

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-46**

18 November 2014

The Requesters, Little Birch, LLC and Minds + Machines Group Limited (two of the four applicants for the .ECO string), seek reconsideration of the Community Priority Evaluation (“CPE”) Panel’s Report, and ICANN’s acceptance of that Report, finding that Big Room Inc.’s (“Big Room’s”) application for .ECO prevailed in CPE for that string.¹ In light of the CPE results, the contention set for .ECO has been resolved and only Big Room’s application will proceed.

I. Brief Summary.

The Requesters each submitted a standard (meaning not community-based) application for .ECO. Those applications were placed in a contention set with the other applications for .ECO, including Big Room’s community-based application (the “Application”). As Big Room’s Application was community-based, Big Room was invited to, and did, participate in CPE. Big Room’s Application prevailed in CPE. As a result, the contention set for the .ECO string has been resolved and only Big Room’s Application will proceed.

The Requesters do not identify any misapplication of any policy or procedure by ICANN or the CPE Panel. Rather, the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and challenge the substantive merits of the CPE Panel’s Report.

¹ Reconsideration Request 14-46 lists both Little Birch, LLC and Minds + Machines Group Limited as Requesters. (Request, § 1, Pg. 1.) Accordingly, the Board Governance Committee treats this Request as having been submitted by both parties, notwithstanding the later representation that the Request is “not” brought on behalf of multiple persons or entities. (*Id.*, § 11, Pg. 11.)

Specifically, the Requesters contend that the CPE Panel improperly applied the first, second and fourth CPE criteria set forth in the Applicant Guidebook (the “Guidebook”).²

Substantive disagreement with the CPE Panel’s Report, however, is not a basis for reconsideration. Since the Requesters have failed to demonstrate that the CPE Panel acted in contravention of any established policy or procedure in rendering the Report, the BGC concludes that Request 14-46 be denied.

II. Facts.

A. Background Facts.

The Requesters each submitted a standard application for .ECO.³ Those applications were placed in a contention set with other applications for .ECO, including Big Room’s community-based application.⁴

On 12 March 2014, Big Room’s Application for .ECO was invited to participate in CPE.⁵ 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.

Big Room elected to participate in CPE for .ECO, and its Application was forwarded to the Economist Intelligence Unit (“EIU”), the CPE provider, for evaluation. On 7 October 2014, the Panel issued its report on Big Room’s Application. The Report explained that the

² Request, §§ 7-8, Pgs. 3-10.

³ See <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/790>; <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1523>. Minds + Machines Group Limited is a wholly-owned subsidiary of Top Level Domain Holdings, Ltd, which is listed as the applicant for .ECO.

⁴ See Contention Resolution Status, *available at* <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/790>.

⁵ See <http://newgtlds.icann.org/en/applicants/cpe>.

Application met the CPE requirements specified in the Guidebook and therefore concluded that the Application prevailed in CPE.⁶

On 22 October 2014, the Requesters filed Request 14-46, requesting reconsideration of the Report, and ICANN’s acceptance of that Report. The same day, Requester Little Birch, LLC filed a request pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”), seeking documents related to the CPE Panel’s Report.⁷

On 31 October 2014, ICANN responded to the DIDP request.⁸ ICANN identified and provided links to all publicly available documents, including comments and correspondence regarding the Application, which were posted on ICANN’s website and considered by the CPE Panel.⁹ ICANN noted that documents responsive to the requests were either: (1) already public; (2) not in ICANN’s possession; or (3) not appropriate for public disclosure because they were subject to certain DIDP Nondisclosure Conditions.¹⁰

B. Relief Requested.

The Requesters ask the Board to: (a) “reconsider the Determination [by the CPE Panel], and in particular not award a passing score” to Big Room’s Application; (b) “reconsider ICANN’s decision that the Requester[s]’ application[s] for the .eco gTLD ‘Will Not Proceed’ to contracting”; and (c) “restore the ‘Application Status’ of Requester[s]’ application[s] and the Application submitted by [Big Room] to ‘Evaluation Compete,’ their respective ‘Contention Resolution Statuses’ to ‘Active,’ and their ‘Contention Resolution Result’ to ‘In Contention.’”¹¹

⁶ See Report, available at <https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>.

⁷ See DIDP Request, available at <https://www.icann.org/en/system/files/files/levy-request-22oct14-en.pdf>.

⁸ See DIDP Response, available at <https://www.icann.org/en/system/files/files/levy-response-31oct14-en.pdf>.

⁹ *Id.*, Pg. 3.

¹⁰ *Id.*, Pgs. 2-5.

¹¹ Request, §§ 8-9, Pgs. 10-11. The Requesters “reserve[d] the right to supplement [their] Reconsideration Request with further information and arguments following the outcome of their [DIDP Request], even if no additional information would be provided by ICANN.” (*Id.*, § 7, Pg. 11.) ICANN responded to the DIDP Request on 31 October 2014, and asked that the Requesters submit supplemental materials, if any, by 11 November 2014. The Requesters did not submit any supplemental materials by that date.

III. Issues.

In view of the claims set forth in the Request, the issues for reconsideration are whether the CPE Panel violated established policy or procedure by failing to properly apply the CPE criteria in evaluating Big Room's Application.¹²

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

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹³ Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC¹⁴ 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. 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.¹⁵

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

¹² Request, § 8, Pgs. 3-10.

¹³ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

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

¹⁴ New gTLD Program Committee.

¹⁵ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

evaluate the CPE Panel’s substantive conclusion that the Application prevailed in CPE. Rather, the BGC’s review is limited to whether the CPE Panel violated any established policy or procedure.

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 (the “CPE Guidelines”) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.¹⁶

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.¹⁷ CPE is performed by an independent community priority panel appointed by the EIU.¹⁸ A CPE panel’s role is to determine whether the community-based applicant 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.¹⁹ To prevail in CPE, an applicant 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).²⁰

V. Analysis and Rationale.

The Requesters object to the CPE Panel’s decision to award 14 out of the possible 16 points to Big Room’s Application, a score sufficient for the Application to prevail in CPE. As noted above, in the context of the New gTLD Program, the reconsideration process does not call for the BGC to evaluate the CPE Panel’s substantive conclusion that the Application prevailed in

¹⁶ See CPE Guidelines, available at <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

¹⁷ Guidebook, § 4.2.

¹⁸ *Id.*, § 4.2.2.

¹⁹ *Id.*, § 4.2.3.

²⁰ *Id.*

CPE. Rather, the BGC’s review is limited to whether the Panel (or staff) violated any established policy or procedure. As discussed below, insofar as the Requesters claim that the number of points awarded by the CPE Panel for various criteria was “wrong,” the Requesters do not claim that the CPE Panel violated established policy or procedure, but instead challenge the substantive determinations of the Panel. That is not a basis for reconsideration.

1. The CPE Panel Properly Applied the First CPE Criterion.

The Requesters claim that the CPE Panel improperly awarded the Application four out of four points on the first criterion, which assesses the community identified in an application.²¹ Specifically, this criterion evaluates “the community as explicitly identified and defined according to statements in the application” through the scoring of two elements, each worth two points—1-A, “Delineation,” and 1-B, “Extension.”²²

In awarding four out of four points for the first criterion, the CPE Panel accurately described and applied the Guidebook scoring guidelines and CPE Guidelines.²³ The Guidebook defines community as “implying more [] cohesion than a mere commonality of interest,” and requiring “an awareness and recognition of a community among its members.”²⁴ The CPE Panel found that “based on [its] research and the materials provided in the application, the community members as defined in the application demonstrate the ‘cohesion’ required by the [Guidebook].”²⁵ Specifically, the CPE Panel noted that each of the four categories of members defined in the Application—not-for profit environmental associations, government agencies with environmental missions, individuals, and businesses—have “cohesion and awareness [] founded in their demonstrable involvement in environmental activities” and “demonstrate active

²¹Guidebook, § 4.2.3; *see also* Request, § 8, Pgs. 3-5.

²² Guidebook, § 4.2.3.

²³ Report, Pgs. 1-5.

²⁴ Guidebook, § 4.2.3.

²⁵ Report, Pg. 2.

commitment, practice and reporting.”²⁶

In challenging the Report, the Requesters do not identify any policy or procedure that the CPE Panel misapplied in scoring the first criterion. Rather, the Requesters argue that the Application’s community definition “is [] not a definition of a community but a vague overview [of] what its membership is considered by Big Room [] to consist of.”²⁷ In the Requesters’ view, the community does not have, as required by the Guidebook, “more cohesion than a mere commonality of interest.”²⁸ They contend that while members of the defined community “may ‘associate’ themselves with [the] issues and activities [identified in the Application], [] this does not prove that there is an ‘awareness and recognition’ of a community in the sense of the [Guidebook].”²⁹ However, the Requesters’ arguments reflect only a substantive disagreement with the CPE Panel’s conclusions. As discussed, such a substantive disagreement is not a proper basis for reconsideration.

2. The CPE Panel Properly Applied the Second CPE Criterion.

The Requesters claim that the CPE Panel improperly awarded the Application two out of three points on element 2-A of the second criterion, “Nexus.”³⁰ Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for element 2-A, “Nexus,” the applied-for string must “match[] the name of the community or [be] a well-known short-form or abbreviation of the community name.”³¹ An application is eligible for two points on element 2-A if the applied-for string “identifies the community, but does not qualify for a score of 3.”³²

In scoring element 2-A, the CPE Panel accurately described and applied the Guidebook

²⁶ *Id.*

²⁷ Request, § 8, Pg. 3.

²⁸ *Id.*, § 8, Pg. 4 (quoting Guidebook, § 4.3.2).

²⁹ *Id.*

³⁰ Request, § 8, Pgs. 5-8.

³¹ Guidebook, § 4.2.3.

³² *Id.*

scoring guidelines and CPE Guidelines.³³ The CPE Panel determined that the Application did not merit a score of three points because .ECO was “not a match of the name of the community or a well-known short-form or abbreviation of the community name.”³⁴ However, the CPE Panel determined that “because of the common association of the prefix ‘eco’ with various phrases closely associated with environmental protection . . . [the applied-for string] d[id] identify the community, without substantially overreaching beyond the community.”³⁵ As such, the CPE Panel determined that, pursuant to the Guidebook, the Application merited a score of two points.³⁶

In challenging the Report, the Requesters do not identify any policy or procedure that the CPE Panel misapplied in scoring element 2-A. Instead, the Requesters disagree with the CPE Panel’s analysis, asserting that “the string ‘eco’ does not ‘closely describe’ the community or the community members, and that it certainly over-reaches substantially beyond the community referred to in the application.”³⁷ The Requesters contend that “many of the members of the organizations referred to in the Application are far from being liaised with ‘ecological’ or ‘environmental’ activities.”³⁸ They also argue that “[i]n [their] view, the CPE Panel [did not] consider[] the many other meanings of the term ‘eco’” and therefore “erroneously determined” that the applied-for string identified that community.³⁹ Again, however, the Requesters’ substantive disagreement with the CPE Panel’s findings is not a proper basis for reconsideration.

3. The CPE Panel Properly Applied the Fourth CPE Criterion.

Finally, the Requesters claim that the CPE Panel improperly awarded the Application two

³³ Report, Pgs. 5-6.

³⁴ *Id.*, Pg. 6.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Request, § 8, Pg. 5.

³⁸ *Id.*, § 8, Pg. 7.

³⁹ *Id.*, § 8, Pgs. 6-7.

out of two points on element 4-B of the fourth criterion.⁴⁰ Element 4-B, “Opposition,” evaluates the existence or absence of community opposition to an application. In order to receive the maximum score on element 4-B, an application must have received “no opposition of relevance.”⁴¹ Relevant opposition must come from a group of “non-negligible size,” which is part of a community “explicitly or implicitly addressed” by the applied-for string.⁴²

In awarding two out of two points for element 4-B, the CPE Panel accurately described and applied the Guidebook scoring guidelines and CPE Guidelines.⁴³ The CPE Panel determined that while the Application had received letters of opposition, those letters were not relevant, “as they were either from individuals or groups of negligible size” or from communities “which were not mentioned in the application” and “have no association to the applied-for string.”⁴⁴

In challenging the Report, the Requesters do not identify any policy or procedure that the CPE Panel misapplied in scoring element 4-B. Instead, they argue that the Panel did not detail “which criteria and standards have been used in determining whether [the] letters [of opposition] were from groups, individuals or communities ‘of negligible size’ that had an association to the applied for string.”⁴⁵ However, as noted above, in scoring element 4-B, the CPE Panel correctly described the Guidebook scoring guidelines and answered the mandatory questions listed in the CPE Guidelines.⁴⁶

The Requesters also argue that because the CPE Panel did not identify the letters of opposition it considered, “it is impossible for [the Requesters] to review whether the

⁴⁰ *Id.*, § 8, Pgs. 8-9.

⁴¹ Guidebook, § 4.2.3.

⁴² *Id.*

⁴³ Report, Pgs. 8-9.

⁴⁴ *Id.*, Pg. 9.

⁴⁵ Request, § 8, Pg. 8.

⁴⁶ Report, Pgs. 8-9; *see also* CPE Guidelines, Pgs. 19-20.

[Application] had indeed satisfied [element 4-B].”⁴⁷ It should be noted that all of the letters of opposition are publicly available to the Requester, either in the Application Comments⁴⁸ or ICANN’s New gTLD Correspondence.⁴⁹ Moreover, the Requesters identify no policy or procedure requiring CPE panels to identify in the CPE reports the names of objectors (because none exists). As such, the Requesters have not identified a proper basis for reconsideration with respect to the CPE Panel’s scoring of element 4-B.

VI. Determination.

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Request 14-46. As there is no indication that either the CPE Panel or ICANN violated any ICANN policy or procedure with respect to the Report, or ICANN’s acceptance of the Report, Request 14-46 should not proceed. If the Requesters believe that they have somehow been treated unfairly in the process, the Requesters are 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.⁵⁰ As discussed above, Request 14-46 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.

⁴⁷ Request, § 8, Pgs. 8-9.

⁴⁸ See <https://gldcomment.icann.org/applicationcomment/viewcomments>.

⁴⁹ See <http://newgtlds.icann.org/en/program-status/correspondence>.

⁵⁰ Bylaws, Art. IV, § 2.15.