

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOT REGISTRY LLC, ) ICDR CASE NO. 01-14-0001-5004  
 )  
Claimant, )  
 )  
and )  
 )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S RESPONSE TO CLAIMANT DOT REGISTRY LLC'S  
REQUEST FOR EMERGENCY RELIEF**

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For Assigned Names and Numbers

8 December 2014

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## INTRODUCTION

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Request for Emergency Arbitrator and Interim Measures of Protection (“Emergency Request”) submitted by claimant Dot Registry, LLC (“Dot Registry”) on 19 November 2014.

2. Dot Registry’s Emergency Request should be denied. Dot Registry has failed to demonstrate a reasonable possibility that it will succeed on the merits of this Independent Review Process (“IRP”), and it has failed to properly weigh the potential harm to all other entities that applied for the .LLC, .LLP, and .INC strings if a stay is granted.

3. Dot Registry acknowledges that it must demonstrate a “prima facie” case for Independent Review, which includes demonstrating a reasonable possibility that it will succeed on the merits of its claims in this IRP. Despite this, the Emergency Request ignores virtually the entirety of ICANN’s October 27, 2014 response on the merits of Dot Registry’s IRP Request (“ICANN’s Merits Response”), which demonstrates that Dot Registry has no basis whatsoever for pursuing Independent Review under ICANN’s Bylaws.

4. This response must be read in conjunction with ICANN’s Merits Response, wherein ICANN provides the background facts related to this matter and explains in detail why Dot Registry’s claims are not appropriate for an IRP. As explained in ICANN’s Merits Response, the majority of Dot Registry’s claims do not implicate any Board action, and thus, Independent Review is simply not applicable. In the two instances where Dot Registry has identified a Board action, ICANN’s Merits Response demonstrates that the Board’s actions were appropriate (and that Dot Registry has presented no evidence to the contrary). Strikingly, the Emergency Request ignores nearly all of ICANN’s arguments, limiting its reply to ICANN’s

Merits Response to a cursory “waive of the hand” on pages 27-29. Dot Registry’s decision not to respond to ICANN’s Merits Response is fatal to its Emergency Request because the record before the Emergency Panelist demonstrates that Dot Registry cannot possibly succeed on the merits of its claims in this IRP.

5. Further, as to the issue of balancing harms, Dot Registry argues that it would be harmed in the absence of a stay but completely ignores the fact that a stay would cause significant prejudice to the entities that submitted 21 competing applications for the three generic top level domains (“gTLDs”) at issue. In deciding whether to stay further processing of any or all of the applications for .LLC, .LLP, and .INC, ICANN had to consider the potential injury that delay might cause the competing applicants for those strings, and weigh that against the likelihood that Dot Registry’s claims would succeed. After carefully weighing the factors, ICANN elected to proceed with processing all applications for these gTLDs, including the auctions that are currently scheduled for 21 January 2015.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

6. Dot Registry has applied to ICANN for the opportunity to operate the .LLC, .LLP, and .INC gTLDs (“Applications”). Dot Registry is not the only applicant for these strings: there are eight other applicants for .LLC, ten other applicants for .INC, and three other applicants for .LLP. Dot Registry is, however, the only applicant that submitted “community applications” for these gTLDs, proposing that each of the gTLDs be operated “for the benefit of a clearly delineated community.”<sup>1</sup> ICANN’s New gTLD Applicant Guidebook (the “Guidebook”) governs the process for evaluating gTLD applications and permits applications to be submitted

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<sup>1</sup> Guidebook, § 1.2.3.1 (Ex. C-ER-2).

as either “community applications” or “standard applications.”<sup>2</sup>

7. Where, as here, a community application is in “contention” with other applications for the same proposed new gTLD, the community-based applicant(s) may participate in Community Priority Evaluation (“CPE”), which is performed by a panel selected by the Economic Intelligence Unit (“EIU”), a third-party provider that ICANN selected to conduct the CPEs.<sup>3</sup> If the application prevails in CPE, only that application (and any other community-based applications for the same string that have prevailed in CPE) is permitted to proceed, while the “non-community” applications may not proceed.<sup>4</sup>

8. The CPE Panels selected by the EIU to evaluate Dot Registry’s Applications determined that the Applications did not meet the criteria required to prevail in CPE.<sup>5</sup> The requirements to prevail in CPE are necessarily “very stringent” because a qualifying community-based application “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”<sup>6</sup> Although Dot Registry’s initial IRP filing implies that its Applications were on the cusp of prevailing, each of Dot Registry’s Applications received only five of the sixteen available points on the CPE criteria, and each needed a minimum of fourteen points in order to prevail.<sup>7</sup> In other words, Dot Registry’s Applications were not even close to qualifying for priority treatment over all of the other competing applications.

9. Because Dot Registry’s Applications did not prevail in CPE, all of the applications for the .LLC, .LLP, and .INC gTLDs will proceed, including Dot Registry’s Applications. Thus, Dot Registry’s Applications are still very much in contention for these new

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*, § 4.3.

<sup>4</sup> *Id.*, § 4.2.3.

<sup>5</sup> CPE Report for .LLC (Ex. C-18); CPE Report for .LLP (Ex. C-19); CPE Report for .INC (Ex. C-20).

<sup>6</sup> Guidebook, § 4.2.3 (Ex. C-ER-2).

<sup>7</sup> CPE Report for .LLC (Ex. C-18); CPE Report for .LLP (Ex. C-19); CPE Report for .INC (Ex. C-20).

gTLDs; Dot Registry simply failed to convince the CPE Panel that its Applications warranted the privilege of prevailing over all other applications for the same gTLDs.

10. Dissatisfied that it will have to be in contention with the other applications for .LLC, .LLP, and .INC, Dot Registry filed its IRP Request on September 21, 2014. In its IRP Request, Dot Registry challenged the CPE Panel Reports determining that its Applications for .LLC, .LLP, and .INC did not prevail in CPE. Dot Registry argued that Independent Review was warranted because: (i) the Board “appointe[d] the EIU to conduct reviews for which the EIU lacked the requisite skill and expertise;”<sup>8</sup> (ii) the Board “allow[ed] the EIU to promulgate new policies and procedures that created additional requirements for applicants undergoing CPE after the application period closed,” namely the “Community Priority Evaluation Guidelines” (“CPE Guidelines”);<sup>9</sup> (iii) the Board improperly accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that applicants for various strings, including .LLC, .INC, and .LLP, should be required to put in place additional safeguards to mitigate the risk of consumer harm;<sup>10</sup> (iv) the EIU “appear[ed] to have a conflict of interest” with respect to Dot Registry’s Applications;<sup>11</sup> and (v) the Board improperly denied Dot Registry’s request for reconsideration of the CPE Reports.<sup>12</sup>

11. ICANN filed its Merits Response on 27 October 2014. ICANN’s Merits Response demonstrates that Dot Registry has not shown a reasonable possibility of success on the merits of its claims. First, as to Dot Registry’s argument that ICANN’s Board improperly “appointed” the EIU, ICANN explained that the Board had no involvement in the selection of the

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<sup>8</sup> IRP Request ¶¶ 63, 65.

<sup>9</sup> *Id.* ¶ 62.

<sup>10</sup> *Id.* ¶¶ 63, 65.

<sup>11</sup> *Id.* ¶ 47.

<sup>12</sup> *Id.* ¶¶ 48-50.

EIU, which was selected by ICANN staff following a public solicitation of Expressions of Interest. Because Independent Review is appropriate only where a Board action was inconsistent with ICANN’s Articles or Bylaws, the selection by ICANN’s staff of the EIU is not a basis for Independent Review.<sup>13</sup> ICANN noted that, in any event, Dot Registry’s only “evidence” that the EIU “lacked the requisite skill and expertise” was that Dot Registry disagreed with the conclusions of the CPE Panels that evaluated Dot Registry’s Applications.<sup>14</sup> Dot Registry presented no other evidence relating to the EIU’s competence.

12. Second, as to the argument that the Board “allowed” the EIU to promulgate the CPE Guidelines after the new gTLD application period closed, ICANN explained that the Board again had no involvement in the promulgation of the CPE Guidelines, which were produced by the EIU and published by ICANN staff after considering community feedback.<sup>15</sup> ICANN explained that, in accordance with the Guidebook, the Board established the New gTLD Program and overall guidelines but left the implementation to ICANN staff.<sup>16</sup> Furthermore, ICANN noted that the CPE Guidelines do not subject Dot Registry to “standards that did not exist when it prepared and submitted its applications.”<sup>17</sup> To the contrary, the CPE Guidelines state that they “do not modify the Guidebook framework” or change the Guidebook standards.<sup>18</sup> Even if a modification had occurred, the terms and conditions of the new gTLD Applications submitted by Dot Registry provide that ICANN “reserves the right to make reasonable updates and changes to [the Guidebook]” and that new gTLD applications “will be subject to any such updates and

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<sup>13</sup> IRP Response ¶ 26.

<sup>14</sup> *Id.* ¶ 27.

<sup>15</sup> *Id.* ¶ 29.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 30 (quoting IRP Request ¶ 28).

<sup>18</sup> CPE Guidelines at 2 (Ex. R-1).

changes.”<sup>19</sup>

13. Third, as to the argument that the Board improperly accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that applicants for various strings, including .LLC, .INC, and .LLP, should be required to put in place additional safeguards to mitigate the risk of consumer harm, ICANN noted that, pursuant to ICANN’s Bylaws, the Board is required to consider the GAC’s advice on public policy matters.<sup>20</sup> Dot Registry argued that the Board did not adequately respond to the GAC’s advice because the safeguards it instituted were voluntary and therefore inadequate. ICANN explained that Dot Registry could not demonstrate that it had suffered harm from ICANN’s acceptance of the GAC advice, and further noted that Dot Registry was wrong in stating that the safeguards were voluntary (they are mandatory).<sup>21</sup>

14. Dot Registry also argued that the Board should have rejected the GAC advice because by allowing competing applicants for .LLC, .INC, and .LLP to institute additional safeguards, the Board made Dot Registry’s application less competitive. Nothing contained in any other application has any bearing whatsoever on the CPE Panels’ evaluations of Dot Registry’s Applications, nor does it have any effect on the auction process. In addition, as previously stated, the terms and conditions of the New gTLD Applications submitted by Dot Registry provide that “ICANN reserves the right to make reasonable changes . . . to the application process.”<sup>22</sup>

15. Fourth, as to the argument that the EIU “appear[ed] to have a conflict of interest”

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<sup>19</sup> New gTLD Application Terms and Conditions ¶ 14 (Ex. R-2).

<sup>20</sup> IRP Response ¶ 31.

<sup>21</sup> *Id.* ¶ 33.

<sup>22</sup> *Id.* ¶ 34 (quoting New gTLD Application Terms and Conditions ¶ 14).



with respect to Dot Registry's Applications, ICANN explained that Dot Registry had presented no evidence of any Board action related to Dot Registry's Applications (or even that the alleged conflict was ever brought to the Board's attention).<sup>23</sup> ICANN further noted that the Guidebook sets forth conflict of interest guidelines for third-party evaluators, and that Dot Registry had presented no evidence that the EIU had failed to follow those guidelines or that the attenuated conflict it alleges (involving not a CPE panelist but a Board member of the Economist Group, of which the EIU is a division) had any effect on the evaluation of Dot Registry's Applications.<sup>24</sup>

16. Fifth, as to the argument that the Board improperly denied Dot Registry's request for reconsideration of the CPE Reports, ICANN explained that while Dot Registry disagreed with the conclusion of the CPE Reports, Dot Registry had not identified any provision of the Bylaws or Articles that the Board allegedly violated in denying Dot Registry's Reconsideration Request.<sup>25</sup> Reconsideration Requests are proper only where an action by ICANN's staff or by a third-party evaluator allegedly violates established ICANN policy or procedure.<sup>26</sup> As explained in ICANN's Merits Response, Dot Registry did not establish any such violation; Dot Registry's substantive disagreement with the CPE Reports was not a basis for reconsideration and is not a basis for an IRP.<sup>27</sup>

## ARGUMENT

### **I. DOT REGISTRY MUST DEMONSTRATE A REASONABLE POSSIBILITY OF SUCCESS ON THE MERITS IN ORDER TO QUALIFY FOR EMERGENCY RELIEF.**

17. It is generally accepted under both international and U.S. law that in order to

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<sup>23</sup> *Id.* ¶ 35.

<sup>24</sup> *Id.* ¶¶ 36-37.

<sup>25</sup> *Id.* ¶¶ 39-40.

<sup>26</sup> Bylaws, Art. IV, § 2.2 (Ex. C-ER-2).

<sup>27</sup> IRP Response ¶¶ 42-48.

demonstrate entitlement to interim relief, the party seeking relief must demonstrate a reasonable possibility of success on the merits. Article 27(A)(1)(b) of the United Nations Commission on International Trade Law's ("UNCITRAL's") Model Law on International Commercial Arbitration states that a party requesting an interim measure must demonstrate that "[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim."<sup>28</sup>

Similarly, tribunals under the International Chamber of Commerce have required a party seeking interim relief to demonstrate a likelihood of success on the merits, noting that the requirement is generally "found both in judicial and arbitral practice."<sup>29</sup> Likewise, under U.S. law, a party seeking a preliminary injunction must demonstrate, at a minimum, that "the likelihood of success is such that serious questions going to the merits were raised."<sup>30</sup> This requirement is appropriate in light of the fact that interim measures are, as one international tribunal has noted, "extraordinary measures not to be granted lightly."<sup>31</sup>

18. Dot Registry itself acknowledges that it needs to demonstrate that it has established "a *prima facie* case on the merits."<sup>32</sup> The treatise that Dot Registry relies upon makes clear that, in this context, a *prima facie* case requires showing a "probability of success on the merits."<sup>33</sup> As the treatise explains, a neutral "may quite properly consider the legal sufficiency and strength of the parties' respective cases" because "[i]t makes very little sense to 'protect' one party . . . if there appears to be little prospect that the 'protected' party will prevail

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<sup>28</sup> UNCITRAL Model Law on International Commercial Arbitration, Art. 17A(1)(b) (Ex. C-ER-50).

<sup>29</sup> See, e.g., *Distributor A v. Manufacturer B*, ICC Case No. 10596, Interlocutory Award of 2000, Yearbook Commercial Arbitration, Vol. XXX 68 n.3 (2005) (Ex. R-ER-1).

<sup>30</sup> *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132-32 (9th Cir. 2011) (internal quotation marks omitted); see also *Winter v. Nat'l Resources Defense Council, Inc.*, 555 U.S. 7, 31 (2008).

<sup>31</sup> *Paushok v. Mongolia*, Order on Interim Measures of 2 September 2008, ¶ 39 (Ex. R-ER-2).

<sup>32</sup> Emergency Request ¶ 23.

<sup>33</sup> Gary G. Born, 2 INTERNATIONAL COMMERCIAL ARBITRATION 2477 (Ex. C-ER-39); see also *Punnett v. Carter*, 621 F.2d 578, 583 (3d Cir. 1980) (requiring a party seeking a preliminary relief to "make a *prima facie* case showing a reasonable probability that it will prevail on the merits,").

in a final award.”<sup>34</sup>

19. Dot Registry has failed to meet this standard. It has completely ignored ICANN’s Merits Response, apparently hoping that the Emergency Panelist will recommend emergency relief based simply on the harm Dot Registry contends that it will suffer. As explained above, ICANN’s Merits Response comprehensively refutes each of Dot Registry’s claims, demonstrates that Dot Registry challenges only a few Board actions, and shows that the Board did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook.

20. Dot Registry’s Emergency Request (submitted several weeks after ICANN submitted its Merits Response) devotes one page to responding to the arguments made in ICANN’s Merits Response. Dot Registry mischaracterizes ICANN’s primary argument by asserting that “ICANN’s primary defense to Dot Registry’s claims is the assertion that ICANN is not responsible for the acts of its agents and employees.”<sup>35</sup> This is not ICANN’s primary defense, and ICANN has never argued that it can avoid responsibility for the acts of its agents and employees. In this IRP, however, the actions of ICANN’s agents and employees are irrelevant. The Bylaws are clear that the Independent Review Process is a unique and voluntary procedure available only to claimants that allege they have been materially and adversely affected by “any action by the Board that [the Claimant] asserts is inconsistent with the Articles of Incorporation or Bylaws.”<sup>36</sup> Dot Registry cannot unilaterally modify the Bylaws in order to accommodate its desire to challenge ICANN staff and third party actions in an IRP.

21. Dot Registry’s claims do not fall within the parameters of an IRP as set forth in the Bylaws, and Dot Registry does not even attempt to argue otherwise. Dot Registry also fails

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<sup>34</sup> Gary G. Born, 2 INTERNATIONAL COMMERCIAL ARBITRATION 2479 (Ex. C-ER-39).

<sup>35</sup> Emergency Request ¶ 42.

<sup>36</sup> Bylaws, Art. IV, § 3.2 (emphasis added) (Ex. C-ER-2).

to respond to the remainder of the arguments in ICANN's Merits Response, which include detailed arguments that, even if the actions of ICANN staff and third parties were reviewable in this IRP, Dot Registry has not provided evidence that those actions were in any way improper or in violation of ICANN's Articles or Bylaws.

22. As a result, the parties' papers establish that Dot Registry cannot prevail in this IRP because: (i) Dot Registry has not identified any Board action with respect to the appointment of the EIU, the promulgation of the CPE Guidelines, or the EIU's alleged conflict of interest; (ii) even if any of these matters included Board action, Dot Registry has not demonstrated how those staff and third-party actions violated ICANN's Articles or Bylaws; and (iii) Dot Registry has no basis to argue that the Board's actions in accepting the GAC Advice and denying Dot Registry's Reconsideration Request were in any way improper.

23. ICANN understands that Dot Registry is disappointed that its Applications did not prevail in CPE, and that Dot Registry will therefore have to compete with other standard applicants for the .LLC, .LLP, and .INC gTLDs. But Dot Registry has not demonstrated that this disappointment is an appropriate basis for an IRP. Dot Registry fails to demonstrate that the Board had any involvement in the CPE Reports or, in any event, that ICANN staff or the EIU acted improperly with respect to the CPE Reports. ICANN's Board has no obligation to (nor should it) second-guess the hundreds of decisions of the independent third party providers that evaluated various aspects of the new gTLD applications or presided over disputes arising from those applications. The Board and the community recognized, in developing the Guidebook, that it is not appropriate for the Board to take on that burden. Dot Registry's disagreement with the outcome of the CPEs does not justify Independent Review under ICANN's Bylaws.

**II. DOT REGISTRY HAS NOT DEMONSTRATED THAT THE HARM IT WOULD SUFFER IN THE ABSENCE OF INTERIM RELIEF OUTWEIGHS THE HARM TO OTHERS, PARTICULARLY GIVEN ITS**

**FAILURE TO PRESENT FACTS SHOWING THAT IT CAN PREVAIL IN THIS IRP.**

24. As Dot Registry acknowledges in its Emergency Request, in order to show a “necessity” for interim relief under international law, Dot Registry must demonstrate proportionality, *i.e.* that the harm it would incur in the absence of interim relief would “exceed[] greatly the damage caused to the party affected” by the issuance of interim relief.<sup>37</sup> Dot Registry contends that it would suffer serious harm in the absence of interim relief because the “[o]peration of .INC, .LLC, and .LLP is a unique right” and “Dot Registry was created expressly for the purpose of securing and managing the registry functions of these three strings.”<sup>38</sup> As an initial matter, the fact that Dot Registry did not prevail in CPE does not mean that it has no chance of prevailing in contention for the .INC, .LLC, and .LLP strings. It simply means that Dot Registry will have to compete with the other applicants for those strings, rather than automatically excluding those other applicants due to community priority. Further, Dot Registry fails to acknowledge that, whatever its unilateral plans might have been, its actual probability of harm is greatly diminished by its scant probability of success on the merits of its claims in this IRP. Finally, Dot Registry minimizes the substantial potential harm that its competitors for the .INC, .LLC, and .LLP gTLDs could suffer if the delegation of those strings were delayed.

25. ICANN’s decision to proceed with processing all applications for .LLC, .LLP, and .INC, including moving forward with auctions for these potential new gTLDs despite Dot

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<sup>37</sup> Emergency Request ¶ 33; *see also Burlington Resources Inc. v. Republic of Ecuador & Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures, 29 June 2009, ¶ 81 (quoting *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on revocation of provisional measures of 13 May 2008, ¶ 72) (Ex. C-ER-38); *see also* UNCITRAL’s Model Law on Commercial Arbitration Art. 17(A)(1)(a) (requiring that a party requesting relief demonstrate that “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”) (emphasis added) (Ex. C-ER-50); *Paushok v. Mongolia*, Order on Interim Measures of 2 September 2008, ¶¶ 68-69 (Ex. R-ER-2).

<sup>38</sup> Emergency Request ¶ 34.

Registry's pending IRP is a reflection of ICANN's belief that: (i) Dot Registry's IRP is frivolous and unlikely to succeed on the merits; and (ii) competing applicants for those strings could potentially suffer substantial harm if the further processing of those strings were delayed.<sup>39</sup> This is the same equitable consideration that is reflected in the proportionality requirement, and explains why Dot Registry is not entitled to interim relief in this case.

### CONCLUSION

26. ICANN urges the Emergency Panelist to deny Dot Registry's request for a stay of the auction and further processing of the applications for .LLC, .LLP, and .INC. Dot Registry has not met its burden with respect to seeking emergency relief because Dot Registry has not demonstrated a reasonable possibility of success, nor has Dot Registry demonstrated that any alleged harm to it substantially outweighs the harm to the other 21 applicants that are seeking to participate in the auction for these three gTLD strings.

Respectfully submitted,

JONES DAY

Dated: December 8, 2014

By: Jeffrey A. LeVee /RLZ  
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<sup>39</sup> As of 1 December 2014, four-hundred and forty four new gTLDs had been delegated. (See <http://newgtlds.icann.org/en/program-status/statistics>.) Given the growing competition in the gTLD space, any further delay in the delegation of the .INC, .LLC, and .LLP is not appropriate.