DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-14

30 NOVEMBER 2015

The Requester, Foggy Sunset, LLC (Requester), seeks reconsideration of the Community Priority Evaluation panel's report (CPE Report), and ICANN's acceptance of the CPE Report, finding that Asia Spa and Wellness Promotion Council Limited's (ASWPC's) application for .SPA prevailed in Community Priority Evaluation (CPE) for that string. In light of the CPE results, the contention set for .SPA has been resolved and only ASWPC's application will proceed.

I. Brief Summary.

The Requester and Top Level Domain Holdings Ltd. each submitted a standard (*i.e.*, not community based) application for the .SPA gTLD. ASWPC submitted a community based application for .SPA (Application). The three .SPA applications were placed into a contention set. Since the Application was community based, ASWPC was invited to, and did, participate in CPE. The Application prevailed in CPE. As a result, the contention set for the .SPA string has been resolved and only the Application will proceed.

The Requester seeks reconsideration of the CPE Report. Specifically, the Requester claims that the CPE panel evaluating ASWPC's Application (CPE Panel) violated established policy or procedure by considering letters of support for the Application that were submitted more than 14 days after the Application was invited to CPE. However, reconsideration is not appropriate here. While a CPE panel is not required to consider letters of support or opposition submitted more than 14 days after an application is invited to CPE, there is no established policy or procedure preventing a CPE panel from doing so. In fact, established policy provides that

CPE panels regularly monitor ICANN's correspondence page for correspondence relevant to ongoing CPEs. The BGC therefore denies Request 15-14.

II. Facts.

A. Background Facts.

The Requester and Top Level Domain Holdings Ltd. (TLDH) each submitted a standard (*i.e.*, not community based) application for the .SPA gTLD. ASWPC submitted a community based application for .SPA. The three .SPA applications were placed into a contention set.[1]

On 3 February 2015, ASWPC's Application was invited to participate in CPE.[2] 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. ASWPC elected to participate in CPE, and its Application was forwarded to the Economist Intelligence Unit (EIU), the CPE provider, for evaluation. The evaluation commenced on 26 February 2015.

On 9 April 2015, ASWPC sent a letter to ICANN, responding to TLDH's opposition to the Application's bid for community priority and explaining why, in ASWPC's view, the Application did meet the Guidebook requirements for community priority.[3] With its 9 April 2015 correspondence, ASWPC attached letters of support from a number of entities, including the International Spa Association.[4]

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[1] *See* Contention Resolution Status, *available at* https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/123.
[2] *See* http://newgtlds.icann.org/en/applicants/cpe.
[3] *See* https://www.icann.org/en/system/files/correspondence/ng-to-icann-09apr15-en.pdf.
[4] *See id*.

On 22 July 2015, the CPE Panel issued its report on the Application, concluding that the Application met the CPE requirements specified in the Guidebook and therefore prevailed in CPE.[5]

On 6 August 2015, the Requester filed Reconsideration Request 15-14 (Request 15-14), requesting reconsideration of the CPE Report, and ICANN's acceptance of the CPE Report.

On 21 September 2015, the Requester filed a request pursuant to ICANN's Document Information Disclosure Policy (DIDP), seeking documents related to the CPE Report (DIDP Request).[6] On 21 October 2015, ICANN responded to the DIDP request (DIDP Response). 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.[7] ICANN also stated that "[t]o help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel's verification of letters of support or opposition, evaluation of criteria, scoring decisions, or underlying analyses."[8]

On 4 November 2015, the Requester submitted a revised version of Request 15-14, contesting "the representation in the DIDP response that ICANN does not involve itself in the CPE process."[9] The Requester does not seek reconsideration of the DIDP Response.[10]

B. Relief Requested.

[5] CPE Report, *available at* https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf.
[6] *See* https://www.icann.org/en/system/files/files/didp-request-redacted-20150921-1-moody-21sep15-en.pdf. The Requester reserved the right to supplement its Reconsideration Request based on ICANN's response to its DIDP Request
[7] *See* https://www.icann.org/en/system/files/files/didp-response-supporting-docs-20150921-1-moody-21oct15-en.pdf.
[8] DIDP Response, Pg. 3.
[9] Revised Request, § 10, Pg. 11, *available at* https://www.icann.org/resources/pages/reconsideration-15-14-foggy-sunset-2015-08-10-en.
[10] Revised Request, § 9, Pg. 7.

The Requester asks that ICANN "vacate [the CPE Report] and direct that a different panel of EIU evaluators consider the ASWPC application without reference to the [support letters] presented to the EIU after 17 February 2015. . . ."[11] The Requester does not seek reconsideration of the DIDP Response.[12]

III. The Relevant Standards for Reconsideration Requests and CPE.

A. Reconsideration Requests.

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[14] 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.[15]

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 shown that a panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or

[11] Request, § 9, Pg. 6.
[12] Revised Request, § 9, Pg. 7.
[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] Bylaws, Art. IV, § 2.

procedures in accepting that determination.[16]

B. Community Priority Evaluation.

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 Guidelines) and the CPE Panel Process Document that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.[17]

CPE generally 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.[18] CPE is performed by an independent panel appointed by the EIU.[19] 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. 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.

IV. Analysis and Rationale.

The Requester presents a single ground for Request 15-14. Specifically, the Requester claims that the CPE Panel should not have considered letters of support submitted more than 14 days after ASWPC was invited to participate CPE.[20] In the Requester's view, because ASWPC was invited to participate in CPE on 3 February 2015, the CPE Panel should not have considered

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[16] *See* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc, BGC Recommendation on Reconsideration Request 13-5.
[17] For CPE Guidelines *see* http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en. For CPE Panel Process Document, *see* http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf.
[18] Guidebook, § 4.2.
[19] *Id*., § 4.2.2.
[20] Request, § 10, Pg. 8.

letters submitted after 17 February 2015.[21] The Requester therefore asserts that the CPE Panel's consideration of certain letters of support—including a letter from the International Spa Association—submitted on 9 April 2015 constitutes a violation of established policy or procedure.[22]

Contrary to what the Requester argues, however, there is no established policy or procedure that prohibits a CPE panel from considering letters of support or opposition submitted more than 14 days after an applicant is invited to participate in CPE. In fact, the EIU's CPE Panel Process Document, which details the CPE panels' evaluation process, states that "[o]n a regular basis, the EIU reviews ICANN's public correspondence page . . . for recently received correspondence to assess whether it is relevant to an ongoing evaluation. If it is relevant, the public correspondence is provided to evaluators assigned to the evaluation for review."[23]

In arguing that the CPE Panel should not have considered letters of support for ASWPC submitted after 17 February 2015, the Requester relies on a statement on ICANN's website providing that "application comments and letters of support or opposition must be submitted within 14 days of the Invitation Date in order to be considered by the CPE Panel."[24] However, this language simply highlights for the community that in the interest of maintaining the efficiency of the CPE process, statements of support or opposition should be submitted within 14 days of the CPE invitation to guarantee that such statements will be considered by the CPE panel. Nothing in the language cited by the Requester states that a CPE panel is prohibited from considering statements submitted more than 14 days after the CPE invitation; and there is no established policy preventing a CPE panel from doing so.

[21] *Id*.
[22] *Id*., *see also* CPE Report, Pgs. 2-3, 7-8.
[23] CPE Panel Process at 5, *available at* https://newgtlds.icann.org/en/applicants/cpe.
[24] Request, § 10, Pg. 8; *see also* https://newgtlds.icann.org/en/applicants/cpe.

The Requester also argues that the CPE Panel Process "clearly describes the 14-day window for submission of support and opposition papers."[25] However, the Requester misstates the CPE Panel Process. The referenced "14-day window" applies only to the process for consideration of public application comments. Specifically, the CPE Panel Process states, in pertinent part, as follows:

> When evaluating an application the CPE Panel also considers the public application comments. The public comments are provided to EIU by ICANN following the close of the 14-day window associated with the CPE invitation.[26]

The CPE Panel Process does not mandate a deadline for submitting correspondence in support of or opposition to an application. To the contrary, as discussed above, the CPE Panel Process states that the EIU will "regular[ly]" review ICANN's correspondence page[27] for correspondence relevant to "ongoing evaluation[s]. If it is relevant, the public correspondence is provided to evaluators assigned to the evaluation for review."[28]

Similarly, the CPE Processing Timeline (on which the Requester also relies) specifies only that the deadline for "application comment" is 14-days.[29] But again, the CPE Processing Timeline does not refer to a deadline for submitting correspondence. Neither the CPE Panel Process nor the CPE Processing Timeline suggests that a CPE panel is prevented from considering correspondence submitted more than 14 days after a CPE invitation is extended. Instead, they merely advise applicants and supporters/opponents that there is no guarantee that public application comments submitted after the 14-day period will be considered by the CPE panel. Here, ASWPC was invited to CPE on 3 February 2015. The evaluation commenced on

[25] Request, § 10, Pg. 8.
[26] CPE Panel Process at 2, *available at* https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf.
[27] *See* https://newgtlds.icann.org/en/program-status/correspondence.
[28] CPE Panel Process at 5.
[29] *See* CPE Processing Timeline, *available at* http://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf; *see also* Request, § 10, Pg. 8.

26 February 2015 and the Report was published on 22 July 2015. ASWPC sent the subject correspondence on 9 April 2015, attaching letters of support from a number of entities, well within the evaluation period. Thus, as noted in the CPE Report, the 9 April 2015 correspondence was considered by the Panel in accordance with the CPE Panel Process and the CPE Guidelines.

Because there is no established policy or procedure preventing CPE panels from considering letters of support submitted more than 14 days after an application is invited to participate in CPE, the Requester has not stated a basis for reconsideration with respect to the CPE Panel's consideration of the letters of support for ASWPC's Application that were submitted after 17 February 2015.[30]

V. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 15-14.

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 consideration is required.[31] As discussed above, Request 15-14 seeks reconsideration of a staff

[30] The Requester does not seek reconsideration of ICANN's response to its DIDP Request. However, in its revised version of Request 15-14, the Requester states that ICANN "denied having any documents responsive to [the DIDP Request]." (Revised Request 15-14, § 10, Pg. 11.) However, the DIDP Response explained 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. (DIDP Response, Pg. 2-6.)

The Requester also contests the statement in the DIDP Response that "[t]o help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel's verification of letters of support or opposition, evaluation of criteria, scoring decisions, or underlying analyses." (*Id*., Pg. 3.) The Requester argues that this statement "contradicts information[] [that] ICANN has communicated publicly regarding its involvement [] in the CPE process," citing a draft program implementation document for CPEs which states that ICANN "performed quality control on the report to ensure consistency and alignment with the [Guidebook] and CPE Guidelines as well as to ensure that adequate rationale was provided for scoring decisions." (Revised Request 15-14, § 10, Pg. 10) (quoting "Draft- Program Implementation Review" at 119, *available at* https://www.icann.org/public-comments/new-gtld-draft-review-2015-09-23-en.) Nothing in this statement implies that ICANN is involved in the verification of statements of support or opposition, or is otherwise involved in the CPE panels' scoring decisions or underlying analyses. As stated in the DIDP Response, to ensure the independence of the CPE process, ICANN's quality control *does not* involve those aspects of the process.

[31] Bylaws, Art. IV, § 2.15.

action or inaction. As such, after consideration of Request 15-14, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days following receipt of the request, unless impractical.[32] To satisfy the thirty-day deadline, the BGC would have to have acted by 5 September 2015. However, the first practical opportunity for the BGC to consider Request 15-14 was 30 November 2015, because the Requester asked that Request 15-14 be suspended until ICANN responded to the Requester's DIDP Request and the Requester was provided with an opportunity to submit any additional arguments. ICANN agreed, and the Requester was provided fourteen days within which to amend Request 15-14 after receiving the DIDP Response on 21 October 2015. The Requester then submitted a revised version of Request 15-14 on 4 November 2015.

[32] *Id*., Art. IV, § 2.16.