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ICANN
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Via email: newgtld@icann.org

Re: Opposition to Application for .LLP (No. 1-880-35508)

Dear Ms. Willett,

This letter of objection is submitted in opposition to the application for .LLP on behalf of DOT Registry. In accordance with the Applicant Guidebook (4-19-20) and the CPE FAQ (p. 2), I respectfully request that the CPE Panel assigned to evaluate application No. 1-880-35508 take these comments into account as relevant when assigning a score under criterion 4-B for “opposition.”

1. The CPE Panel Should Apply the Community Priority Criteria Strictly.

Community Priority Evaluation serves the critical purpose of testing whether a string identified by its applicant as community-based actually satisfies the criteria of a community-based TLD. This “independent analysis” serves several critical purposes. AGB at 4-7. Because “a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be,” CPE operates as a contention resolution procedure. *Id.* at 4-9. As the Applicant Guidebook explains, “This is a fundamental reason for very stringent requirements for qualification of a community-based application.” *Id.* No applicant should receive an unfair competitive advantage by claiming a community priority that is undeserved.

But there are other reasons for CPE, beyond ensuring the fair treatment of all new gTLD applicants—important as that purpose is.

ICANN has said that it views new gTLDs “as important to fostering choice, innovation and competition in domain registration services.” *Id.* at A1. These purposes behind the new gTLD program will be frustrated if an applicant obtains a community-based TLD that does not satisfy the criteria developed through ICANN’s consensus policy-making processes. Consumers will have fewer choices if an applicant manages to obtain a generic community-based TLD that excludes them

from becoming registrants despite legitimate interests in the string. Rightly puzzled over why *their* interests do not permit them to register domains in a TLD with logical and legal connections to their activities, such excluded would-be registrants will be deprived of the enhanced choices the new gTLD program was designed to give them. Registrars would be similarly harmed by the improper delegation of a community-based string. Competition they would have been entitled to under the Registry Code of Conduct could be placed in jeopardy if a mistaken community string delegation strengthens a registry operator's request for an exemption. *Compare* New gTLD Registry Agreement, Specification 9, ¶¶ 1(a) & 6. These results—diminished consumer choice and competition—would contradict ICANN's basic commitment to “promote competition, consumer trust, and consumer choice in the DNS marketplace.” Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (eff. Oct. 1, 2009), at ¶ 3.

More generally, delegation of a community-based string that does not satisfy established criteria will introduce a TLD into the global Internet root contrary to ICANN's consensus policies and therefore contrary to its obligations under the Affirmation of Commitments and the IANA Agreement. *See id.* at ¶ 8(c) (“ICANN affirms its commitments ... to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.”); IANA Agreement, at § C.1.3 (eff. Oct. 1, 2012) (referring to “the multi-stakeholder, private sector led, bottom-up policy development model for the domain name system (DNS) that the Internet Corporation for Assigned Names and Numbers (ICANN) represents”).

The serious purposes behind the CPE procedure will be served effectively only if CPE Panels apply the written guidelines for community-based strings strictly. An elaborate scoring process has been devised, in part, to “prevent[] ‘false positives,’” which would occur by “awarding undue priority to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string.” AGB at 4-9. Avoiding false positives will be the natural outcome wherever the CPE Panel is guided by ICANN's core value of “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness.” ICANN Bylaws, art. I, § 2(8).

Let me now turn directly to DOT Registry's application for .LLP.

2. DOT Registry's Application for .LLP Fails the Community Priority Criteria.

The central point of the detailed criteria for community priority is to underscore that “[c]ommunity-based applications are intended to be a *narrow* category, for applications where there are *unambiguous* associations among the applicant, the community served, and the applied-for gTLD string.” AGB 1-28 to 29 (emphasis added). Only by insisting that such associations are “unambiguous” can this Panel ensure that community-based strings remain “a narrow category.” *Id.*

To that end, ICANN has determined that an application must receive 14 out of a possible 16 points. *See* AGB, at 4-8 (“Following the evaluation, the deposit will be refunded to applicants that score 14 or higher.”). DOT Registry's application falls considerably short of that high standard.

a. Community Establishment

CPE Guidelines and AGB criteria measure “community establishment” in two parts—delineation and extension. Each part receives 2 possible points, offering a total of 4 points. *See* CPE Guidelines at 3. An applicant receives from 2 points for a “[c]learly delineated, organized, and pre-existing community” to 0 points when there is “[i]nsufficient delineation and pre-existence for a score of 1.” *Id.* Up to 2 points also are available for a “[c]ommunity of considerable size and longevity,” but only 0 points are appropriate for a “[c]ommunity of neither considerable size or longevity.” *Id.* at 5.

DOT Registry should receive 0 for delineation. Its application states that “DOT Registry plans to serve the Community of Registered Limited Liability Partnerships,” a community whose members include “businesses registered as Limited Liability Partnerships with the United States or its territories.” There is no evidence that any organization united the disparate community of U.S. limited liability partnerships before 2007, much less that DOT Registry led that organization. No single entity is “dedicated to the community.” CPE Guidelines, at 3. Governments in all 50 states and U.S. territories have different rules governing LLPs, as DOT Registry concedes: “LLP formation guidelines are dictated by state law and can vary based on each state's regulations.” Besides, DOT Registry has produced no “documented evidence of community activities.” CPE Guidelines, at 3. The application contains no evidence that community members are “aware of the existence of the community as defined by the applicant” or that all LLPs in the U.S. and its territories “recognize the community as defined by the applicant.” *Id.* at 4.

Scored generously, DOT Registry could receive 2 scores for extension. Registered LLPs in the U.S. compose a “community of considerable size” (assuming

it is a community at all) and it has demonstrated longevity. *Id.* at 5. At least one might argue that the independent business and professional activities of registered LLPs mean that “the pursuits of a community are of a lasting, non-transient nature.” *Id.* But it would be reasonable to question whether these professional and business activities qualify as “pursuits of a community.” *Id.* (emphasis added). Describing such activities as community pursuits appears to rest on the dubious premise that the accident of a common legal form makes a community. If it entertains such doubts, the Panel could decide that only 1 point for extension is appropriate.

b. Nexus between Proposed String and Community

An application may be awarded a maximum of 4 points for this criterion, measured by “nexus” and “uniqueness.” CPE Guidelines, at 7. Up to 3 points are available for “nexus” when “[t]he string matches the name of the community or is a well-known short-form or abbreviation of the community.” *Id.* Only 1 point may be given for uniqueness when an applied-for string “has no other significant meaning beyond identifying the community described in the application.” *Id.* at 8-9.

DOT Registry should receive no more than a 1 for Nexus. CPE Guidelines emphasize that an applied-for TLD receives only 1 point when it is “excessively broad.” CPE Guidelines, at 8. As an illustration of this fault the Guidelines cite “a globally well-known but local tennis club applying for ‘.TENNIS.’” *Id.* DOT Registry’s application makes the same error by applying for a commercial acronym used to identify business organizations in multiple countries on behalf of the “globally well-known but local” group of U.S.-based organizations. This application “would not qualify for a 2.” *Id.*

Awarding only a single point for nexus reflects one of this application’s deepest flaws. In applying for a coveted place on the global Internet, DOT Registry has sought global control of a name that holds meaning for businesses and individuals outside the United States even while it seeks to restrict domain registrations to a single country. This business plan would discriminate against registrants, registrars, and would-be registries in multiple countries. Local monopoly of internationally-used names is contrary to ICANN’s global reach and charter. DOT Registry’s attempt to obtain control of a generic name with international meaning for a U.S.-only community should be rejected.

Zero points should be awarded for uniqueness. Because this criterion “implies a requirement that the string does identify the community,” an application must receive a score of 2 or 3 for Nexus “to be eligible for a score of 1 for “Uniqueness.” *Id.* at 9-10.

c. Registration Policies

An applicant may achieve 4 points for this criterion, which is subdivided into four parts. CPE Guidelines, at 11. One point each is available for eligibility, name selection, content and use, and enforcement. *Id.* An applicant's registration policies receive a point when those policies restrict eligibility to community members. *Id.* To receive credit, an applicant's registration policies must "include name selection rules consistent with the articulated community-based purpose of the applied-for TLD." *Id.* at 12. Registration policies will be awarded a point only if they "include rules for content and use consistent with the articulated community-based purpose of the applied-for TLD." *Id.* at 13. And such policies also must "include specific enforcement measures (e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms." *Id.* at 13-14.

Separately evaluating DOT Registry's registration policies is unnecessary. Its application cannot meet the criteria for community priority even if its registration policies received a full 4 points.

d. Community Endorsement

An applicant may receive 4 points for this criterion, measured by support and opposition to the application. CPE Guidelines, at 16. Two points for support are available when an "[a]pplicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community." *Id.* at 16. A single point is appropriate, however, with "[d]ocumented support from at least one group with relevance, but insufficient support for a score of 2." *Id.* Two points are likewise available for an application that has "[n]o opposition of relevance" and one point for an application with "[r]elevant opposition from one group of non-negligible size." *Id.*

DOT Registry should receive at most 1 point for support. The Guidelines make it clear that awarding "only a 1 if the string implicitly addresses similar communities in other nations"—which this string does for the reasons I have explained. What support DOT Registry has obtained from U.S. entities makes even 1 point questionable. It has produced letters come from a few American states and from the National Association of Secretaries of State (NASS), a United States organization of state officials with responsibility for corporate registrations. Not only do these supporting letters represent a minority of all NASS members, but the letters themselves do not endorse DOT Registry's application at all. Instead, they support the general policy of placing restrictions on domains registered under TLDs corresponding to common business forms like INC, LLC, and LLP. NASS's request that "NASS members be consulted by DOT Registry or other applicants regarding

policy related to the registering and identifying of businesses”—its only mention of DOT Registry—is not a weak endorsement; it is no endorsement at all. None of letters it produced single out DOT Registry as the preferred registry operator. Without such a statement, the Panel should consider assigning no points for support.

Opposition—reasonable and relevant opposition—should be taken into account when scoring this section. Comments and letters of opposition like this one make it clear that DOT Registry’s claim to community priority is reasonably contested. Relevant opposition of any sort is sufficient to subtract at least one point from the score for opposition. Given the amount of reasonable opposition to this application, then, it might receive at most 1 point.

This application should score 2 points for community establishment, 1 point for nexus between the proposed string and the community, 4 points for registration policies, and 2 points for community endorsement. These scores assume a maximum score for registration policies, even without evaluating them directly, and give DOT Registry the benefit of any doubts. Even with these liberal assumptions, the total score is 9—a full 5 points away from a passing score. Denying this application community priority should not be a close question.

3. DOT Registry’s Application for .LLP Must Be Evaluated Alongside Competing Strings as a Standard Application.

DOT Registry’s application may not proceed because it fails to meet the criteria for a community-based TLD. The Applicant Guidebook repeatedly explains that under this circumstance the application *must* be evaluated alongside all other applications in the same contention set. *See* AGB at 4-9 (“If none of the community-based applications are found to meet the criteria, then all of the parties in the contention set (both standard and community-based applicants) will proceed to an auction.”); *id.* at 1-28 (“An auction will result for cases of contention not resolved by community priority evaluation or agreement between the parties.... If a community priority evaluation occurs but does not produce a clear winner, an auction will take place to resolve the contention.”); *id.* at 4-5 (“[C]ases of contention might be resolved by community priority evaluation or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.”).

No unfairness results from declaring that an applied-for-string is not community-based. It avoids all the harms of awarding a “false positive” in a community priority evaluation. Consumers will have greater choice. Marketplace competition in the domain name industry will be enhanced. And ICANN will avoid permitting a new gTLD applicant to obtain undue competitive advantage. A

neutral and objective application of documented community-based criteria simply allows an applicant like DOT Registry to apply on equal terms with other applicants competing for the same string—exactly as ICANN and the stakeholder community intended.

Conclusion

DOT Registry's application for .LLP does not satisfy the criteria for a community-based string. Its probable score of 9 points does not come close to ensuring that this application is within the "narrow category" contemplated by ICANN's standards "where there are *unambiguous* associations among the applicant, the community served, and the applied-for gTLD string." 1-28 to 29 (emphasis added). Based on several years' experience working on ICANN-related matters for international organizations, both commercial and non-profit, it is my judgment that awarding this application community priority would be a disservice to the global Internet community.

Please contact me at sgunnarson@kmclaw.com or at (801) 323-5907 if you have questions or concerns.

Sincerely,



R. Shawn Gunnarson

Kirton McConkie