

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUESTS 16-1 AND 16-2**

25 FEBRUARY 2016

Commercial Connect, LLC (Requester) filed two Reconsideration Requests—Requests 16-1 and 16-2 (collectively, Requests)—regarding the same subject matter.¹ In Request 16-2, the Requester seeks reconsideration of ICANN staff’s determination to proceed with the scheduled 27 January 2016 auction for .SHOP (Auction). In Request 16-1, the Requester seeks reconsideration of ICANN’s staff’s determination that the Requester’s time to invoke the Cooperative Engagement Process (CEP) regarding the Board’s denial of Reconsideration Request 15-13 (Request 15-13) had passed, and argues that ICANN staff “prevented” it from filing a valid Request for Independent Review Process (IRP). The Requester also renews the challenges that it raised in Request 15-13 to a Community Priority Evaluation (CPE) panel’s report finding that the Requester’s application for .SHOP did not achieve priority through CPE (CPE Report), and ICANN’s acceptance of that report.

I. Brief Summary.

The Requester submitted a community-based application for .SHOP (Application). Eight other applications were also submitted for .SHOP. The Requester’s Application did not prevail in CPE and therefore remained in contention with the eight other applications.

Requests 16-1 and 16-2 represent the *fifth and sixth* reconsideration requests that the Requester has filed related to its Application. In Request 16-2, the Requester seeks to somehow undo the results of the .SHOP Auction that occurred on 27 January 2016 – an auction in which the Requester previously had chosen not to participate. In Request 16-1, the Requester renews

¹ Because the Requests are made by the same Requester and raise sufficiently similar issues, they will be addressed in the same proceeding. Bylaws, Art. IV, § 2.8

its time-barred challenge to the CPE Report finding that its Application was not entitled to community priority. The Requester also challenges ICANN staff's determination that the Requester had missed the Bylaws-mandated deadline to initiate CEP regarding the Board's denial of Request 15-13. The Requester likewise claims that ICANN staff acted to prevent it from initiating an IRP regarding the Board's denial of Request 15-13.

The Requester's claims are unsupported and are the latest in a long line of frivolous abuses of ICANN's accountability mechanisms by the Requester. The Requester's renewed attempt to challenge the CPE Report is improper and time-barred. The Requester has not raised any new arguments or evidence since its previous challenge to the CPE report in Request 15-13, which was denied. As to the other issues raised by the Requester, the facts demonstrate that ICANN staff adhered to established policy and procedure with respect to the Auction, took unprecedented steps to keep the Requester apprised of, and involved in, the Auction, and properly responded to the Requester's many incomplete, aborted, and/or improper attempts to invoke ICANN's accountability mechanisms. The BGC therefore denies Requests 16-1 and 16-2.

The BGC is also deeply concerned by the Requester's repeated abuses of ICANN's accountability mechanisms and New gTLD Program processes, all of which appear to be last ditch delay tactics. These include, but certainly are not limited to, the Requester's filing of a frivolous lawsuit and a vacuous motion for temporary restraining order against ICANN in federal court in violation of the Terms and Conditions of the Applicant Guidebook (Guidebook), as well as the Requester's invocation of essentially *every* accountability mechanism within a 24-hour period before the Auction, after the Requester affirmatively decided to not participate in the Auction. ICANN has expended and diverted significant resources and funds engaging with the Requester and responding to its numerous, last-minute attempts to stop the .SHOP Auction.

Although providing fair, open, and transparent access to ICANN’s accountability mechanisms is critical to ICANN’s mandate, there is no justification for ICANN and members of its community having to suffer repeated baseless invocations of those mechanisms.

II. Facts.

A. Background Facts.

1. The Requester’s Application

In 2000, the ICANN Board adopted a measured and responsible application process for the introduction of new gTLDs.² The Requester submitted an application for .SHOP during this “proof-of-concept” round (2000 Application). In its 2000 Application, the Requester acknowledged that it had “no legally enforceable right to acceptance or any other treatment of [its] application or to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root.”³ The Requester also expressly agreed in its 2000 Application to “*release[] and forever discharge[] ICANN . . . from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD.*”⁴ The Requester’s 2000 Application was not approved by ICANN.

In 2012, as part of the New gTLD Program, the Requester submitted a community-based application for .SHOP. As provided for in the Guidebook, because the Requester had applied for .SHOP in its 2000 Application but was not awarded the string, the Requester received an US\$86,000 offset for its .SHOP Application.⁵ In accepting this credit, the Requester signed a

² ICANN TLD Application Process: Information for Applicants, *available at* <http://www.icann.org/en/tlds/tld-application-process.htm>

³ 2000 Application, *available at* https://archive.icann.org/en/tlds/mall1/_2_I6.1_AppTrans.htm, ¶ B12; *see also id.* ¶ B6 (“there is no understanding, assurance, or agreement that this application will be selected for negotiations toward entry of an agreement with a registry operator”).)

⁴ *Id.* ¶ B14.2 (emphasis added.)

⁵ Guidebook, § 1.5.1.

credit request form (2000 Credit Request Form) confirming that it “was not awarded any string pursuant to the 2000 proof-of-concept round and [] has no legal claims arising from the 2000 proof-of-concept process.”⁶

In addition, the Requester, like all others submitting applications in connection with the 2012 New gTLD Program, acknowledged and agreed to the Terms and Conditions set forth in Module 6 of the Guidebook. Among those Terms and Conditions is a waiver and release barring all actions in court or other judicial fora against ICANN or its Affiliated Parties (as defined in Guidebook Module 6) arising out of ICANN’s or those Affiliated Parties’ evaluation of any new gTLD application:

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties [i.e., ICANN’s affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents] from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, 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. . . .⁷

Following the results of a String Similarity Review (SSR) process and the determinations on various string confusion objections, the Requester’s Application was placed into a contention set with eight other applications for .SHOP.

The Requester filed twenty-one string confusion objections against applicants for strings like .BUY, .ECOM, .SALE, .SHOPYOURWAY, and for strings representing words such as

⁶ New gTLD Application 2000 Round Credit Request, *available at* <https://www.icann.org/en/system/files/files/cc-v-icann-oyler-declaration-exhibits-a-f-25jan16-en.pdf>.

⁷ Guidebook, Module 6, ¶ 6.

“web shop” in languages such as Chinese, Japanese, and Arabic.⁸ All but two of the Requester’s twenty-one objections were overruled, and one of the two objections in which the Requester prevailed was later overturned.⁹

In 2013 and 2014, the Requester also filed *three* separate Reconsideration Requests relating to its Application.¹⁰ All three Reconsideration Requests were denied.¹¹

Because the Requester submitted a community application, it was invited to participate in CPE. The Requester elected to participate in CPE, and on 21 May 2105, the CPE Panel issued the CPE Report, determining that the Requester’s Application scored only five out of 16 possible points on the CPE criteria—11 points less than the minimum required to achieve priority—and therefore did not prevail in CPE.¹²

On 10 July 2015, the Requester filed its *fourth* reconsideration request, Reconsideration Request 15-13, seeking reconsideration of the CPE Report, and challenging various procedures

⁸ See <http://newgtlds.icann.org/en/program-status/odr/determination>.

⁹ *Id.* One of the determinations finding that the Requester prevailed (Determination) was perceived as inconsistent with another string similarity objection determination. The NGPC resolved that the Determination should be re-evaluated, and the dispute resolution service provider that conducted the re-evaluation of the objection proceeding later overturned the Determination as unreasonable. NGPC Resolutions 2014.10.12.NG02-03, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>; Final Determination on Case No. 0115 0003 3821, *available at* <https://newgtlds.icann.org/sites/default/files/drsp/21aug15/determination-2-1-1318-15593-en.pdf>.

¹⁰ Reconsideration Request 13-10, *available at* <https://www.icann.org/en/system/files/files/request-commercial-connect-05sep13-en.pdf>; Reconsideration Request 13-15, *available at* <https://www.icann.org/en/system/files/files/request-commercial-connect-25oct13-en.pdf>; Reconsideration Request 14-11, *available at* <https://www.icann.org/en/system/files/files/request-commercial-connect-02apr14-en.pdf>.

¹¹ BGC Recommendation on Request 13-10, *available at* <https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf>; NGPC Resolution 2014.11.07.NG02, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-11-07-en>; BGC Determination on Request 13-15, *available at* <https://www.icann.org/en/system/files/files/determination-commercial-connect-12dec13-en.pdf>; BGC Determination on Request 14-11, *available at* <https://www.icann.org/en/system/files/files/determination-commercial-connect-29apr14-en.pdf>.

¹² CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>.

governing the New gTLD Program, as well as the SSR process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for its Application.¹³

On 24 August 2015, the BGC recommended that Request 15-13 be denied, determining that the Requester's claims were time-barred, and in any event, the Requester had not demonstrated a basis for reconsideration with respect to the CPE Report or otherwise.¹⁴

On 28 September 2015, the New gTLD Program Committee (NGPC) accepted the BGC's recommendation to deny Request 15-13 (28 September 2015 Resolution).¹⁵ The minutes of that meeting were published on 19 October 2015.¹⁶

On 3 November 2015, the deadline for the Requester to invoke CEP relating to the 28 September 2015 Resolution expired.¹⁷

2. The Requester's Attempts to Delay the Resolution of the .SHOP Contention Set.

Following the denial of Request 15-13, rather than timely invoking the accountability mechanisms available to it, the Requester began to engage in months-long pattern of dilatory tactics aimed at preventing ICANN staff from facilitating resolution of the .SHOP contention set. On 17 November 2015, the day before a Request for IRP relating to the 28 September 2015 Resolution would have been due, the Requester filed a request pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), seeking additional information regarding

¹³ Request 15-13, *available at* <https://www.icann.org/en/system/files/files/reconsideration-request-15-13-commercial-connect-with-appendices-10jul15-en.pdf>

¹⁴ BGC Recommendation on Request 15-13, *available at* <https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf>.

¹⁵ Resolution 2015.09.28.NG02, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en>.

¹⁶ *See* <https://www.icann.org/resources/board-material/minutes-new-gtld-2015-09-28-en>.

¹⁷ Cooperative Engagement Process, ¶ 2, *available at* <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>; Bylaws, Art. IV, § 3.14.

SSRs, auctions, and other issues.¹⁸ The same day, the Requester appeared to make a request for CEP and stated that it anticipated initiating an IRP relating to the 28 September 2015 Resolution. The Requester claimed that it had delayed doing so on the mistaken impression that the minutes of that meeting had not yet been published, and then had been unable to submit a Request for IRP due to alleged issues with the International Centre for Dispute Resolution's (ICDR) website. The Requester attached a two-page Notice of IRP form (without any of the supporting documentation required to initiate an IRP) and requested a 30-day extension to initiate an IRP.¹⁹

On 18 November 2015, ICANN advised the Requester that minutes of the NGPC's 28 September 2015 meeting had been published on 19 October 2015 and directed the Requester to the link for the published minutes.²⁰ ICANN also advised the Requester that the deadline to initiate a CEP related to the 28 September 2015 Resolution had been 3 November 2015, and that the Bylaws-mandated deadline to file an IRP Request was 18 November 2015.²¹ Additionally, ICANN provided the Requester with links to pages on the ICDR's website with information about the requirements for filing IRP Requests to help assist the Requester with its attempts to initiate an IRP.²² With respect to the request for a 30-day extension, ICANN informed the Requester that because the deadline is mandated by ICANN's Bylaws, ICANN could not grant the requested extension.²³ In this time frame, the Requester never properly initiated CEP or an IRP, notwithstanding ICANN and the ICDR's attempt to assist the Requester.

On 29 October 2015, all applications in the .SHOP contention set were invited to enter into the auction process. Applicants were given a deadline of 26 November 2015 to elect to

¹⁸ DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20151117-1-smith-request-17nov15-en.pdf>.

¹⁹ Exhibit A, Pgs. 1-2.

²⁰ Exhibit B, Pgs. 6-7, 8.

²¹ *Id.*, Pg. 9

²² *Id.*, Pgs. 8-9.

²³ *Id.*

enter into the auction process and participate in the auction.²⁴ On 20 November 2015, ICANN sent the Requester a reminder regarding the 26 November 2015 deadline.²⁵ On 25 November 2015, the Requester asked for and received an extension to 1 December 2015 to respond to the auction invitation.²⁶ Despite repeated reminders by ICANN, the Requester did not respond to the auction request, as it had stated that it would do.²⁷ Instead, it informed ICANN on 4 December 2015 that it felt it should not have to respond while trying to determine a way forward with its IRP, and that it did not have sufficient information regarding the Auction.²⁸

On 3 December 2015, the Requester informed ICANN that it was “still [its] intent to file [a] request for Independent Review . . . but [was] still unclear on what is needed and how to proceed.”²⁹ The ICDR, which was copied on the Requester’s email, responded providing the Requester with all the relevant information for initiating an IRP. ICANN followed up, continuing to try to help the Requester, stating that ICANN understood that the ICDR had “provided [the Requester] with what appears to be all the relevant information needed to file your request for Independent Review. If you have any additional questions, please let us know.”³⁰

On 10 December 2015, ICANN was contacted by [an](#) attorney retained by the Requester. She stated that the Requester was considering pursuing an IRP relating to Request 15-13 and sought additional information regarding when that request would be considered by the NGPC.³¹ On 12 December 2015, ICANN responded to the attorney, setting forth the information it had

²⁴ Exhibit K, Pg. 130.

²⁵ Exhibit L, Pg. 138.

²⁶ *Id.*, Pgs. 137-38.

²⁷ *Id.*, Pg. 137.

²⁸ *Id.*, Pg. 136.

²⁹ Exhibit D, Pgs. 67-68.

³⁰ Exhibit E, Pg. 73.

³¹ Exhibit F, Pgs. 81-82.

previously provided the Requester by email on 18 November 2015 (including that the NGPC had considered Request 15-13 on 28 September 2015, and that the minutes of that meeting had been published on 19 October 2015).³²

On 11 December 2015, ICANN provided the Requester with further information regarding the auction process.³³ ICANN also specifically advised the Requester that at that time there were no accountability mechanisms affecting the .SHOP contention set and that the Auction was still scheduled for 27 January 2016.³⁴ ICANN repeated these reminders on 15, 18, and 22 December 2015.³⁵ On 23 December 2015, ICANN sent the Requester yet another reminder, further advising the Requester that if it wished to participate in the Auction it would need to submit a bidder agreement by 15 January 2016.³⁶

On 6 January 2016, the Requester filed a lawsuit regarding the Requester's Application and 2000 Application against ICANN and the ICDR in the United States District Court for the Western District of Kentucky, together with a motion for Temporary Restraining Order and Preliminary Injunction (Motion for TRO/PI).³⁷ Despite the Requester's claims of exigent circumstances in the lawsuit and Motion for TRO/PI, the Requester never served ICANN with a copy of the summons, complaint, or motion papers.

Despite the filing of the Requester's lawsuit, on 7 January 2016, ICANN participated in a telephone conference with the Requester, again advising the Requester of the 15 January 2016 deadline for submitting a bidder agreement and also advising it that the deadline to deposit

³² *Id.*, Pgs. 80-81.

³³ Exhibit L, Pgs. 134-35.

³⁴ *Id.*

³⁵ *Id.*, Pgs. 133-34.

³⁶ *Id.*, Pgs. 132-33.

³⁷ See <https://www.icann.org/en/system/files/files/cc-v-icann-complaint-06jan16-en.pdf>.

auction fees was 20 January 2016.³⁸ ICANN sent the Requester a final reminder on 15 January 2016.³⁹ The Requester did not submit a bidder agreement.

On 11 January 2016, after ICANN through its own means had learned of the Requester's lawsuit, ICANN's outside counsel sent the Requester's counsel a letter advising that the Requester's lawsuit was barred by the waivers and releases accepted by Requester in Module 6, Requester's 2000 Application and the 2000 Round Credit Form, and that the lawsuit was a breach of Requester's Application.⁴⁰ For these reasons, and others, ICANN's counsel demanded that the Requester withdraw the lawsuit or risk ICANN pursuing sanctions against the Requester and its counsel for filing a frivolous lawsuit as well as the risk of ICANN terminating the Requester's Application for breach of the Guidebook's terms and conditions.⁴¹

Knowing of these risks, the Requester proceeded with its lawsuit. However, on 18 January 2016, the Requester's counsel filed a motion to withdraw as counsel, stating that he had not been aware of the waivers and releases when the suit was filed and had a "fundamental disagreement" with the Requester's decision to proceed with the suit.⁴² On 25 January 2016, despite not having been served in the case, ICANN made a special appearance to oppose the Requester's Motion for TRO/PI based on an order from the court.⁴³ On 26 January 2016, the court denied the Requester's Motion for TRO/PI, finding that the Requester had failed to show a likelihood of success on the merits of its claims because the releases agreed to by Requester were "clear and comprehensive."⁴⁴ The court also granted the Requester's counsel's motion to

³⁸ Exhibit L, Pg. 132.

³⁹ *Id.*, Pgs. 131-32.

⁴⁰ Exhibit M.

⁴¹ *Id.*

⁴² See <https://www.icann.org/en/system/files/files/cc-v-icann-plaintiff-motion-withdraw-counsel-18jan16-en.pdf>.

⁴³ See <https://www.icann.org/en/system/files/files/cc-v-icann-special-appearance-atallah-declaration-25jan16-en.pdf>.

⁴⁴ See <https://www.icann.org/en/system/files/files/cc-v-icann-court-order-prelim-injunction-withdraw-counsel-26jan16-en.pdf>.

withdraw, finding that “[g]ood cause exists where an attorney’s continued representation of a client could subject counsel to [] sanctions.”⁴⁵

On 22 January 2016, and while the Requester’s Motion for TRO/PI was pending, a representative for the Requester sent ICANN a Notice of IRP filing, but did not provide the supporting documents required to complete its filing.⁴⁶ On 26 January 2016, the ICDR informed the Requester’s representative by email that its attempt to initiate an IRP was defective and “not sufficient in order to proceed with administration of this matter,” under the ICDR Rules and the Supplementary Procedures for IRPs, because it was not accompanied by the requisite supporting documentation.⁴⁷

Then, less than 24 hours before the Auction was scheduled to take place, the Requester attempted to invoke *all* of ICANN’s accountability mechanisms in a late and last-ditch effort to stop the Auction, in which it had previously and affirmatively chosen not to participate. First, on the morning of 26 January 2016, the Requester attempted to initiate a CEP regarding the 28 September 2015 Resolution.⁴⁸ ICANN staff promptly informed the Requester, as it had previously done on two other occasions, that the deadline to initiate a CEP relating to that Board action was 3 November 2015, nearly three months earlier.⁴⁹

Second, later that afternoon the Requester filed a complaint with the Ombudsman, which the Ombudsman declined for lack of jurisdiction in light of the Requester’s lawsuit.⁵⁰

Third, on the same day, the Requester filed Request 16-1, its *fifth* reconsideration request related to its .SHOP Application, seeking reconsideration of ICANN staff’s determination that

⁴⁵ *Id.*, Pg. 2.

⁴⁶ Exhibit S, Pgs. 171-72.

⁴⁷ Exhibit N, Pgs. 153-54.

⁴⁸ Exhibit G, Pgs. 84-88.

⁴⁹ *Id.*, Pg. 84.

⁵⁰ Exhibit J, Pg. 123.

the time to initiate a CEP had passed, arguing that staff had somehow prevented it from initiating an IRP, and renewing the various challenges raised in Request 15-13.⁵¹ The Requester included other applicants in the .SHOP contention set on many of these communications, despite requests that he not do so and in violation of ICANN's auction rules.⁵²

Finally, on the morning of 27 January 2016, less than two hours before the scheduled Auction, the Requester submitted a Request for Emergency Arbitrator to the ICDR (Emergency Request).⁵³ Without conceding the Requester's claims or the appropriateness and merit of the Emergency Request, ICANN immediately informed the ICDR that it would not challenge the Requester's pursuit of its Emergency Request.⁵⁴ Accordingly, the ICDR moved forward with the Emergency Request.

The .SHOP Auction was conducted on 27 January 2016, as had been scheduled to do since 29 October 2015.

On 28 January 2016, ICANN received an email from the ICDR stating that the Requester was seeking a short stay of the Emergency Request.⁵⁵ On 1 February 2016, the Requester's counsel notified the ICDR that the Requester was suspending its Emergency Request.⁵⁶ On 2 February 2016, the ICDR informed the Requester and ICANN that, based on the Requester's

⁵¹ Request 16-1.

⁵² Exhibit J, Pgs. 115-16. The auction rules provide that from the time auction deposits are submitted until after an auction concludes, applicants within the relevant contention set are not allowed to communicate with each other regarding the contention set. *See* New gTLD Auction Rules, Pg. 12, *available at* <https://newgtlds.icann.org/en/applicants/auctions>. The Blackout Period for the .SHOP Auction began on 20 January 2016.

⁵³ Exhibit O, Pgs. 158-59.

⁵⁴ *Id.*, Pgs. 157-58.

⁵⁵ Exhibit P, Pg. 161.

⁵⁶ Exhibit Q, Pgs. 163-64.

suspension, the ICDR was terminating the appointment of an emergency panelist to hear the Emergency Request.⁵⁷

Then, the Requester sought from the ICDR an extension to 5 February 2016 to submit papers supporting an IRP Request, which the ICDR permitted without consulting ICANN.⁵⁸ On 5 February 2016, the Requester sought another extension from the ICDR to submit papers supporting an IRP Request.⁵⁹ ICANN's counsel responded to the ICDR and the Requester that since the Requester had not yet filed any written submissions supporting an IRP Request, as required by ICANN's Bylaws and the Supplementary Procedures, the Requester had not yet initiated an IRP, and in ICANN's view extensions were not relevant.⁶⁰

On 10 February 2016, the Requester filed Reconsideration Request 16-2, its *sixth* reconsideration request, seeking reconsideration of ICANN staff's decision to go ahead with the 27 January 2016 Auction.⁶¹ On 10 February 2016, the Requester filed another IRP Request with the ICDR. The ICDR is in the process of administering the Requester's latest IRP Request. On 19 February 2016, however, the Requester's counsel failed to appear at a scheduled administrative hearing for that IRP.

B. Relief Requested.

In Request 16-1, the Requester asks that ICANN

1. “[I]dentify and correct[] process and policy errors that have been made by the EIU and ICANN” with respect to the issues raised by the Requester (relating to the CPE);⁶²

⁵⁷ *Id.*, Pg. 162.

⁵⁸ Exhibit R, Pgs. 167-68.

⁵⁹ *Id.*, Pgs. 166-67.

⁶⁰ *Id.*, Pg. 166.

⁶¹ Request 16-2.

⁶² Request 16-1, § 9, Pg. 4.

2. “[A]ccept the Requester’s Notice of Independent Review submitted on 17 November 2015 and the initiation of the Cooperative Engagement Process by the Requester on the same date;”⁶³
3. “[S]uspend the process for string contention resolution in relation to the .SHOP gTLD.”⁶⁴
4. Appoint a third party to perform a new CPE for the Requester’s Application or “[d]etermine that the [Requester] meets the Community standards . . . and allow [the Requester] to proceed to delegation.”⁶⁵

In Request 16-2, the Requester asks that ICANN

1. “[P]rovide a full explanation of why ICANN has not approved Requester’s application in the context of the 2000 round, in light of ICANN’s Mission and Core Values;”⁶⁶
2. Explain why ICANN “ignored Requester’s initial application in making determinations in the context of the 2000 round and the New gTLD Program, and more in particular the CPE and auction processes;”⁶⁷
3. “[S]et aside the results of the New gTLD Program Auction for the .SHOP contention set . . . pending the outcome of Reconsideration Request 16-1 and any Accountability Mechanisms Requester may invoke following the determination by ICANN;”⁶⁸
4. “[S]uspend the process for entering into an agreement with any party having participated in the auction process for the .SHOP gTLD before any pending or future Accountability Mechanisms relating to applications for the .SHOP gTLD have been completed.”⁶⁹

⁶³ *Id.*, § 9, Pg. 5.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Request 16-2, § 9, Pg. 5.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

III. 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.⁷⁰ The Requester challenges the actions of staff and of a third party service provider. Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board 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.⁷¹

IV. Analysis and Rationale.

A. ICANN Staff Complied with Established Policy in Proceeding with the Scheduled Action for .SHOP.

In Request 16-2, the Requester argues that ICANN staff violated established policy by proceeding with the scheduled 27 January 2016 .SHOP Auction despite the fact that the Requester had submitted a reconsideration request—Request 16-1—on 26 January 2016.⁷²

ICANN's website states that “a string contention set will be eligible to enter into the New gTLD

⁷⁰ 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.

⁷¹ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

⁷² Request 16-2, § 8, Pgs. 3-4.

Program Auction” only where “[a]ll active applications in the contention set have . . . [n]o pending ICANN Accountability Mechanisms.”⁷³ The Requester argues that Request 16-1, filed a day before the .SHOP Auction, represented a pending accountability mechanism that should have stayed the scheduled action.

However, contrary to what the Requester argues, there were no pending accountability mechanisms when the .SHOP contention set entered into the auction process. Specifically, the invitations for the .SHOP Auction were sent on 29 October 2015, three months before the scheduled auction date and at a time when no accountability mechanisms were pending. The Requester received an invitation, as well as numerous reminders from ICANN staff about deadlines related to the Auction. The Requester never accepted the invitation (despite having received multiple extensions of time to do so). The Requester also failed to invoke any accountability mechanisms, despite repeated reminders from ICANN staff (on 11, 25, 18, and 22 December 2015) that there were no pending accountability mechanisms affecting the .SHOP contention set and that the Auction was still scheduled for 27 January 2016. Meanwhile, the technical and financial preparations for the Auction went forward.

On 22 January 2016, the Requester filed a Notice of IRP, but did not properly invoke an ICANN accountability mechanism because the filing did not comport with the ICDR’s Rules and Supplementary Procedures. As the ICDR informed the Requester, on 26 January 2016, the Notice of IRP was defective and “not sufficient in order to proceed with administration of this matter,” because it was not accompanied by a supporting, written submission.

Finally, Request 16-1, filed by the Requester the day before the .SHOP Auction, and the Emergency Request, filed two hours before the Auction was set to begin, were not proper

⁷³ See <https://newgtlds.icann.org/en/applicants/auctions>.

methods to stay the scheduled Auction and ICANN received no “order” or any other direction from the ICDR to stay the auction. The Requester’s belated attempt to invoke an accountability mechanism represented a meritless and improper eleventh hour attempt to delay the scheduled Auction, when the Requester could have taken numerous actions long before to try to do so. Delaying the Auction at such a late date would have caused further significant delays to the other members of the .SHOP contention set, all of which had suffered from earlier delays caused by the Requester’s conduct in initiating earlier accountability mechanisms, and had already placed significant amounts of money in escrow in reliance on the Auction going ahead as scheduled. As such, ICANN staff properly determined that it would not violate established policy to proceed with the .SHOP Auction despite the Requester’s belatedly filed reconsideration request.

B. ICANN Staff Complied with Established Policy in Declining to Extend the Bylaws-Mandated Deadline for CEP.

In Request 16-1, the Requester argues that it attempted to initiate CEP on 17 November 2015 and again 26 January 2016, but was informed that the deadline to initiate CEP had already expired and could not be extended.⁷⁴ The Rules for CEP, which are incorporated into the Bylaws, provide that CEP must be initiated within 15 days of the posting of Board minutes that the requesting party contends demonstrate that the Board violated its Bylaws or Articles of Incorporation.⁷⁵ As ICANN staff repeatedly informed the Requester (which it did for the first time in November 2015), because the minutes relating to the 28 September 2015 Resolution the Requester seeks to challenge were posted on 19 October 2015, the deadline to initiate CEP expired on 3 November 2015. For ICANN staff to have extended this deadline could itself have been a violation of ICANN’s Bylaws. As such, staff did not violate any established policy in

⁷⁴ Request 16-1, § 8, Pg. 8.

⁷⁵ Cooperative Engagement Process, ¶ 2, *available at* <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>; Bylaws, Art. IV, § 3.14.

determining that it could not extend the Bylaws-mandated deadline for the Requester to initiate CEP.

The BGC notes that CEP is a voluntary process and is not a prerequisite to file an IRP. The BGC also notes that the Requester was well aware of the 3 November 2015 deadline when it again attempted to initiate CEP on 26 January 2016, almost three months late and the day before the scheduled .SHOP Auction. ICANN had specifically informed the Requester on 18 November 2015 of the CEP deadline. The Requester then improperly used ICANN's denial of its time-barred CEP request as a pretext to file a "timely" Request 16-1. As discussed further below, Request 16-1 raises numerous time-barred arguments unrelated to the Requester's CEP request.

C. The Requester Never Properly Initiated an IRP.

In Request 16-1, the Requester also appears to argue that ICANN somehow prevented the Requester from initiating an IRP relating to the 28 September 2015 Resolution.⁷⁶ To the contrary, ICANN staff repeatedly attempted to assist the Requester to initiate an IRP.

As demonstrated by the 18 November 2016 email from ICANN attached to Request 16-1, when the Requester sought assistance filing an IRP Request with the ICDR, ICANN provided the Requester with all the information necessary to initiate an IRP, including links to the pages on ICDR's website containing information on filing fees, forms, and guides.⁷⁷ ICANN also reminded the Requester that it had not properly filed an IRP Request, and that the deadline to do so was that day.⁷⁸

⁷⁶ Request 16-1, § 8, Pg. 9.

⁷⁷ Exhibits to Request 16-1 (18 November 2015 email from E. Le to J. Smith, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-1-commercial-connect-attachments-redacted-26jan16-en.pdf>.

⁷⁸ *Id.*

Despite having all the relevant information, the Requester did not file an IRP Request. Instead, weeks later, on 3 December 2015, the Requester informed ICANN that it was “still [its] intent to file [a] request for Independent Review . . .but [was] still unclear on what is needed and how to proceed.” The ICDR, which was copied on the Requester’s email, responded providing the Requester with all the relevant information for initiating an IRP. ICANN followed up—still attempting to help and not to prevent the Requester from initiating an IRP—stating that it appeared the ICDR had “provided [the Requester] with what appears to be all the relevant information needed to file your request for Independent Review. If you have any additional questions, please let us know.” ICANN did not receive a response from the Requester.

On 22 January 2016, a representative for the Requester sent ICANN a two-page Notice of IRP filing, but again did not provide the supporting documents required to initiate an IRP. On 10 February 2016—almost three months after the 30-day deadline mandated by the Bylaws—the Requester finally submitted to the ICDR the documents required to initiate an IRP regarding the 28 September 2015 Resolution.

As this history reflects, at no time did ICANN staff prevent the Requester from initiating an IRP. To the contrary, ICANN staff repeatedly informed the Requester of the relevant deadlines and provided the Requester with all the relevant information required to initiate an IRP, even after the deadline to properly to do had long since passed. The Requester’s months-long delay in initiating an IRP was not caused by ICANN, but rather is consistent with the Requester’s other delayed invocations of ICANN’s accountability mechanisms.

D. The Requester's Renewed Argument of Issues Raised in Request 15-13 Is Improper and Time-Barred.

Finally, in Request 16-1 the Requester renews the same argument it raised in Request 15-13—challenging the results of the CPE Report finding its Application did not prevail in CPE.⁷⁹ The BGC issued its recommendation on Request 15-13 on 24 August 2015, and the NGPC accepted that recommendation on 28 September 2015. The 28 September 2015 Resolution and accompanying rationale were posted on 30 September 2015. The deadline to seek reconsideration of the 28 September 2015 Resolution was therefore 13 October 2015—over two months before the Requester submitted Request 16-1. The Requester gives no reason for its delay in seeking reconsideration of the 28 September 2015 Resolution.⁸⁰ Its Request is time-barred, and for this reason alone, its request is denied.

The BGC also notes that the Requester does not raise any new arguments or facts besides those already raised in Request 15-13. ICANN is charged with using its resources in the public benefit; responding to repeated reconsideration requests, when they are based on the same circumstances and do not assert any grounds for reconsideration, is not an appropriate use of those resources. For the reasons discussed in the BGC's Recommendation on Request 15-13, the Requester has not stated a basis for reconsideration of the CPE Report.⁸¹

V. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Requests 16-1 and 16-2. In addition, the BGC notes that it is also deeply concerned by the Requester's repeated abuses of ICANN's

⁷⁹ Request 16-1, § 8, Pgs. 3-9.

⁸⁰ Notably, Request 15-13 was itself time-barred by over a month. The CPE Report was published on 21 May 2015. Thus, any reconsideration request challenging the CPE Report must have been filed by 5 June 2015. Bylaws, Art. IV, § 2.5. The Requester, however, did not file Request 15-13 until 10 July 2015, over a month after the filing deadline.

⁸¹ BGC Recommendation on Request 15-13, Pgs. 8-20.

accountability mechanisms and New gTLD Program processes, as described above and as explained further below.

First, the Requester filed suit against ICANN in a United States District Court, despite having accepted multiple releases—in its 2000 Application, its Credit Request Form and its New gTLD Application—barring it from bringing any claims against ICANN related to the Requester’s applications. On 11 January 2016, ICANN’s outside counsel informed the Requester of these releases and stated that if the lawsuit was not immediately dismissed, ICANN would “deem [the Requester] in material breach of the Terms and Conditions of its Application as well as the terms of the Credit Request Form, which may lead to the cancellation of [the Requester’s] Application.” Despite this, the Requester did not withdraw its lawsuit and proceeded with its Motion for TRO/PI. Thus, ICANN was required to expend considerable resources responding to the Requester’s frivolous Motion for TRO/PI. The Requester’s Motion for TRO/PI was denied by the court based on its finding that the Requester had failed to show a likelihood of success on the merits of its claims, and that the releases agreed to by the Requester were “clear and comprehensive.”

Next, as detailed above, the Requester has repeatedly and improperly invoked ICANN’s accountability mechanisms in an attempt to delay the resolution of the .SHOP contention set without any even arguably proper basis to do so. The Requester has filed six reconsideration requests relating to its Application, two of which, Request 15-13 and Request 16-1, raised arguments that were plainly time-barred. Further, Request 16-1 improperly raised the same arguments raised in Request 15-13. The Requester also repeatedly attempted to initiate CEP despite being informed that the Bylaws-mandated deadline for doing so had expired. Finally, despite repeatedly claiming that it was invoking the independent review process, the Requester

failed to actually file an IRP Request that even attempted to conform with the rules until 10 February 2016, almost three months past the Bylaws-mandated deadline.

Within 24 hours before the .SHOP Auction was set to go forward, the Requester made numerous frivolous attempts to invoke every ICANN accountability mechanism in a blatant attempt to halt the scheduled Auction. The Requester invoked CEP (despite knowing that it was time-barred by months), filed Request 16-1 (also raising time-barred arguments), and filed a complaint with the Ombudsman (which was declined for lack of jurisdiction). The day of the Auction, the Requester filed with the ICDR an Emergency Request for relief from an IRP emergency panel that (although time-barred) could have been filed well in advance of the Auction and which was ultimately abandoned by the Requester.

As discussed, ICANN is a nonprofit public benefit corporation charged with ensuring the stable and secure operation of the domain name system and remaining accountable to the Internet community while also using its resources in the public benefit.⁸² ICANN has expended significant resources engaging with the Requester and responding to the many (and mostly improper) filings described above. Although it is critical that all within the ICANN community have fair access to ICANN's accountability mechanisms, there is no justification for ICANN and members of its community having to suffer repeated baseless invocations of those mechanisms. .

⁸² Bylaws, Art. I, §§ 1, 2.10.