DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-40

23 October 2014

The Requester, Dadotart, Inc., seeks reconsideration of the Community Priority

Evaluation ("CPE") Panel's Report ("CPE Report"), and ICANN's acceptance of that Report,

finding that the Requester did not prevail in the CPE for .ART. In light of the CPE results, while

the Requester's application will not be given priority over other applications for the same string,

it is still in contention to ultimately be, following contention resolution, the prevailing

application for its string.

I.   Brief Summary.

The Requester submitted a community-based application for .ART ("Application"). The

Application was placed in a contention set with other applications for .ART. As the Application

is community-based, the Requester was invited to, and did, participate in CPE for the

Application. The Requester's Application did not prevail in the CPE. As a result, the

Application goes back into contention with the other applications for the same string. The

contention will be resolved by auction or some arrangement among the involved applicants.

The Requester claims that the CPE Panel[1] failed to comply with established ICANN

policies and procedures in rendering the CPE Report. Specifically, the Requester contends that

policies or procedures were violated because: (i) the Panel was comprised of two panelists,

which the Requester claims was contrary to the "original intent" set forth in the Applicant

Guidebook; (ii) the Economic Intelligence Unit ("EIU"), the CPE provider, declined to identify

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[1] The "Panel" includes those people who were involved in: (i) evaluating and scoring the Application; (ii) validating letters of support and opposition; and (iii) issuing the "CPE Report" on the Requester's Application.

the panelists who rendered the CPE Report; (iii) the Requester claims that the CPE Report demonstrates a lack of objectivity; and (iv) ICANN declined to produce "any communication between itself and EIU" or the results of "test/pilot evaluations" conducted by the EIU with respect to its panels. (Request, § 8, Pgs. 4-6.)

The Requester's claims do not support reconsideration. The Requester has failed to demonstrate that the EIU, the Panel or ICANN acted in contravention of established policy or procedure. Contrary to the Requester's assertions, the Applicant Guidebook ("Guidebook") does not prohibit a two-person CPE panel; the EIU is not required to provide details regarding the identity of the Panelists or their independent research; and there is no policy or procedure mandating that ICANN produce all of its communications with the EIU. The BGC therefore concludes that Reconsideration Request 14-40 should be denied.

II.   Facts.

A.   Background Facts.

The Requester submitted a community-based application for .ART.[2]

The Application was placed in a contention set with other applicants for. ART.[3]

On 20 February 2014, the Requester was invited to participate in CPE for .ART.[4] CPE is a method of resolving string contention, described in section 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 .ART, and its Application was forwarded to the EIU, the CPE provider, for evaluation.

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[2] *See* Application Details, *available at*
https://gtldresult.icann.org/applicationstatus/applicationdetails/1437.
[3] *See* Contention Set: Art, *available at* https://gtldresult.icann.org/application-result/applicationstatus/contentionsetdiagram/72.
[4] *See* Community Priority Evaluation (CPE), *available at*
http://newgtlds.icann.org/en/applicants/cpe#invitations.

On 10 September 2014, the Panel issued its CPE Report. The CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application did not prevail in CPE.[5]

On 12 September 2014, ICANN posted the CPE results on its new gTLD microsite.[6]

On 25 September 2014, the Requester filed Reconsideration Request 14-40, requesting reconsideration of the CPE Report and ICANN's denial of its requests for information regarding the Panel and the EIU's practices.

B.   The Requester's Claims.

The Requester contends that reconsideration is warranted because:

1.   The Panel was comprised of two panelists, which the Requester claims runs contrary to the "original intent" set forth in the Guidebook (Request, §§ 7-8, Pgs. 3-4);

2.   The EIU declined to identify the panelists who rendered the CPE Report (Request, § 8, Pg. 5);

3.   The Panel issued a CPE Report that Requester claims lacks objectivity (Request, § 8, Pgs. 5-6); and

4.   ICANN has not produced its communications with the EIU or other EIU documentation related to the panelists, such as the results of "test/pilot evaluations" and "guidance" the EIU was "developing for its panels" (Request, § 8, Pg. 5).

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[5] *See* .ART Report, *available at* https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf.

[6] *See* Community Priority Evaluation (CPE), *available at* http://newgtlds.icann.org/en/applicants/cpe #invitations.

C.   Relief Requested.

The Requester seeks the release of the requested EIU documentation and communications, a refund of a portion of its CPE fee in the amount of $12,000, reconsideration of the CPE Report, and asks that .ART not be subject to an auction of last resort until ICANN provides briefing on the public policy implications of auctions. (Request, § 9, Pg. 6.)[7]

III.   Issues.

In view of the claims set forth in the Request, the issues for reconsideration are whether the EIU or ICANN violated established policy or procedure by:

1.   Permitting a two-person panel to prepare the CPE Report (Request, §§ 7-8, Pgs. 3-4);

2.   Declining to identify the panelists who rendered the CPE Report (Request, § 8, Pg. 5);

3.   Issuing a CPE Report that Requester claims lacks objectivity (Request, § 8, Pgs. 5-6); or

4.   Declining to produce ICANN's communications with the EIU and other EIU documentation such as pilot program results (Request, § 8, Pg. 5).

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

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

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[7] The Requester does not directly ask that the BGC reconsider its placement of the Application into active contention with the other applicants for .ART. (*See* Request, § 9, Pg. 6.)

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

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or

reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or

the NGPC[9] agrees to the extent that the BGC deems that further consideration by the Board or

NGPC is necessary, that the requesting party does not have standing because the party failed to

satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined

that the reconsideration process can properly be invoked for challenges to determinations

rendered by panels formed by third party service providers, such as the 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.[10]

In the context of the New gTLD Program, the reconsideration process does not call for

the BGC to perform a substantive review of CPE reports. Accordingly, the BGC does not

evaluate the Panels' substantive conclusions that the Application did not prevail in CPE. Rather,

the BGC's review is limited to whether the Requester has identified any policy or procedure

violation.

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition,

the EIU – the firm selected to perform CPE – has published supplementary guidelines ("CPE

(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.
[9] New gTLD Program Committee.
[10] *See* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-
01aug13- en.doc, BGC Recommendation on Reconsideration Request 13-5.

Guidelines") that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.[11]

CPE will occur only if an applicant for a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process. (Guidebook, § 4.2.) CPE is performed by an independent community priority panel appointed by the EIU. (Guidebook, § 4.2.2.) A CPE panel's role is to determine whether the community-based application satisfies 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 application must receive a minimum of 14 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points (for a total of 16 points).

V.   Analysis and Rationale.

A.   The Requester's Claim That The CPE Panel Was Improperly Comprised Of Two Panelists Does Not Support Reconsideration.

The Requester claims that the CPE Panel was improperly comprised of a "two person panel that provided an internal review/appeal mechanism," and that this type of procedure was "never the original intent of the [Guidebook] as all objection panels and CPE panels were intended to be a single person panel unless a multi-panel review was requested by a party to the proceeding." (Request, § 8, Pgs. 3-5.)

The EIU has in fact instituted a two-panelist procedure, as well as a "tie breaker"

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[11] The CPE Guidelines may be found here: http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.

procedure in the event the two panelists reach differing conclusions.[12] If the two panelists

disagree as to the result of the evaluation, a Project Coordinator "reviews and mediates" the

evaluation.[13] In addition, after the evaluation is complete, it is "assesse[d]" by a Project

Coordinator to ensure "consistency and accuracy."[14]

The Requester, however, has failed to provide any evidence to support its claim that the

two-panelist procedure contravenes the purported "original intent" of the Guidebook to restrict

CPE (or any other) panels to one sole panelist. Neither the current Guidebook nor previous

iterations of the Guidebook indicate any such intent.[15] Furthermore, it is counter-intuitive for the

Requester to argue that "certain aspects of the new gTLD process," including CPE, suffer from a

"lack of uniformity" (Request, § 7, Pg. 3) when the EIU specifically has implemented a review

process to ensure consistency and accuracy across CPE Panel reports.

The Requester also speculates that "the incorporation of the [two-panelist procedure]

resulted in a doubling of fees to applicants seeking CPE." (Request, § 8, Pg. 5.) Despite the

Requester's claims, the Guidebook specifies only that CPE participants must pay a fee "*currently

estimated* at USD 10,000[.]" (Guidebook, § 1.5.2 (emphasis added).) The Guidebook makes

clear that "[t]he estimated fee amounts provided in this section 1.5.2 *will be updated* upon

engagement of panel service providers and establishment of fees." (*Id*. at § 1.5.2, n.10 (emphasis

added).) This language puts applicants on notice that the amount of the fee is subject to change,

and does not support the Requester's claims that the use of a two-panelist procedure improperly

resulted in "a doubling of fees" to applicants seeking CPE. That the CPE fee is currently

$22,000 therefore is consistent with the Guidebook, and does not support reconsideration or

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[12] *See* Community Priority Evaluation Panel And Its Processes, *available at*
http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf.
[13] *Id*.
[14] *Id*.
[15] *See* Historical Documents, *available at* http://newgtlds.icann.org/en/about/historical-documentation.

Requester's claim for a refund.

In sum, the Requester has not identified any established policy or procedure that has been violated by the number of panelists on the CPE Panel, the internal review process that the EIU has instituted with respect to the Panel's determination, or the fees associated with CPE.

B. No Policy Or Procedure Requires The EIU To Identify The CPE Panelists.

The Requester claims that reconsideration is warranted because ICANN "permitted EIU to withhold the identity of the panelists." (Request, § 8, Pg. 5.) However, the Requester identifies no policy or procedure requiring the EIU to disclose the identity of CPE panelists. Notably, the CPE Panel Process Document, issued on 6 August 2014 by the EIU, explicitly sets forth its panelist selection process and does not include any disclosure requirements regarding the identity of panelists.[16] Thus there is no indication, and should be no reasonable expectation, that the Panelists' identities will be revealed. The Requester, however, essentially argues that the Guidebook *should* have included such a procedural requirement and, on that basis, argues that reconsideration is warranted. As acknowledged by the Requester (Response, § 8, Pg. 5), however, the Guidebook was extensively vetted by the ICANN stakeholder community over a course of years and included a total of ten versions with multiple notice and public comment periods,[17] and it does not have such a requirement.

Reconsideration is only warranted where a staff action "contradict[s] *established* ICANN policy(ies)[.]" (Bylaws, Art. IV, § 2, emphasis added.) Reconsideration is not warranted where, as here, Requester seeks procedural measures that the Guidebook does not provide.

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[16] *See* CPE, *available at* http://newgtlds.icann.org/en/applicants/cpe.
[17] The current version of the Guidebook is available at http://newgtlds.icann.org/en/applicants/agb. The prior versions of the Guidebook are available at http://newgtlds.icann.org/en/about/historical-documentation. As noted in its Preamble, the Guidebook was the product of an extensive evaluation process that involved public comment on multiple drafts.

C.   No Reconsideration Is Warranted Based Upon The CPE Report's Purported Lack of Objectivity.

The Requester claims the CPE Report reflected improper: (1) "results-based interpretation" of the Guidebook and "a lack of objective and consistent use of definitional constructs"; and (2) research involving "externalities chosen by the panelists for guidance in a specialized field, the arts, without any consultation with the applicant." (Request, § 8, Pg. 5.)

First, a request for reconsideration cannot challenge the substance of the Panel's conclusions, but only its adherence to the applicable policies and procedures. While the Requester alludes to an inconsistent application of Guidebook definitions, it identifies no examples where the CPE Report purportedly contravenes the Guidebook either in terms of inconsistent usage of "definitional constructs" or otherwise. (Request, § 8, Pg. 5.) Instead, the Requester summarily concludes, without explanation, that "any fair reading" of the CPE Report discloses unspecified defects demonstrating a lack of objectivity. (*Id*.) The Requester does not identify any procedural irregularity, or point to any particular term or concept it contends was applied inconsistently. Given that the Requester bears the burden of demonstrating that a particular policy or procedural violation occurred (*see* Bylaws Art. IV, § 2), its vague criticism of the Report does not support a finding that reconsideration is warranted.

Second, the Requester faults the Panelists for their "'reach' to externalities[.]" (Request, § 8, Pg. 5.) However, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to "perform independent research, if deemed necessary to reach informed scoring decisions." (Guidebook, § 4.2.3.) The Requester 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 Requester's argument that the Panel engaged in independent research does not support reconsideration.

D.   No Policy Or Procedure Requires ICANN To Produce Its Communications With The EIU Or Other EIU Documentation.

The Requester claims that "ICANN staff communicated to the community that the EIU was developing guidance for its panels and undertaking test/pilot evaluations" and then "refused […] to produce any communication between itself and the EIU." (Request, § 8, Pg. 5.) While the Requester claims that it is a "gross violation of administrative procedure" to keep these communications confidential, it does not point to any particular administrative procedure that might require their disclosure. Given that the Requester has failed to offer any details as to either the genesis of its complaint or any specific policy or procedure it contends ICANN has violated, the Requester's argument that ICANN should have produced EIU correspondence, the results of EIU pilot programs, or draft guidance documents drafted by the EIU does not provide any grounds for reconsideration.

E.   No Alternative Relief Is Warranted.

If its reconsideration request is denied, the Requester asks that "in the alternative" no auction be conducted with respect to .ART until ICANN complies with the GAC's Buenos Aires Communiqué, which requested a "briefing on the public policy implications of holding auctions to resolve string contention (including community applications)." (Request, § 9, Pg. 6 (quoting GAC Communiqué – Buenos Aires, Argentina, *available at* https://www.icann.org/en/system/files/correspondence/gac-to-board-20nov13-en.pdf).) As an initial matter, the Buenos Aires Communiqué set forth no deadline for the requested briefing and did not state that ICANN should refrain from holding any auctions until briefing is complete.[18] Furthermore, the Guidebook clearly authorizes an auction as "a tie-breaker method for resolving

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[18] Moreover, the Requester did not submit a response to the GAC's Buenos Aires Communiqué, which all applicants were invited to do, and as many other applicants did do. (*See* GAC Advice: Buenos Aires Communiqué and Applicant Responses, *available at* http://newgtlds.icann.org/en/applicants/gac-advice/buenosaires48.)

string contention among the applications within a contention set, if the contention has not been resolved by other means [including CPE]." (Guidebook, § 4.3.) As such, the Requester has identified no authority demonstrating it is entitled to the "alternative" relief it seeks.

VI. Determination.

Based upon the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 14-40. As there is no indication that the EIU, the Panel or ICANN violated any ICANN policy or procedure, the Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

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 no Board (or NGPC) consideration is required. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-40 seeks reconsideration of a staff action or inaction. As such, after consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.