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ARIF HYDER ALI

Contact Information  
Redacted

August 8, 2017

**VIA E-MAIL STEVE.CROCKER@ICANN.ORG**

ICANN Board of Directors  
c/o Mr. Steve Crocker, Chair  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

Re: Community Priority Evaluation (“CPE”) investigation

Dear Chairman Crocker and Members of the ICANN Board:

We write on behalf of dotgay LLC (“dotgay”) to both highlight its concern with and seek remedy with respect to the ongoing delays in the Board Governance Committee’s (the “BGC”) Community Priority Evaluation (“CPE”) investigation. Nearly one year ago, the BGC requested materials and research from its CPE provider, the Economist Intelligence Unit (“EIU”), as part of its investigation in the CPE process and halted its consideration of dotgay’s Reconsideration Request 16-3 (“RR 16-3”) pending the investigation.<sup>1</sup> The BGC has yet to resume its consideration of RR 16-3 and this delay is seemingly caused, at least partially, by the lack of cooperation and/or compliance from the EIU.

**The EIU’s Noncompliance with the BGC’s Request**

ICANN and the BGC has provided dotgay with little information regarding the BGC’s CPE investigation and its hiring of FTI Consulting Inc. (“FTI”) to conduct an independent review of the CPE process. But, based on the sparse information provided, it seems that ICANN’s CPE provider has been entirely uncooperative or unresponsive to requests for information regarding an already opaque process.

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<sup>1</sup> See BGC Meeting Minutes (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

The BGC's CPE investigation began in September 2016, when the BGC asked its President and CEO to undertake a review of the process ICANN used to interact with the EIU.<sup>2</sup> The October 18, 2016 BGC meeting minutes showed that the BGC planned to "[r]equest from the CPE provider the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports."<sup>3</sup>

On April 26, 2017, an update from Chris Disspain indicated that the materials were "currently being collected as part of the President and CEO's review and will be forwarded to the BGC in due course."<sup>4</sup> Thus, six months after the BGC's request, the EIU had still not provided the requested materials.

On June 2, 2017, a new update on the CPE investigation was released, informing dotgay that "FTI is currently waiting on responses from the CPE provider related to the requests for information and documents. The CPE provider is seeking to provide its responses to the information requests by the end of next week and is currently evaluating the document requests."<sup>5</sup> The June 2017 update finally provided a time estimate for the EIU to release the materials and information about the CPE process: June 9, 2017, the "end of next week."<sup>6</sup>

Yet, more than two weeks past the EIU's proposed delivery date of June 9, 2017, the BGC noted in its June 25, 2017 minutes that FTI "is also working with the CPE provider to

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<sup>2</sup> ICANN Resolution (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>3</sup> BGC Meeting Minutes (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>. The BGC also suspended its review of dotgay's RR 16-3 pending its investigation of the CPE process. *Id.*

<sup>4</sup> Chris Disspain, Update on the Review of the New gTLD Community Priority Evaluation Process (26 Apr. 2017), <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>5</sup> Community Priority Evaluation Process Review Update (2 Jun. 2017), <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

<sup>6</sup> *Id.*

obtain the reference materials for the evaluations that are the subject of pending Reconsideration Requests.”<sup>7</sup>

Thus, more than nine months after the BGC’s request, the EIU has yet to fully comply with the request and provide the materials and research relied upon by the CPE panels in making their determinations with respect to the pending CPE reports.

### **dotgay’s Concerns Regarding the EIU’s Delays in Compliance**

This delay in compliance is concerning. It suggests to dotgay that the EIU has no such documentation and it reinforces the assumption that the EIU conducted no meaningful research during the CPE process for the community applications. In other words, the EIU’s disclosure delays only lends further credence to dotgay’s objections to the final CPE Report for its .GAY community application and the clear evidence that the EIU inconsistently applied the CPE criteria in the final CPE Report for .GAY.<sup>8</sup>

### **ICANN’s Transparency Obligations Regarding its CPE Investigation**

The entire CPE investigation has been mired in mystery since it began nearly one year ago, despite dotgay’s vested interest in the process and ICANN’s transparency obligations.

As explained by the IRP Panel in *Dot Registry, LLC v. ICANN*, “[t]ransparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.”<sup>9</sup> ICANN’s Articles and Bylaws constantly reinforce that ICANN is required to act in a transparent manner:

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<sup>7</sup> BGC Meeting Minutes (25 Jun. 2017), <https://www.icann.org/resources/board-material/minutes-bgc-2017-06-25-en>.

<sup>8</sup> See, e.g., Letter to ICANN Board of Directors from Arif Ali on behalf of dotgay (15 Nov. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>.

<sup>9</sup> *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

1. ICANN’s Articles of Incorporation states that it shall “carry[ ] out its activities. . .through open and transparent processes.”<sup>10</sup>
2. ICANN’s Bylaws also commit it to “carry[ ] out its activities. . .through open and transparent processes.”<sup>11</sup>
3. ICANN’s Bylaws devote an entire Article—Article 3—to its commitment to “operate to the maximum extent feasible in an open and transparent manner.”<sup>12</sup>
4. ICANN’s accountability and review process, as set out in its Bylaws, was specifically created “for certain action. . .and procedures. . ., including the transparency provisions of Article 3.”<sup>13</sup>

Under these transparency obligations, ICANN is obligated to disclose the status of the EIU’s compliance with its disclosure obligations, along with the materials and research disclosed by the EIU in response to that request. Any lack of transparency regarding the materials and communications between the CPE Provider, ICANN, and FTI only fosters dotgay’s concerns regarding the independent evaluation. Without access to the materials disclosed by the EIU, dotgay cannot determine whether the EIU considered all of the relevant information when evaluating its community application—including the materials dotgay submitted. This directly relates to the core of dotgay’s suspended RR 16-3.<sup>14</sup>

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<sup>10</sup> ICANN Articles of Incorporation, Art. 2(III).

<sup>11</sup> ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(a).

<sup>12</sup> ICANN Bylaws (22 Jul. 2017), Art. 3(3.1).

<sup>13</sup> ICANN Bylaws (22 Jul. 2017), Art. 4(4.1).

<sup>14</sup> See dotgay Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

### **ICANN's Timeliness Obligations Regarding its CPE Investigation**

The EIU's delay in complying with the BGC's request for documentation has stalled the BGC's CPE investigation and, as a result, unfairly delayed resolution of RR 16-3. ICANN has an obligation to act in a timely manner.<sup>15</sup> The BGC has failed to do so by allowing the EIU's compliance failures to stall the entire CPE investigation.

When dotgay submitted its RR 16-3 over a year ago, in February 2016, it expected that the process would proceed pursuant to the timeframe enshrined in ICANN's Bylaws. And, according to the Bylaws, the BGC was required to provide a determination "within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board . . . its best estimate of the time requires to produce such a final determination or recommendation."<sup>16</sup> It has now been over a year<sup>17</sup> and dotgay still has no estimate as to when the BGC will conclude its CPE investigation and consider the pending RR 16-3.

### **Request for Relief**

In light of the above, dotgay requests that ICANN set an immediate deadline for the EIU to deliver a complete set of the requested materials to ICANN and FTI. Clearly, there appears to be no legitimate or rational reason why reference materials and research requested for the CPE investigation have yet to be fully delivered to FTI. If not delivered

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<sup>15</sup> ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(b)(v) ("[T]he following '**Core Values**' should also guide the decisions and actions of ICANN. . .[o]perating with efficiency and excellence.").


<sup>16</sup> ICANN Bylaws (11 Feb. 2016), Art. IV, §2(16).

<sup>17</sup> Even under the current version of the Bylaws, which were not in effect when dotgay submitted its RR 16-3, the BGC has delayed considering and issuing a determination on dotgay's RR 16-3 over a year past the expected deadline. According to the current Bylaws, the BGC should issue a determination within 45 days of the Reconsideration Request's submission. A requestor's Reconsideration Request is sent to the Ombudsman once it is submitted to the BGC, and the Ombudsman has 15 days to provide "a substantive evaluation of the" Reconsideration Request to the BGC. ICANN Bylaws (22 Jul. 2017), Art. 4(4.2)(c)(1)(ii). The BGC then has 30 days to "make a final recommendation to the Board" after receiving the Ombudsman's evaluation. *Id.*, Art. 4(4.2)(q).

immediately, ICANN should assume that such materials do not exist and FTI should proceed with the investigation in order to avoid further delays.

dotgay further requests that ICANN discloses any and all materials received from the EIU to the relevant applicants, in order to ensure the legitimacy of the CPE investigation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif Hyder Ali', with a long horizontal stroke extending to the right.

Arif Hyder Ali