INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

COMMERCIAL CONNECT, LLC Claimant, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS Respondent.	)	ICDR CASE NO. 01-16-0000-2315

ICANN'S RESPONSE TO CLAIMANT COMMERCIAL CONNECT, LLC'S AMENDED REQUEST FOR INDEPENDENT REVIEW PROCESS

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The Internet Corporation for Assigned Names and Numbers ("ICANN") hereby submits this Response to the Amended Request for Independent Review Process ("Amended IRP Request") submitted by claimant Commercial Connect, LLC ("Claimant") on 28 September 2016.

INTRODUCTION

1. The Panel allowed Claimant to file an Amended IRP Request ("Amended IRP Request") for the limited purposes of responding to ICANN's arguments, and updating the Panel regarding new developments regarding the .SHOP gTLD. Nevertheless, Claimant uses its Amended IRP Request to reiterate previous arguments that have already been briefed, and to raise new issues that were never briefed in either Claimant's original Request for IRP ("Original IRP Request") or in ICANN's original IRP Response and, therefore, have no place in the IRP. Claimant's Amended IRP Request, which was signed and filed by Claimant's President rather than Claimant's counsel, does not comply with the Panel's Procedural Order No. 1 and, furthermore, fails to demonstrate that ICANN's Board violated ICANN's Articles of Incorporation ("Articles") or Bylaws.

2. As an initial and determinative matter, the Amended IRP Request does not address the fact that Claimant's Original IRP Request was time barred. Based on this alone, the IRP should be summarily denied.

3. Nevertheless, even if considered on its merits, the Amended IRP Request is just as deficient as the Original IRP Request. The ICANN Board took only one action relating to Claimant's .SHOP Application ("Application"): Denying Claimant's reconsideration request 15-13 ("Request 15-13"). Yet Claimant barely even addresses this Board action and utterly fails to

demonstrate that the Board's denial of Request 15-13 in any way violated ICANN's Articles or Bylaws, as required to prevail in an IRP.

4. Furthermore, Claimant's argument that the Community Priority Evaluation Panel ("CPE Panel") improperly issued and utilized the CPE Guidelines is meritless. The CPE Guidelines, which were not issued by the ICANN Board, are completely consistent with and substantively identical to the CPE requirements set forth in the gTLD Applicant Guidebook ("Guidebook"), under which Claimant submitted its Application. Furthermore, any challenges to the CPE requirements set forth in the Guidebook are clearly time barred, as the Guidebook was published in 2012.

5. Moreover, Claimant's argument that its Application (submitted in 2012) is entitled to "priority treatment" because it applied for .SHOP in the 2000 application round distorts all relevant facts. When Claimant applied for .SHOP in 2000, it acknowledged that it had no rights in the .SHOP gTLD. Then, when Claimant applied for .SHOP in 2012, and accepted a significant credit for the application fee, Claimant again made the same acknowledgement that it had no rights in the .SHOP gTLD. In addition, Claimant identifies no ICANN statement, principle, rule or policy indicating that Claimant's Application should be given priority because of the 2000 application.

6. Finally, ICANN correctly proceeded with the .SHOP auction because no Accountability Mechanisms were pending at the time the .SHOP auction was ***scheduled***. Instead, Claimant invoked ICANN's Accountability Mechanisms almost three months after the scheduling of the .SHOP auction and a mere 24 hours before the auction was to take place, all in a last-ditch effort to delay the auction. Thus, there was no reason the auction could not proceed.

7. In short, nothing in the Amended IRP Request provides support for the notion that the ICANN Board violated ICANN's Articles or Bylaws.

BRIEF SUMMARY OF BACKGROUND FACTS

8. Claimant first submitted an application to operate the .SHOP gTLD in ICANN's 2000 "proof of concept" round ("2000 Application").[1] In its 2000 Application, Claimant 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."[2] Claimant's 2000 Application was not one of the applications approved by ICANN.

9. In 2012, as part of the New gTLD Program, Claimant submitted a community-based application for .SHOP ("Application"). As provided for in the Guidebook, because Claimant had applied for .SHOP in its 2000 Application but was not awarded the string, Claimant was offered a US$86,000 credit for its 2012 .SHOP Application, which Claimant accepted. In accepting this credit, Claimant signed a 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."[3] The Claimant has never suggested that he misunderstood the terms of accepting the credit, or that the agreement is somehow unenforceable.

10. In accordance with the Guidebook, Claimant's Application was placed in a contention set with eight other applications for .SHOP.

11. On 26 November 2014, Claimant was invited to participate in Community Priority Evaluation ("CPE") for .SHOP; Claimant elected to participate in CPE, and its

[1] ICANN TLD Application Process: Information for Applicants (Resp. Ex. 11).
[2] Commercial Connect LLC's Unsponsored TLD Application Transmittal Form ¶ B12 (Resp. Ex. 12); *see also id.* at ¶ 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").
[3] Commercial Connect LLC's New gTLD Application 2000 Credit Request (Resp. Ex. 13).

Application was forwarded to the CPE provider for evaluation.[4] On 21 May 2015, the CPE provider issued its CPE Report on Claimant's Application.[5] The Application received only five out of 16 possible points on the CPE criteria, which did not meet the 14 points necessary to prevail in CPE.[6] As a result, Claimant's Application remained in contention with the eight other applications for .SHOP (".SHOP Contention Set").

12. On 10 July 2015 – over a month and a half after the CPE Report was issued and posted – Claimant filed Request 15-13, seeking reconsideration of the CPE Report, among other things.[7] On 24 August 2015, the BGC recommended that Request 15-13 be denied. Although Claimant's claims were time-barred (reconsideration requests must be filed within 15 days of the action being challenged), the BGC considered Request 15-13 on its merits and concluded that Claimant had not demonstrated a basis for reconsideration with respect to the CPE Report or otherwise.[8]

13. On 28 September 2015, in its Board Resolution, the NGPC accepted the BGC's recommendation to deny Request 15-13 ("Board Resolution").[9] The minutes and the board briefing materials for that NGPC meeting were published on 19 October 2015, thus commencing the 30-day period for Claimant to file an IRP relating to the Board Resolution.[10]

14. On 29 October 2015, ICANN scheduled the .SHOP auction ("Auction") for 27 January 2016, and all applicants in the .SHOP Contention Set, including Claimant's, were invited to enter into the Auction process.[11] Applicants were given a deadline of 26 November

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[4] *See* Community Priority Evaluation (Resp. Ex. 7).
[5] Community Priority Evaluation Report for Commercial Connect LLC's Application for .SHOP (Resp. Ex. 14).
[6] *Id.*
[7] Reconsideration Request 15-13 (Resp. Ex. 16).
[8] BGC Recommendation on Request 15-13 (Cl. Annex-6).
[9] Resolution 2015.09.28.NG02 (Resp. Ex. 17).
[10] Minutes of 28 September 2015 NGPC Meeting (Resp. Ex. 2); Bylaws, Art. IV, § 3.3 (Cl. Annex-3).
[11] Email from Independent Review to J. Smith and B. Lieben, dated 27 January 2016 ("On 29 October 2015, auction invitations were issued to the .SHOP contention set, including Commercial Connect.") (Resp. Ex. 30).

2015 to elect to enter into the Auction process and participate in the Auction.[12] ICANN sent Claimant repeated reminders of that deadline and provided Claimant with multiple extensions of time to submit the necessary documentation to participate in the Auction. Despite ICANN's efforts to reach out to Claimant, and despite stating that it would do so, Claimant never responded to the Auction request.[13]

15. On 26 January 2016, less than 24 hours before the Auction was scheduled to begin, Claimant attempted to invoke ***all*** of ICANN's Accountability Mechanisms, including: (a) attempting to initiate a cooperative engagement process ("CEP") regarding the Board Resolution;[14] (b) filing a complaint with the Ombudsman; and (c) filing Reconsideration Request 16-1.[15] Finally, on the morning of 27 January 2016, less than two hours before the scheduled Auction, Claimant purported to seek emergency relief from the ICDR (albeit without following proper procedures).[16]

16. The .SHOP Auction began as scheduled on 27 January 2016, as it had been scheduled to do since 29 October 2015.

17. On 10 February 2016, Claimant filed the Original IRP Request.

ARGUMENT

I. THE AMENDED IRP REQUEST FAILS TO COMPLY WITH PROCEDURAL ORDER NUMBER ONE.

18. As an initial matter, Claimant's Amended IRP Request fails to comply with the Panel's instructions and, therefore, should not be considered in this IRP. In Procedural Order No. 1, the Panel clearly stated that Claimant's Amended IRP Request should: "(i) include and make reference to all arguments on which Claimant relies …; (ii) respond to all points and arguments

[12] Intent to Auction Notification (Resp. Ex. 23).
[13] Case Comments for Commercial Connect, LLC at 1-3, 5-8 (Resp. Ex. 24).
[14] 26 January 2016 Email from J. Smith to Independent Review (Resp. Ex. 29).
[15] Reconsideration Request 16-1 (Cl. Annex-11).
[16] Email from B. Lieben to T. Simotas, E. Enson, dated 27 January 2016 (Resp. Ex. 31).

raised by Respondent...; (iii) provide an update on facts and circumstances in respect of the .shop gTLD ...; and (iv) ... specify the relief requested bearing in mind the scope of the IRP Panel's authority."[17]

19. In addition, Claimant failed to file its Amended IRP Request by the time set forth in Procedural Order No. 1 and, instead, sought a week extension of the filing deadline. The Panel granted the extension and admonished that "all communications from the parties in this case should be made by and through the parties' legal representatives."[18]

20. Rather than complying with these clear instructions, Claimant's President, Jeffrey S. Smith, filed and signed the Amended IRP Request, which does nothing more than re-state and re-word Claimant's Original IRP Request. The Amended IRP Request does not respond to any of the points or arguments made in ICANN's Response to the Original IRP Request ("Original IRP Response"). It does not provide any update on facts and circumstances regarding the .SHOP gTLD. And, rather than staying within the limited scope of Procedural Order No. 1, Claimant attempts to introduce a new, wholly unrelated argument regarding alleged deficiencies in ICANN's string similarity review process.[19] This generalized complaint pertains to entirely different strings (.shopping, .store, .buy, .sale, .sell, .service, etc.) as well as an entirely different ICANN process, string similarity review, which took place in 2013.[20] Because the Amended IRP Request introduces no new relevant arguments or facts, and ignores the instructions set forth in Procedural Order No. 1, the Amended IRP Request should not be considered by the Panel.

[17] Procedural Order No. 1 (Resp. Ex. 35).
[18] Email from C. Gibson, dated 23 September 2016 (emphasis in the original)(Resp. Ex. 36).
[19] Amended IRP Request, Pgs. 12-14.
[20] New gTLD Program: String Similarity Contention Sets (Resp. Ex. 37).

21. However, even if the Panel chooses to consider the Amended IRP Request, the Panel will see, as set forth below, that the Amended IRP Request is just as deficient as the Original IRP Request.

II. CLAIMANT'S AMENDED IRP REQUEST REMAINS TIME BARRED.

22. Other than Claimant's assertion that ICANN's "time-barring arguments" are becoming "increasingly moot," the Amended IRP Request does not address ICANN's argument that the Original IRP Request is time barred.[21] Under ICANN's Bylaws, a "request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN ... violated its Bylaws or Articles of Incorporation."[22] The only Board action at issue (and, therefore, the only action that could even be argued to support an IRP) is the Board's denial of Claimant's Request 15-13. The minutes and briefing materials from the 28 September 2015 NGPC meeting (during which the NGPC passed the Resolution on Request 15-13) were posted on 19 October 2015. As such, the deadline to initiate an IRP was 18 November 2015.[23] Claimant failed to even attempt to initiate an IRP until 10 February 2016 – ***almost three months after*** the deadline. Therefore, and given the fact that Claimant does not even address this issue in its Amended IRP Request, Claimant's IRP should be denied as time barred.

23. To be clear, ICANN is not seeking to avoid accountability or the review of Board actions by asserting this argument. Instead, ICANN is seeking to ensure that all who invoke ICANN's Accountability Mechanisms are held to the same standards and that ICANN complies with the procedures set forth in the Bylaws regarding the Accountability Mechanisms.

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[21] Amended IRP Request, Pg. 8.
[22] Bylaws, Art. IV, § 3.3 (emphasis added) (Cl. Annex-3).
[23] *See* NGPC Meeting Minutes, dated 28 September 2015 (Resp. Ex. 2).

III. ICANN'S BOARD PROPERLY DENIED RECONSIDERATION REQUEST 15-13.

24. The Amended IRP Request does not explicitly challenge the Board's denial of Request 15-13. Yet the Board's denial of Request 15-13 is the only Board action that could even arguably be at issue in this IRP and the only action that could even support an IRP. In denying Request 15-13, the Board acted without "conflict of interest," with "a reasonable number of facts in front of it," and at all times "exercise[d] independent judgment."[24] As such, the Board's denial of Request 15-13 was not inconsistent with ICANN's Articles and Bylaws.

25. Although Request 15-13 raised several issues, it primarily challenged the CPE Panel's evaluation of Claimant's Application. In evaluating Request 15-13, the ICANN Board Governance Committee ("BGC") first considered Claimants' argument that the CPE Panel had not properly considered expressions of support for, and opposition to, Claimant's Application (one of the four CPE criteria set forth in the Guidebook).[25] The BGC examined Claimant's arguments and determined that the CPE Panel had followed established policy in its verification of support and opposition to Claimant's Application.[26] Specifically, the BGC confirmed that the CPE Panel correctly verified letters of support and, significantly, a letter of opposition from a "multinational corporation."[27] The BGC next examined Claimant's argument that the CPE Panel incorrectly determined that Claimant did not prevail in CPE.[28] On this argument, the BGC reviewed the CPE Report and determined that the CPE Panel had applied the correct CPE criteria contained in the Guidebook; indeed, the BGC painstakingly reviewed the CPE Panel's scoring of CPE Elements 1-A ("Delineation") and 1-B ("Extension"), as well as the Third and Fourth CPE

[24] IRP Standard of Review. *See* Bylaws Art., IV §§ 3.1, 3.4 (Cl. Annex-3).
[25] Request 15-13, Pgs. 13-14 (Resp. Ex. 16).
[26] BGC Recommendation on Request 15-13, Pgs. 9-11 (Cl. Annex-6).
[27] *Id.*
[28] Request 15-13, Pgs. 11-14 (Resp. Ex. 16).

Criterion.[29] As such, the BGC properly concluded that Claimant failed to identify any violation of "established ICANN . . . policy(ies)" by the CPE Panel, which is the correct standard for reconsideration of actions taken by third party evaluators.[30] As such, the BGC members had more than a sufficient amount of information in front of them, to exercise independent judgment in properly denying Request 15-13.

26. Nowhere in the Amended IRP Request, or in the Original IRP Request for that matter, does Claimant identify any Article or Bylaws provision violated by the BGC in denying Request 15-13.

IV. THERE IS NO BOARD ACTION THAT VIOLATED ANY PROVISION OF THE ARTICLES OR BYLAWS WITH RESPECT TO THE PROMULGATION OF THE CPE GUIDELINES.

27. The Amended IRP Request reiterates another flawed argument, namely, that the "CPE Panel did not have the authority under ICANN Policy… to publish such additional 'CPE Guidelines.'"[31] This argument is flawed for many reasons. First, it was ICANN staff in conjunction with the CPE provider – not the ICANN Board – that "published the CPE Guidelines produced by the [CPE provider] after considering ICANN community feedback on the first draft."[32] Thus, there is no ICANN Board action associated with the CPE Guidelines that can be challenged in this IRP.

28. Second, the CPE Guidelines are not contrary to the CPE requirements set forth in the Guidebook, as Claimant alleges. For example, the CPE Guidelines provide that an application earns a maximum score for Criterion 2-A Nexus when "[t]he string matches the name

[29] BGC Recommendation on Request 15-13, Pgs. 11-17 (Cl. Annex-6).
[30] Bylaws, Art. IV, § 2.2(a) (Cl. Annex-3).
[31] Amended IRP Request, Pgs. 16-18.
[32] *See* Community Priority Evaluation (Resp. Ex. 7).

of the community or is a well known short form or abbreviation of the community."[33] That language and scoring is pulled directly from Guidebook § 4.2.3, which sets forth the CPE standards.[34] Similarly, the CPE Guidelines indicate that an Application receives a maximum score for Criterion 1-A Delineation when there is a"[c]learly delineated, organized, and pre-existing community,"[35] which matches Guidebook § 4.2.3 verbatim.[36] Indeed, the CPE Guidelines expressly state that they do not "modify the [Guidebook] framework [or] change the intent or standards laid out in the [Guidebook]."[37]

29. Third, Claimant made the choice to proceed under the CPE Guidelines. The CPE Guidelines were published on 27 September 2013; Claimant was invited to participate in CPE on 26 November 2014, and elected to do so on 16 December 2014 – more than a year after the CPE Guidelines were published. Thus, Claimant had full knowledge of the CPE Guidelines and chose to participate in the CPE process. Claimant cannot now attempt to challenge the CPE Guidelines – over three years after the CPE Guidelines were published, and nearly two years after electing to participate in CPE and have its Application scored according to those Guidelines – merely because Claimant disagrees with the CPE results. Any such challenge is long since time-barred.

V. CLAIMANT PROVIDES NO BASIS FOR ITS IRRELEVANT CONTENTION THAT THE CPE PANEL ERRED.

30. In its Amended IRP Request, Claimant again argues, based on "information and belief... that the information relied upon by the [CPE provider in CPE was] false, incomplete, or materially incorrect."[38] The Amended IRP Request, however, does not offer a single fact to

[33] CPE Guidelines, Pg. 7 (Resp. Ex. 34).
[34] Guidebook, § 4.2.3 (An applicant earns three points (the maximum score) for Nexus when "[t]he string matches the name of the community or is a well-known short-form or abbreviation of the community") (Cl. Annex-9).
[35] CPE Guidelines, Pg. 3 (Resp. Ex. 34).
[36] Guidebook, § 4.2.3 (An applicant earns a maximum score (two points) for Delineation when there is a "clearly delineated, organized, and pre-existing community") (Cl. Annex-9).
[37] CPE Guidelines, Pg. 2 (emphasis added) (Resp. Ex. 34).
[38] Amended IRP Request, Pg. 16.

support this conclusory statement. Rather, as described in detail in the BGC's recommendation regarding Request 15-13, the CPE Panel carefully adhered to the CPE criteria in evaluating Claimant's Application.[39]

VI. CLAIMANT HAS NO RIGHT TO THE .SHOP STRING.

31. In its Amended IRP Request, Claimant continues to insist that its Application was entitled to "preferential treatment" because it applied for .SHOP "prior to the implementation of the 2011 [sic] New gTLD Program."[40] But Claimant offers nothing in support of this claim other than Mr. Smith's own opinion. Indeed, Claimant contends that ICANN made "numerous statements and confirmations" that Claimant's 2000 Application for .SHOP somehow entitled Claimant to priority treatment in later application rounds.[41] Claimant, however, fails to identify even a single statement made by ICANN to that effect – because there were no such statements or assurances.

32. Moreover, Claimant's belief that its 2000 Application conferred it with "preferential treatment" in subsequent gTLD application rounds demonstrates that Claimant misunderstood the purpose of the 2000 Application Round and ignored ICANN's clear and unequivocal statements on this subject. In 2000, ICANN held the first of two trial gTLD application rounds that were designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet.[42] Claimant chose to participate in the 2000 "proof of concept" round and, in its 2000 Application, acknowledged that it had "no legally enforceable right to acceptance or any other treatment of [its] application or to the delegation in

[39] BGC Recommendation on Reconsideration Request 15-13, Pgs. 12-17 (Cl. Annex-6).
[40] Amended IRP Request, Pg. 7.
[41] *Id.*
[42] About the New gTLD Program (Resp. Ex. 38).

any particular manner of any top-level domain that may be established in the authoritative DNS root."[43]

33. When Claimant submitted its Application in 2012, Claimant was offered and accepted a US$86,000 credit in light of its 2000 Application. In accepting this credit, Claimant signed a 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."[44]

34. In sum, ICANN never represented that Claimant would be given priority treatment as a 2000 application round applicant. Rather, on multiple occasions, ICANN reiterated and Claimant specifically acknowledged that Claimant was not entitled to and had no right to any priority treatment in the .SHOP string arising from its 2000 Application. Claimant's belief that its 2000 Application for .SHOP conferred preferential treatment in later gTLD application rounds is unsupported and unreasonable, and in direct contravention of the acknowledgements executed by Claimant.

VII. NO ACCOUNTABILITY MECHANISM WAS PENDING WHEN THE .SHOP AUCTION WAS SCHEDULED.

35. Finally, Claimant contends that ICANN wrongfully proceeded with the .SHOP Auction despite "Claimant invok[ing] numerous Accountability Mechanisms."[45] The operative Auction Rules, dated 24 February 2015, state that all "***pending*** ICANN Accountability Mechanisms" must be resolved "prior to the ***scheduling*** of an Auction."[46] The scheduling of the .SHOP Auction took place on 29 October 2015. There were no Accountability Mechanisms pending on 29 October 2015.

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[43] ICANN TLD Application Process: Information for Applicants (Resp. Ex. 12).
[44] Commercial Connect LLC's New gTLD Application 2000 Credit Request (Resp. Ex. 13).
[45] Amended IRP Request, Pg. 18.
[46] Auction Rules for New gTLDs: Indirect Contentions Edition (emphasis added) (Resp. Ex. 39).

36. In a last-ditch effort, Claimant filed Reconsideration Request 16-1, invoked CEP, filed an Ombudsman complaint, and submitted what it called a "Request for Emergency Arbitrator" to the ICDR on 26-27 January 2016. Claimant tried to delay the .SHOP Auction by invoking ***all*** of ICANN's Accountability Mechanisms less than 24 hours before the Auction, and almost three months after the Auction had been scheduled. Such attempted manipulation of the auction process is not permitted.

37. If, as Claimant suggests, an applicant could delay an auction by invoking an Accountability Mechanism immediately before an auction is set to begin, ICANN's Accountability Mechanisms would be ripe for abuse by disgruntled applicants. The Auction Rules were designed to, among other things, avoid this type of gamesmanship. The Auction Rules prohibit auctions from being ***scheduled*** while Accountability Mechanisms are pending. This approach appropriately balances fairness towards applicants that invoke Accountability Mechanisms with fairness towards other auction participants that have a vested interest in the auction going forward.

38. Thus, ICANN correctly proceeded with the Auction on 27 January 2016, despite Claimant's last minute, shotgun attempts to derail it.

CONCLUSION

39. Claimant's Amended IRP Request does not address the dispositive time-bar issue and does not demonstrate that ICANN's Board failed to act in conformance with its Articles or Bylaws. For the reasons discussed above, ICANN urges the IRP panel to declare that Claimant has not identified any basis for independent review and that ICANN is the prevailing party.

Respectfully submitted,

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Dated: October 12, 2016