request, and thus ICANN's partial deferral of the change request constitutes a violation

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[14] *See* ICANN, New gTLD Application Change Request Process and Criteria, *available at*
http://newgtlds.icann.org/en/applicants/customer-service/change-requests (citing Guidebook, § 1.2.7).

of ICANN policy or procedure. (Request, § 8, Pgs. 7-8.) The Requester's argument, however, simply reflects its substantive disagreement with ICANN's decision to defer the revisions portion of the change request. The Requester presents no evidence that ICANN staff in fact failed to apply the required factors in violation of established policy.

In evaluating change requests, all available information is considered against the seven criteria above. The weight of each criterion may vary on a case-by-case basis, depending upon the facts and circumstances surrounding the change request, the application, and the string. In this instance, ICANN's 27 May 2014 letter setting forth ICANN's decision to partially defer the Requester's change request expressly stated that the request "was carefully evaluated by the several decision criteria described on the New gTLD microsite" listed above. (Request, Ex. B, Pg. 7.) The letter made clear that in balancing the factors, factors five and seven above tipped the balance in favor of deferring portions of the Requester's change request. Specifically, ICANN stated that the reason for the deferral is "to be fair to other applicants" and that ICANN will evaluate the change request at the "completion of Community Priority Evaluation (CPE) for this application." (Request, Ex. B, Pg. 7.)

A change to update a community's definition and registration policies prior to contracting is material because: (1) other parties' decisions on whether to file a community objection to the application were made on the basis of what was in the application at the time of the objection window; (2) the community definition and registration policies serve as the basis for determining the merits of a community objection; and (3) they are evaluated during CPE. Similarly, approval of a change request to update a community's definition and registration policies prior to the completion of CPE would cause issues of unfairness to other applicants in the same contention set. As mentioned above, ICANN's responsibilities are to ensure fair and equitable treatment for

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all applicants. Accordingly, all change requests of these types have been deferred until after

CPE. Once CPE is complete, ICANN will consider approving the change request.

These criteria, and the process for evaluating them, were carefully developed to enable

applicants to make necessary changes to their applications while ensuring a fair and equitable

process for all applicants.

The Requester does not point to any violation of policy or procedure in ICANN's

application of the seven change request evaluation factors. ICANN's letter explaining the

decision to defer consideration of part of the change request makes clear that ICANN considered

the relevant factors in reaching its conclusion. Any substantive disagreement with the result of

that analysis cannot form the proper basis for a Request for Reconsideration.

B.   **The Requester Has Not Demonstrated It Was Materially Affected By The Partial Deferral Of Its Change Request.**

Absent evidence that the Requester has been materially and adversely affected by

ICANN's decision to defer consideration of part of the Requester's change request,

reconsideration is not appropriate. (Bylaws, Art. IV, § 2.2.)

Here, the Requester concedes that while "ICANN staff may have felt that there were

actual changes in the nature of the application" in reality "it effectively reflects the same

community definition." (Request, § 8, Pg. 5.) As such, it is difficult to see how the deferred

change request decision materially affects the Requester. The Requester contends, though, that

the changes are "critical" to ensure "an equitable CPE for the application" because the CPE

Panel allegedly does not meet the level of expertise the Requester claims the Guidebook led it to

expect. But as discussed above, the Requester cites no particular provision of the Guidebook

upon which it bases its expectations for an expert. Moreover, the Requester has not provided any

specific reason why it contends the CPE Panel lacks the expertise required to competently

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determine whether the Application meets the community priority criteria. In sum, the Requester has failed to demonstrate it was materially affected by the partial deferral of its change request and, on that basis, reconsideration is not warranted.

VI.   Determination.

Based on the foregoing, the BGC concludes the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-29. If the Requester believes it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 14-29 shall be final and does not require Board (or NGPC) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-29 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of the BGC's Determination, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. (*See* Bylaws, Article IV, § 2.16.) To satisfy the thirty-day deadline, the BGC would have to have acted by 11 July 2014. Due to the volume of Reconsideration Requests received within recent months, it was impractical for the BGC to render a determination on Request 14-29 prior to 22 August 2014.