

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: Jacob Malthouse, on behalf of Big Room Inc.

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

Big Room Inc. ("Big Room") respectfully requests Board reconsideration of ICANN staff inaction in connection with its failure to terminate the ongoing Cooperative Engagement Process ("CEP") pertaining to the .ECO generic top-level domain (gTLD) subject matter.

Per the evaluation result published on October 6, 2014, Big Room has prevailed in the contention set for the .ECO generic top-level domain (gTLD) by passing the Community Priority Evaluation (“CPE”). (*Available at: <https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>.*)

A Final Board Determination on the matter was issued on November 18, 2014. (Determination on Reconsideration Request 14-46, *available at <https://www.icann.org/en/system/files/files/determination-little-birch-minds-machines-18nov14-en.pdf>*.)

The Determination concluded that the parties requesting reconsideration, Little Birch, LLC, also known as “Donuts,” and Minds + Machines Group Limited (collectively “Complainants”), had failed to identify any misapplication of policy or procedure by ICANN or the CPE panel:

The Requesters do not identify any misapplication of any policy or procedure by ICANN or the CPE Panel. Rather, the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and challenge the substantive merits of the CPE Panel’s Report.

Nonetheless, ICANN staff subsequently accepted a CEP with Complainants regarding the .ECO subject matter. (See <https://www.icann.org/en/system/files/files/cep-irp-pending-11dec14-en.pdf>.)

Big Room endeavored to resolve this issue informally, and sent a request in writing to ICANN staff on January 30, 2015, requesting that ICANN terminate the CEP process by February 6, 2015, because the CEP process (and any subsequent Independent Review Process (“IRP”)) only pertains to Board actions or decisions, and as such is not a proper accountability mechanism in this context. ICANN did not respond to that request and Big Room’s .ECO gTLD application continues to remain on hold as a result.

In sum, Big Room is suffering considerable harm as a result of its .ECO gTLD application being placed in “on hold” status for an indeterminate amount of time, which is a direct result of ICANN staff inaction with respect to its failure to terminate the ongoing, inappropriate CEP with Complainants.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

ICANN’s inaction with respect to its failure to terminate the CEP process with Complainants is ongoing.

5. On what date did you become aware of the action or that action would not be taken?

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

ICANN's CEP with Complainants is ongoing. Big Room previously requested in writing, by letter dated January 30, 2015, that ICANN end the CEP. Big Room requested a response from ICANN by February 6, 2015. ICANN has so far failed to respond to the letter, and has not ended the CEP with Complainants. Accordingly, February 6, 2015 is the date by which Big Room learned of the ICANN staff inaction with respect to ending the CEP with Complainants.

6. Describe how you believe you are materially affected by the action or inaction:

Big Room applied for the .ECO gTLD on a "community-priority" basis with the support and engagement of the global environmental community, including, among others, the UN Global Compact, the WWF International, Greenpeace, the Natural Resources Defense Council, the David Suzuki Foundation, 350.org, Green Cross International, and the International Union for the Conservation of

Nature. Big Room’s application passed Initial Evaluation on May 24, 2013 and was placed in a contention set with three other applicants: Little Birch, LLC, Minds + Machines LLC, and Planet Dot Eco LLC. (See <http://newgtlds.icann.org/sites/default/files/ier/f3T5ufeSpeThAJezaxezuDtE/ie-1-912-59314-en.pdf>.) None of these other applicants applied for .ECO on a community basis.

Big Room was invited to Community Priority Evaluation (“CPE”) on March 12, 2014. The CPE Panel’s Report was completed on October 6, 2014, and concluded that Big Room’s community-based application prevailed in its contention set. ICANN subsequently accepted the CPE Panel’s report, allowing only Big Room’s application for the .ECO gTLD to proceed. Unfortunately, as a result of their baseless resort to the various ICANN accountability mechanisms, Little Birch, LLC and Minds + Machines LLC have effectively stalled Big Room’s .ECO application, which is “on hold” for the duration of the ongoing CEP that is the subject of this Request for Reconsideration.

As of the date of this reconsideration request, the .ECO CEP has been active for more than 70 days, over five times the expected duration of a CEP. (See <https://www.icann.org/en/news/irp/cep-11apr13-en.pdf>.) Because there are no issues that could be brought to an IRP with respect to .ECO, there is no basis for a CEP, let alone for extending such a process many weeks beyond its presumptive duration. ICANN and Complainants cannot reasonably cooperate

on narrowing or resolving an issue in advance of an IRP – the sole purpose of a CEP – because there is no issue relating to .ECO that could properly be raised in an IRP.

Had these delays not occurred, Big Room would have launched .ECO concurrently with other recently launched eco-oriented gTLDs. Due to the ICANN staff's inaction with respect to the CEP with Complainants, however, this is no longer a possibility. Significant damage to Big Room and the environmental community has already occurred as a result, and will continue to occur as long as ICANN permits its accountability processes to be abused in this manner.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

As noted above, and further below, many prominent members of the international environmental community are being adversely affected, and will continue to be adversely affected, by ICANN's failure to terminate Complainants' unfounded resort to the accountability mechanisms that have stalled the .ECO application. More broadly, ICANN should not permit powerful private interests such as Complainants to manipulate ICANN's processes and procedures to the detriment of communities like the environmental community and entities like Big Room that work on their behalf

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies).

Please identify the policy(ies) with which the action/inaction was inconsistent.

The policies that are eligible to serve as the basis for a Request for

Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board

before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

Complainants filed a Reconsideration Request with ICANN's BGC on October 22, 2014, apparently claiming that the CPE result was contrary to policy and they were thus harmed by their elimination from contention. As relevant to the gTLD application process, ICANN's Bylaws provide: "Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent that he, she, or it have been adversely affected by . . . one or more staff actions or inactions *that contradict established ICANN policy(ies)* . . ." (emphasis added). (ICANN Bylaws, Article IV, § 2.2.)

The BGC rejected Complainants' request. In a final written determination issued on November 18, 2014, the BGC concluded that Complainants had failed

to “identify any misapplication of any policy or procedure by ICANN or the CPE Panel.” Instead, the BGC found that Complainants “simply disagree[d] with the CPE Panel’s determination and scoring of the Application, and challenge[d] the substantive merits of the CPE Panel’s Report,” neither of which were proper grounds for reconsideration. (Determination on Reconsideration Request 14-46 at 1, *available at* <https://www.icann.org/en/system/files/files/determination-little-birch-minds-machines-18nov14-en.pdf>.) The BGC thus denied Complainants’ request on the ground that Complainants had “failed to demonstrate that the CPE Panel acted in contravention of any established policy or procedure . . .” (*Id.* at 2.)

Given the BGC’s strongly-worded denial of Complainants’ reconsideration request, Big Room was surprised to learn from ICANN’s list of pending matters that ICANN had apparently permitted Complainants to initiate a Cooperative Engagement Process (“CEP”) on December 3, 2014 (See <https://www.icann.org/en/system/files/files/cep-irp-pending-11dec14-en.pdf>.)

ICANN’s decision to engage in a CEP with Complainants violates ICANN’s Bylaws, and the resulting delays and uncertainty are harming both Big Room and its many supporters in the environmental community. ICANN’s Bylaws provide that the CEP is not an independent process, but a recommended precursor to a request for an IRP, intended only “for the purpose of resolving or narrowing the

issues that are contemplated to be brought to the IRP.” (ICANN Bylaws, Article IV, § 3.14.)

The IRP, in turn, is expressly limited to a review of ICANN Board actions (ICANN Bylaws, Article IV, § 3.2):

Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

The narrow permissible scope of both the CEP and any subsequent IRP are reinforced by the terms of their deadlines, which provide that a CEP request must be filed within 15 days “of the posting of *the minutes of the Board meeting* . . . that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.” An IRP must be requested within 30 days of

the posting of such Board minutes (a deadline that is extended for each day of the CEP). (*Id.* at § 3.3.)

The IRP does not apply here, for at least two reasons.

First, the CPE Panel's report, and ICANN's acceptance of that report, are unquestionably ICANN *staff actions*, not Board decisions or actions.

Complainants conceded as much in their Reconsideration Request, claiming “that the publication of these Community Priority Evaluation results [in favor of Big Room] are considered to be an action by ICANN staff,” (Reconsideration Request 14-46 at 9, *available at* <https://www.icann.org/en/system/files/files/request-little-birch-minds-machines-22oct14-en.pdf>) and ICANN itself concluded that Complainants sought “reconsideration of a staff action or inaction.” (Determination on Reconsideration Request 14-46 at 10.) Indeed, there are no relevant Board meeting minutes on which a CEP or IRP could be based. Because the IRP does not contemplate review of staff actions, ICANN has no authority to engage in a CEP – which is nothing more than an informal precursor to an IRP – with Complainants.

Second, even if the IRP could be used to review ICANN staff actions, which it cannot, Complainants' request for a CEP and any subsequent IRP must be rejected as untimely. The “action” about which Complainants complain – the CPE Panel's report – was complete on October 6, 2014, as Complaints again

conceded in their Reconsideration Request. (Reconsideration Request 14-46 at 2.) Complainants, however, did not initiate a CEP until December 3, 2014, well beyond the 15-day time limit for commencing the CEP and, indeed, long after the 30-day period for commencing an IRP expired.

Ultimately, there is nothing in ICANN's Bylaws that permits Complainants to employ the CEP/IRP processes to reconsider the CPE Panel Report finding that Big Room prevailed in its contention set for the .ECO gTLD. Complainants filed a Reconsideration Request – their only recourse following the CPE Panel Report – and the BGC denied that request in a well-reasoned written determination that concluded the CPE Panel had not violated any established policy or procedure. As ICANN's Bylaws make clear: "The Board Governance Committee's determination [of a Reconsideration Request] is final and establishes precedential value." (ICANN Bylaws, Article IV, § 2.15. This provision in the Bylaws should also foreclose any claim by Complainants that the BGC's denial of their Reconsideration Request can be challenged through a CEP/IRP.) As they are doing here, Complainants have established a pattern of improperly pursuing one or more of the ICANN accountability mechanisms where they failed to prevail in their contention set.

In light of the above, there is no justification for the ICANN staff's inaction with respect to ending the ongoing, improper CEP, and it is now well past time for

ICANN to put a stop to Complainants' dilatory tactics and allow Big Room's application to proceed.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

Terminate the CEP process with Complainants, reject any subsequent application by Complainants for an IRP, and thereby permit Big Room's .ECO application to have its 'on hold' status removed and continue through the contracting, testing and delegation process.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and

particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

Big Room's .ECO application has been in process for more than two years and seven months, and is now "on hold" for an undetermined length of time because ICANN has engaged in a CEP with Complainants in a manner that is directly contrary to ICANN's own Bylaws and ICANN staff has now refused to terminate that CEP despite its improper basis. As the prevailing applicant for the .ECO gTLD, Big Room rightfully wishes to execute a Registry Agreement with ICANN for the .ECO gTLD as soon as possible, so that it can commence the difficult work of developing a successful domain that uniquely serves the interests of the global environmental community. Complainants' improper resort to ICANN's dispute resolution processes is further delaying this important project at the same time that competing gTLDs, including .GREEN, recently launched. (See http://www.csrwire.com/press_releases/37574-Launching-Social-Responsibility-With-Green.) This makes it all the more essential that Big Room's application proceeds immediately.

The .GREEN gTLD (see <http://nic.green>), as well as the recently launched .ORGANIC and .BIO, present significant competitive challenges for Big Room and the environmental community with respect to .ECO. These eco-oriented gTLDs will market directly to members of the environmental community and/or to those interested in environmental issues, but unlike .ECO, they do not represent the environmental community. Should a .ECO launch be further delayed, Big Room and the environmental community would undoubtedly suffer harm as a result of not being able to compete directly with these gTLDs for an indeterminate period. For example, every .GREEN domain that is registered (and over time renewed) instead of a .ECO domain will result in funding being channeled to the privately-run .GREEN registry instead of to a community-run .ECO registry, whose whole mission is to support the environmental community and its goals. The same is true for .ORGANIC and .BIO.

Big Room and its partners in the environmental community hope to create an online home governing the environmental community for the greater good. In the same way that the .EDU gTLD signals that a website is affiliated with an American educational institution, .ECO will denote the home of a quality environmental resource to Internet users around the world. Revenue from .ECO domains will be shared with environmental organizations and causes. Most important, .ECO's performance requirements will help members achieve the community's goal of transitioning our global economy towards a more sustainable development model.

Big Room has consistently sought to exemplify best practices and good governance throughout the development and success of its application. For example, Big Room voluntarily adopted public interest commitments inclusive of all aspects of the community commitments explained in its application. (See [https://gtldresult.icann.org/application-](https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/1753?t:ac=1753)

[result/applicationstatus/applicationdetails:downloadpicposting/1753?t:ac=1753.](https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/1753?t:ac=1753))

Big Room is the only gTLD applicant that is also a certified B Corporation, meaning that it is certified to meet rigorous standards of social and environmental performance, as well as accountability and transparency. (See [https://www.bcorporation.net/community/big-room-inc.](https://www.bcorporation.net/community/big-room-inc))

While .ECO is Big Room's sole focus, Complainants operate vast portfolios of gTLDs ranging from .HORSE to .WTF as .com clones. Complainant Little Birch, LLC (also known as "Donuts"), for example, has submitted at least 307 gTLD Applications. Complainants do not share a community vision for .ECO and do not enjoy the support of the environmental community, as their applications are not community-based. Indeed, if Complainants were to operate .ECO, environmental groups would be totally excluded from the .ECO Registry Agreement and likely excluded from any role in .ECO governance or benefits flowing from the gTLD – a result directly contrary to the goals that led Big Room to form a coalition to seek the .ECO gTLD in the first instance. Their lack of good

faith is demonstrated by their ongoing efforts to obstruct and delay Big Room's application.

Had these delays not occurred, Big Room would have launched .ECO concurrently with the other recently launched eco-oriented gTLDs. Due to Complainants' actions, this is no longer a possibility. Significant damage to Big Room and the environmental community has already occurred as a result, and will continue to occur as long as ICANN permits its accountability processes to be abused.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request.

Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for->

[reconsideration-en.htm](#).

Examples of Complainants improperly pursuing one or more of the ICANN accountability mechanisms where they failed to prevail in their contention set:

1. RADIO (Request 14-41, Tin Dale, LLC (Donuts, Inc.)), available at <https://www.icann.org/resources/pages/14-41-2014-09-29-en>;
2. .HOTEL (Request 14-39, Donuts, Inc.; Minds + Machines), available at <https://www.icann.org/resources/pages/14-39-2014-09-23-en>;
3. .HOTEL (Request 14-34, Spring McCook, LLC (Donuts, Inc.), and Top Level Domain Holdings Limited (Minds + Machines)), available at <https://www.icann.org/resources/pages/14-34-2014-07-01-en>;
4. .CHARITY (Request 14-3, Corn Lake, LLC (Donuts, Inc.)), available at <https://www.icann.org/resources/pages/14-3-2014-01-30-en>;
5. .HOSPITAL (Board Reconsideration Request 13-23, Ruby Pike LLC (Donuts, Inc.)), available at <https://www.icann.org/resources/pages/13-23-2014-02-14-en>;
6. Cooperative Engagement and/or Independent Review Processes for .CHARITY, .HOSPITAL, .HOTEL, .SKI, .RUGBY, .INSURANCE, .MEDICAL, .SPORTS, available at <https://www.icann.org/en/system/files/files/cep-irp-pending-12aug14-en.pdf>; and <https://www.icann.org/en/system/files/files/cep-irp-pending-18nov14-en.pdf>

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



02 / 20 / 15

Signature

Date