

**REFERENCE MATERIALS – BOARD SUBMISSION NO.**

**2016.08.09.2d.REV1.CLEAN**

**TITLE:                    Consideration of *Dot Registry, LLC vs. ICANN Independent Review Process Final Declaration***

**Document/Background Links**

The following attachment is relevant to the Board’s consideration of the Panel’s Final Declaration in the Dot Registry IRP:

- Attachment A is the Panel’s [Final Declaration](#) issued on 29 July 2016.
- Attachment B is a letter from Dot Registry, dated 6 August 2016, which can also be found at [INSERT URL].
- Attachment C is the Navigant Report referenced in Attachment B
- Attachment D is the CPE Report referenced in Attachment B
- Attachment E is a document entitled “Factual Clarifications Regarding Online Blogged Report in the Register on 3 August 2016 about Dot Registry v. ICANN IRP Final Declaration”

**Other Relevant Materials**

The documents submitted during the course of the Dot Registry IRP are available at:

<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>.

The BGC Determination on Reconsideration Requests 14-30, 14-32, and 14-33 is

available at: <https://www.icann.org/en/system/files/files/determination-dotregistry-24jul14-en.pdf>.

Reconsideration Request 14-30 is available at:

<https://www.icann.org/resources/pages/14-30-2014-06-25-en>.

Reconsideration Request 14-32 is available at:

<https://www.icann.org/resources/pages/14-32-2014-06-26-en>.

Reconsideration Request 14-33 is available at:

<https://www.icann.org/resources/pages/14-33-2014-06-26-en>.

The CPE Report on Dot Registry's application for .INC is available at:

<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>.

The CPE Report on Dot Registry's application for .LLC is available at:

<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>.

The CPE Report on Dot Registry's application for .LLP is available at:

<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>.

A letter from Delaware Department of State to the ICANN Board members, dated 8 August 2016, is available at: [ADD URL].

Submitted by: Amy A. Stathos, Deputy General Counsel

Date Noted: 8 August 2016

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**INDEPENDENT REVIEW PROCESS**  
**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01 – 14 - 0001 – 5004

In the matter of an Independent Review  
Concerning ICANN Board Action re  
Determination of the Board Governance Committee  
Reconsideration Requests 14-30, 14-32, 14-33 (24 July 2014)

DOT REGISTRY, LLC, for itself and on behalf of The NATIONAL ASSOCIATION OF  
SECRETARIES OF STATE

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

**DECLARATION OF THE INDEPENDENT REVIEW PANEL**

29 July 2016

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

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## I. INTRODUCTION

### A. Internet Corporation for Assigned Names and Numbers (ICANN)

1. ICANN is a nonprofit public-benefit corporation organized under the laws of the State of California. ICANN was incorporated on September 30, 1998. Jon Postel, a computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network ("ARPANET"), which morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations when normal means of communication were unavailable or deemed insecure.

2. Prior to ICANN's creation, there existed seven generic Top Level Domains (gTLDs), which were intended for specific uses on the Internet: *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use; *.org*, intended for the use of non-commercial organizations; *.net*, intended for the use of network related entities; *.edu*, intended for United States higher education institutions; *.int*, established for international organizations; *.gov*, intended for domain name registrations for arms of the United States federal

government and for state governmental entities; and, finally, *.mil*, designed for the use of the United States military.

3. ICANN's "mission," as set out in its bylaws, is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." Bylaws, Art. 1, § 1. ICANN has fulfilled this function under a contract with the United States Department of Commerce.

4. The original ICANN Board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. VI, § 1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VII of the Bylaws.

5. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN Board of Directors began considering the invitation to the general public to operate new gTLDs of its own creation. In 2008, the Board of Directors adopted 19 specific Generic Name Supporting Organization (GNSO) recommendations for the implementation of a new gTLD programs. In 2011 the Board approved the Applicant Guidebook and the launch of a new gTLD program. The application window opened on January 12, 2012, and ICANN immediately began receiving applications.

B. Board Governance Committee (BGC)

6. The Board Governance Committee was created by Charter, approved by the ICANN Board of Directors on October 13, 2012. Among its responsibilities is to consider and respond to reconsideration requests submitted to the Board pursuant to ICANN's Bylaws and to work closely with the Chair and Vice Chair of the Board and with ICANN's CEO. Charter, Sections 1.6 and 2.6, and 2.1.3. At the hearing of this matter, and consistent with the position taken by ICANN before other Independent Review Panels, counsel for ICANN confirmed that the conduct of the BGC was the conduct of the Board for purposes of these proceedings.

7. The BGC is composed of at least three, but not more than 6 voting Board Directors and not more than 2 Liaison Directors, as determined and appointed annually by the Board. Only the voting Board of Directors members shall be voting members of the BGC. Charter, Section 3.

8. A preliminary report with respect to actions taken at each BGC meeting, whether telephonic or in-person, shall be recorded and distributed to BGC members within two working days, and meeting minutes are to be posted promptly following their approval by the BGC. Charter, Section 6. No such preliminary report was produced to the Panel in these proceedings.

C. Dot Registry LLC (Dot Registry)

9. Dot Registry is a limited liability company registered under the laws of the State of Kansas. Dot Registry was formed in 2011 in order to apply to ICANN for the rights to operate five new gTLD strings: *.corp*, *.inc*, *.llc*, *.llp*, and *.ltd*. Dot Registry applied to be the only community applicant for the new gTLD strings *.inc*, *.llc*, and *.llp*. Dot Registry submitted each of its three applications for listed strings on 13 June 2012. Dot Registry submitted these applications for itself and on behalf of the National Association of Secretaries of State (NASS). Dot Registry is an affiliate of the NASS, which is “an organization which acts as a medium for the exchange of information between states and fosters cooperation in the development of public policy, and is working to develop individual relationships with each Secretary of State’s office in order to ensure our continued commitment to honor and respect the authorities of each state.” New gTLD Application Submitted to ICANN by: Dot Registry LLC, String: INC, Originally Posted: 13 June 2012, Application ID: 1-880-35979, Exhibit C-007, Para. 20(b), p. 14 Of 66. For ease of reading, this Declaration shall refer to “Dot Registry” as the disputing party, but the Panel recognizes that Dot Registry and the NASS jointly made the Reconsideration Requests at issue in these proceedings.

10. The mission/purpose stated in its respective applications for the three strings was “to build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically



serve the respective communities of “registered corporations,” “registered limited liability companies,” and/or “registered limited liability partnerships.” Under Dot Registry’s proposal, a registrant would have to demonstrate that it has registered to do business with the Secretary of State of one of the United States in the form corresponding to the gTLD (corporation for *.inc*, limited liability company for *.llc*, and limited liability partnership for *.llp*.)

11. With each of its community applications, Dot Registry deposited an additional \$22,000, so as to be given the opportunity to participate in a Community Priority Evaluation (“CPE”). A community application that passes a CPE is given priority for the gTLD string that has successfully passed, and that gTLD string is removed from the string contention set into which all applications that are identical or confusingly similar for that string are placed. The successful community CPE applicant is awarded that string, unless there are more than one successful community applicant for the same string, in which case the successful applicants would be placed into a contention set.

D. The Economist Intelligence Unit (EIU)

12. The EIU describes itself as “the business information arm of the Economist Group, publisher of the Economist.” “The EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world’s leading provider of country intelligence, the EIU

helps executives, governments and institutions by providing timely, reliable and impartial analysis.” Community Priority Evaluation Panel and Its Processes, at 1.

13. The EIU responded to a request for proposals received from ICANN to undertake to act as a Community Priority Panel. The task of a Community Priority Panel is to review and score community based applications which have elected the community priority evaluation based on information provided in the application plus other relevant information available (such as public information regarding the community represented).” Applicant Guidebook (“AGB”), § 4.2.3. The AGB sets out specific Criteria and Guidelines which a Community Priority Panel is to follow in performing its evaluation. *Id.*

14. Upon its selection by ICANN, the EIU negotiated a services contract with ICANN whereby the EIU undertook to perform Community Priority Evaluations (CPEs) for new gTLD applicants. Declaration of <sup>EIU Contact Information Redacted</sup>  
EIU Contact Information Redacted of the EIU  
(hereinafter <sup>EIU Contact Information Redacted</sup> Declaration”), ¶¶ 1 and 4, at 1 and 2.

15. <sup>EIU Contact Information Redacted</sup> declared that EIU was “not a gTLD decision-maker but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible for all legal matters pertaining to the application process.” <sup>EIU Contact Information Redacted</sup> Declaration, ¶3,

at 2. Further, ICANN confirmed at the hearing that ICANN “accepts” the CPE recommendations from the EIU, a statement reiterated in the Minutes for the BGC meeting considering the subject Reconsideration Requests: “Staff briefed the BGC regarding Dot Registry, LLC’s (‘Requestor’s’) request seeking reconsideration of the Community Priority Evaluation (‘CPE’) Panel’s Reports, and ICANN’s acceptance of those Reports.” (Emphasis added.)

16. Under its contract with ICANN, the EIU agreed to a Statement of Work. Statement of Work No:[2], ICANN New gTLD Program, Application Evaluation Services – Community Priority Evaluation and Geographic Names, March 12<sup>th</sup> 2012 (“EIU SoW”). Under Section 10, Terms and Conditions, supplemental terms were added to the Master Agreement between the parties. Among those terms are the following:

“(ii) ICANN will be free in its complete discretion to decide whether to follow [EIU’s] determination and to issue a decision on that basis or not;

(iii) ICANN will be solely responsible to applicants and other interested parties for the decisions it decides to issue and the [EIU] shall have no responsibility nor liability to ICANN for any decision issued by ICANN except to the extent the [EIU’s] evaluation and recommendation of a relevant application constitutes willful misconduct or is fraudulent, negligent or in breach of any of {EIU’s} obligations under this SoW;

(iv) each decision and all associated materials must be issued by ICANN in its own name only, without any reference to the [EIU] unless agreed in writing in advance.” EIU SoW, at 14.

17. In order to qualify to provide dedicated services to a defined community, an applicant must undergo an evaluation of its qualifications to serve such community, the criteria for which are set out in the Community Priority Evaluation Guidelines (“CPE Guidelines”). The CPE Guidelines were developed by the Economist Intelligence Unit (“EIU”) under contract with ICANN. According to the EIU, “[t]he CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.” CPE Guidelines Prepared by the EIU, Version 2.0 (“CPE Guidelines”), at 2. In the CPE Guidelines, the EIU states that “the evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.” CPE Guidelines, at 22.

18. This message was reiterated in the EIU Community Priority Evaluation Panel and its Processes, where it states that the CPE process “respects the principles of fairness, transparency avoidance of potential conflicts of interest, and non-discrimination. Consistency in approach in scoring applications is of particular importance.” Community Priority Evaluation Panel and its Processes, at 1.

## II. PROCEDURAL HISTORY

### A. Community Priority Evaluation and Reconsideration

19. On June 11, 2014, the EIU issued three Community Priority Evaluation Reports, one for each of the three new gTLDs that are the subject of this

proceeding. In order to prevail on each of its applications, Dot Registry would have to have been awarded 14 out of a possible 16 points per application. In the evaluation of each of its three applications, Dot Registry was awarded a total per application of 5 points. Thus, each of the applications submitted did not prevail.

20. The practical result of this failure to prevail is that Dot Registry would be placed in a contention set for each of the proposed gTLDs with other applicants who had applied for one or more of the proposed gTLDs.

21. On April 11, 2013, Dot Registry submitted three Requests for Reconsideration to the BGC, requesting that the BGC reconsider the denial of Dot Registry's applications for Community Priority.

22. The bases for Dot Registry's requests for reconsideration were the following:

- a. The CPE Panel failed to validate all letters of support of and in opposition to its application for Community Priority status;
- b. The CPE Panel failed to disclose the sources, the substance, the methods, or the scope of its independent research;
- c. The CPE Panel engaged in "double counting," which practice is contrary to the criteria established in the AGB;
- d. The Panel failed to evaluate each of Dot Registry's applications independently;
- e. The Panel failed to properly apply the CPE criteria set out in the guidebook for community establishment, community organization, pre-existence, size, and longevity;
- f. The Panel used the incorrect standard in its evaluation of the nexus criterion;

- g. The failure in determining Nexus, led to a failure in determining “uniqueness.”
- h. The Panel erroneously found that Dot Registry had failed to provide for an appropriate appeals process in its applications;
- i. The Panel applied an erroneous standard to determine community support, a standard not contained in the CPE;
- j. The Panel misstated that the European Commission and the Secretary of State of Delaware opposed Dot Registry’s applications and failed to note that the Secretary of State of Delaware had clarified the comment submitted and that the European Commission had withdrawn its comment.

23. In response to Dot Registry’s Requests for Reconsideration of its applications, on July 24, 2014, The Board Governance Committee (“BGC”) issued its Determination that “[Dot Registry] has not stated grounds for reconsideration.” The BGC’s Determination was based on the failure of Dot Registry to show “that either the Panels or ICANN violated any ICANN policy or procedure with respect to the Reports, or ICANN acceptance of those Reports.” Determination of the Board Governance Committee (BGC) Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014.

B. History of Independent Review Process

24. As all of the party’s substantive submissions and the IRP Panel’s procedural orders are posted on the ICANN web site covering IRP Proceedings (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>), this section will serve only to highlight those that contain significant procedural or substantive rulings.

25. On September 22, 2014, Dot Registry requested Independent Review of the denial of reconsideration of each of its three applications. On October 27, 2014, ICANN filed its Response to Dot Registry's request for Independent Review.

26. On November 19, 2014, Dot Registry requested the appointment of an Emergency Panelist and for interim measures of protection. On November 26, 2014, the emergency panelist, having been appointed, issued Procedural Order No. 1, setting out a schedule for the hearing and resolution of the request for interim measures of protection.

27. On December 8, 2014, ICANN filed a Response to Dot Registry's request for emergency relief.

28. On December 23, 2014, the Emergency Independent Review Panelist issued the Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection. The Order made the following rulings:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP, and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.

4. This Order renders a final decision on [Dot Registry's] Request for emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied

29. The Independent Review Process Panel (the "IRP Panel"), having been duly constituted, issued a total of thirteen procedural orders, in addition to that issued by the Emergency Independent Review Panelist.

All of the orders were issued by the unanimous IRP Panel. The following are descriptions of portions of those orders particularly germane to the present Declaration.

30. On March 26, 2015, the Independent Review Process Panel [the "IRP Panel"] having been duly constituted, the IRP Panel issued an Amended Procedural Order No. 2. Among other matters covered therein, pursuant to its powers under ICDR Rules of Arbitration, Art. 20, 4 ("At any time during the proceedings, the [panel] may order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate") the IRP Panel ordered ICANN to produce to the Panel certain documents and gave each party the opportunity to request of the other additional documents.

31. The order which required production of certain documents to the Panel read as follows:

Pursuant to the Articles of Incorporation and Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") and the International Arbitration Rules and Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process of the International Centre for Dispute



Resolution (“ICDR”), the Panel hereby requires ICANN to produce to the Panel and Dot Registry, LLC (“Dot Registry”) no later than April 3, 2015, all non-privileged communications and other documents within its possession, custody or control referring to or describing (a) the engagement by ICANN of the Economist Intelligence Unit (“EIU”) to perform Community Priority Evaluations, including without limitation any Board and staff records, contracts and agreements between ICANN and EIU evidencing that engagement and/or describing the scope of EIU’s responsibilities thereunder, and (b) the work done and to be done by the EIU with respect to the Determination of the ICANN Board of Governance Committee on Dot Registry’s Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC) and 14-33 (.LLP), dated July 24, 2014, including work done by the EIU at the request, directly or indirectly, of the Board of Governance Committee on or after the date Dot Registry filed its Reconsideration Requests, and (c) consideration by ICANN of, and acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry’s applications for .INC, .LLC, and/or .LLP, including at the request, directly or indirectly, of the Board of Governance Committee.

32. In Procedural Order No. 3, issued May 24, 2015, the Panel’s order to ICANN to produce documents was clarified as follows:

The Panel notes that the Panel sought *inter alia* all non-privileged communications and other documents within ICANN’s possession, custody or control referring or describing:

- (a) The engagement by ICANN of the EIU to perform Community Priority Evaluations. That request covers internal ICANN documents and communications, not just communications with the EIU, referring to or describing the subject of the Panel’s request (the engagement to perform Community Priority Evaluations).
- (b) The work done and to be done by the EIU with respect to the Determination of the ICANN board of governance Committee on Dot Registry’s Reconsideration Request. That request again covers internal ICANN documents and communications, not solely communications with EIU, referring to or describing the subject of the Panel’s request (the work done and to be done by the EIU with

- respect to the Determination). As well as the work-product itself in its various draft and final iterations.
- (c) Consideration by ICANN of the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU referring to or describing the subject of the Panel's request (consideration by ICANN of the work performed by the EIU).
  - (d) Acts done and decisions taken by ICANN with respect to the work performed by the EIU in connection with Dot Registry's applications. That request again covers internal ICANN documents and communications, not solely communications with the EIU, referring to or describing the subject of the Panel's request (both acts done and decisions taken by ICANN with respect to the EIU work).

The Panel notes that in Section 2 of its amended Procedural Order No. 2, material provided by ICANN to the Panel, but not yet to Dot Registry, appears not to include, among other matters, internal ICANN documents and communications referring to or describing the above subject matters that the Panel would have expected to be created in the ordinary course of ICANN in connection with these matters. It may be that the Panel was less than clear in its requests. The Panel requests that ICANN consider again whether the production was fully responsive to the foregoing requests.

The production shall include names of EIU personnel involved in the work contemplated and the work performed by the EIU in connection with Dot Registry's applications for .INC, .LLC, and/or .LLP with respect to Dot Registry's Reconsideration Requests Nos. 14-30 (.LLC), 14-32 (.INC), and 14-33 (.LLP), dated July 24, 2024, in that such information may be relevant to the requirements of Sections 2.4.2, 2.4.3, 2.4.3.1, and 2.4.3.2 of Module 2 of the Applicant Guidebook. The Panel expects strict compliance by Dot Registry and its counsel with Paragraph 8 of this Order and the Confidentiality and Non-Disclosure Undertaking procedure set forth therein and in Annex 1 attached hereto.

Procedural Order No. 3 included, among other provisions, a confidentiality provision, which provided in pertinent part:

"Documents exchanged by the parties or produced to the Panel at the Panel's directive which contain confidential information:

- i. May not be used for any purpose other than participating in ICDR Case No. 01-14-0001-5004, and;
- ii. May not be referenced in any, and any information contained therein must be redacted from any, written submissions prior to posting.

33. In Procedural Order No. 6, issued June 12, 2015, the Panel reiterated its document production order, made express that the BGC was covered by the reference to the "Board," and required that documents withheld on the basis of privilege be identified in a privilege log. On June 19, 2015, Counsel for ICANN submitted a confirming attestation, the required privilege log, and an additional responsive email. *See. also*, Procedural Order No. 8, issued August 26, 2015, paragraph 3, first sentence.

34. On July 6, 2015, the IRP Panel issued Procedural Order No. 7. That order memorialized the parties' stipulations that the term "local law" as used in Article 4 of ICANN's Articles of Incorporation was a reference to California law and that under California law, in the event of a conflict between a corporation's Bylaws and Articles, the Articles of Incorporation would prevail.

35. In Procedural Order No. 8, "[t]he Panel designate[d] the place of these proceedings as New York, New York."

36. In Procedural Order No. 12, issued February 26, 2016, the Panel ordered that the hearing would be by video conference and would be limited to seven hours. No live percipient or expert witness testimony would be permitted, and only the witness statements and documents

previously submitted by the parties and accepted by the panel would be admitted. (ICANN had previously submitted one witness declaration, that of EIU Contact Information Redacted of the EIU. Dot Registry had previously submitted four witness declarations and one expert witness declaration.) The hearing would consist of arguments by counsel and questions from the Panel. A stenographic transcript of the proceedings would be prepared.

37. On March 29, 2016, a one-day hearing by video conference was held with party representatives and counsel and the Panel present in either Washington, D.C. or Los Angeles, California. Each party presented arguments in support of its case, and the Panel had the opportunity to ask questions of counsel. A stenographic transcript of the proceedings was made. During the hearing, Dot Registry attempted to introduce live testimony from a fact witness. The Panel declined to hear testimony from the proffered witness. Hearing Tr., at p. 42, ll. 11-15. At the conclusion of the hearing, the Panel requested that the parties address specific questions in a post-hearing memorial.

38. On April 8, 2016, the parties filed post-hearing memorials addressing the questions posed by the Panel.

39. On May 5, 2016, the parties stipulated to the correction of limited inaccuracies in the stenographic transcript, which changes were duly noted by the Panel.

### III. SUBMISSIONS OF THE PARTIES

#### A. Dot Registry

40. Dot Registry states that the applicable law(s) to be applied in this proceeding are ICANN's Articles of Incorporation ("Articles") and Bylaws, relevant principles of international law (such as good faith) and the doctrine of legitimate expectations, applicable international conventions, the laws of the State of California ("California law"), the Applicant Guidebook ("AGB"), the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules"), and the Supplementary Procedures for the Independent Review Process (the "Supplemental Rules"). Prior declarations of IRP panels have "precedential value." Additional Submission of Dot Registry, LLC ("DR Additional Submissions"), ¶¶3, at 2-3, and notes 11, 12, and 15. Request of Dot Registry LLC for Independent Review Process ("DR IRP Request"), ¶ 55, at 20. The Standard of Review should be de novo. DR Additional Submission, ¶¶ 4-7, at 3-5.

41. Dot Registry effectively argues that actions of the ICANN staff and the EIU constitute actions of the ICANN board, because, under California law and ICANN's Bylaws, ICANN's board of directors is "ultimately responsible" for the conduct of the new gTLD program. Since ICANN is a California nonprofit public-benefit corporation, all of its activities must be undertaken by or under the direction of its Board of Directors. DR

Additional Submission, ¶¶ 12-14, at 7-8 and notes 37-40; IRP Request, ¶ 62.

42. Dot Registry asserts that ICANN's staff and the EIU are "ICANN affiliated parties," and as such ICANN is responsible for their actions. AGB, Module 6.5.

43. In any event, Dot Registry takes the position that ICANN is responsible for the acts of EIU and the ICANN staff, since EIU can only recommend to ICANN for ICANN's ultimate approval, and ICANN has complete discretion as to whether to follow EIU's recommendations. DR Additional Submission, ¶18, at 11 (citing EIU SoW, §10(b)(ii) – (iv), (vii), at 6.

44. Dot Registry asserts that the EIU also has the understanding that ICANN bears the responsibility for the actions of the EIU in its role as ICANN's evaluator. DR Additional Submission, ¶19, at 11, citing Declaration of EIU Contact Information Redacted

of the EIU, § 3, at 2. In addition, the CPEs were issued on ICANN letterhead, not EIU letterhead. Indeed, on the final page of the CPEs generated by the EIU, there is a disclaimer, which states in pertinent part that "these Community Priority Evaluation results do not necessarily determine the final result of the application." See, e.g., CPE Report 1-990-35979, Report Date: 11 June 2014.

45. Dot Registry contends that under California law the business judgment rule protects the individual corporate directors from complaints by shareholders and other specifically defined persons who are analogous to

shareholders, but does not protect a corporation or a corporate board from actions by third parties. DR Post-Hearing Brief, at 4 – 7.

46. Even assuming *arguendo* that the business judgment rule applies to the present proceeding, Dot Registry argues that it would not protect ICANN, since the ICANN Board and BGC failed to comply with the Articles, Bylaws, and the AGB, performed the acts at issue without making a reasonable inquiry, and failed to exercise proper care, skill and diligence. DR Post Hearing Brief, at 7 – 8.

47. Dot Registry alleges that EIU altered the AGB requirements only as to Dot Registry's applications in the following respects, and thus engaged in unjustified discrimination (disparate treatment) and non-transparent conduct:

- a) Added a requirement in its evaluation that the community must "act" as a community, and that a community must "associate as a community;"
- b) Added the requirement that the organization must have no other function but to represent the community;
- c) Utilized the increased requirement for "association" to abstain from evaluating the requirements of "size" or "longevity;"
- d) Misread Dot Registry's applications in order to find that Dot Registry's registration policies failed to provide "an appropriate appeals mechanism;"

- e) Altered the AGB criteria that the majority of community institutions support the application to require that every institution express “consistent” support;
- f) Altered the requirement that an application must have no relevant opposition to require that an application have no opposition.

See, e.g., Dot Registry Reconsideration Request re *.llc*, Version of 11 April 2013, at 4 -17 (Exhibit C-017).

48. Dot Registry asserts that the EIU applied different standards to other CPE applications, applying those standards inconsistently across all applicants.

49. While EIU required Dot Registry to demonstrate that its communities “act” and “associated” as communities, it did not require that other communities do so.

50. EIU also required that *.llc*, and *.llp* community members be participants in a clearly defined-industry and that the “members” have an awareness and recognition of their inclusion in the industry community.

51. While noting that “research” supported its conclusions, the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusions.

52. Dot Registry also argued that the Board of Governance Committee (“BGC”) breached its obligations to ensure fair and equitable, reasonable and non-discriminatory treatment.



53. In response to a request for reconsideration, the BGC has the authority to:

- a) conduct a factual investigation (Bylaws, Art. 11, § 3, d);
- b) request additional written submissions from the affected party or other parties (Bylaws, Art. IV, § 3, e);
- c) ask ICANN staff for its views on the matter (Bylaws, Art. IV, § 11);
- d) request additional information or clarification from the requestor (Bylaws, Art. IV, §12);
- e) conduct a meeting with requestor by telephone, email, or in person (*Id.*);
- f) request information relevant to the request from third parties (Bylaws, Art. IV, § 13.

The BCG did none of these.

54. Dot Registry requested that the IRP Panel make a final and binding declaration:

- a) that the Board breached its Articles, its Bylaws and the AGB including by failing to determine that ICANN staff and the EIU improperly and discriminatorily applied the AGB criteria for community priority status in evaluating Dot Registry's applications;
- b) that ICANN and the EIU breached the articles, Bylaws and the AGB, including by erring in scoring Dot Registry's CPE applications for *.inc*, *.llc*, and *.llp* and by treating Dot Registry's applications discriminatorily;

- c) that Dot Registry's CPE applications for the *.inc*, *.llc*, and *.llp* strings satisfy the CPE criteria set forth in the AGB and that Dot Registry's applications are entitled to community priority status;
- d) recommending that the Board issue a resolution confirming the foregoing;
- e) awarding Dot Registry its costs in this proceeding, including, without limitation, all legal fees and expenses; and
- f) awarding such other relief as the Panel may find appropriate in the circumstances.

Claimant's Post-Hearing Brief, April 8, 2016 ("DR Post-Hearing Brief"), at 9.

55. Finally, Dot Registry stated that it "does not believe that a declaration recommending that the Board should send Dot Registry's CPE applications to a new evaluation by the EIU would be proper." DR Post-Hearing Brief, at 9.

## B. ICANN

56. ICANN asserts that ICANN's Articles and Bylaws and the Supplementary Procedures apply to an IRP proceeding. ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, October 27, 2014 ("ICANN Response"), ¶¶21, at 8, and ¶¶

29, at 9. ICANN's Response to Claimant Dot Registry LLC's Additional Submission ("Response to Additional Submission"), ¶2, at 1; ¶ 8, at 3.

57. ICANN argues that "there is only one Board action at issue in this IRP, the BGC's review of the reconsideration requests Dot Registry filed challenging the CPE Reports." Response to Additional Submission, ¶ 8, at 3.

58. ICANN contends that this standard only applies as to the BGC's actions (or inactions) in its reconsideration of the EIU or ICANN staff actions. Response to Additional Submission, ¶ 10, at 4; ¶13, at 5

59. ICANN argues that the Bylaws make clear that the IRP review does not extend to actions of ICANN staff or of third parties acting on behalf of ICANN staff, such as the EIU.

60. ICANN contends that, when the BGC responds to a Reconsideration Request, the standard applicable to the BGC's review looks to whether or not the CPE Panel violated "any established policy or procedure." ICANN Response, ¶45, at 20, ¶¶ 46 and 47, at 21. Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10; ¶ 19, at 8.

61. ICANN argues that Dot Registry failed to show that the EIU violated any established policies and procedures, on one occasion referring to "rules and procedures," in another to "established ICANN policy(ies)," and in another to "appropriate policies and procedures." Response to Additional Submission, ¶ 7, at 2; ¶14, at 6 and note 10, and ¶19, at 8

62. ICANN contends that Dot Registry failed to show that the BGC actions in its reconsideration were not in accordance with ICANN's Articles and Bylaws. Response to Additional Submission, ¶¶ 21, at 9, and ¶¶ 23 at 10. However, ICASNN has never argued in these proceedings that Dot Registry failed timely or properly to raise claims of *inter alia* disparate treatment/unjustified discrimination, lack of transparency or other alleged breaches of Articles, Bylaws, or AGB by the BGC, only that Dot Registry failed to prove its case on those matters.

63. ICANN agrees that "the 'rules' at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook." Letter of Jeffrey A. LeVee, Jones Day LLP, to the Panel, dated October 12, 2015, at 6.

64. In response to a question from the Panel, ICANN asserts that, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel (R-12), ICANN did not require the ICANN staff and EIU to adhere to ICANN's Bylaws. ICANN denied that the reference therein that "the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" and its request "that candidates include a 'statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency" obligated the EIU and the ICANN staff to adhere to any of ICANN's Articles or Bylaws. ICANN's Post-Hearing Brief, ¶¶ 6, 7, and 8, at 4.

65. In response to the Panel’s question as to whether the Call for Expressions of Interest called for EIU to comply with other ICANN policies and procedures, ICANN stated that the Call for Expressions of Interest required applicants to “respect the principles of fairness, transparency and . . . non-discrimination.” ICANN’s Post-Hearing Submission, dated April 8, 2016, at ¶ 5.

66. ICANN asserts that California’s business judgment rule applies to ICANN and “requires deference to actions of a corporate board of directors so long as the board acted ‘upon reasonable investigation, in good faith and with regard for the best interests of’ the corporation, and ‘exercised discretion clearly within the scope of its authority.’” Post—Hearing Brief, ¶ 1, at 1, and *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4<sup>th</sup> 249, 265 (1999).

#### IV. DECLARATION OF PANEL

##### A. Applicable Principles of Law

67. The Panel declares that the principles of law applicable to the present proceeding are ICANN’s Articles of Incorporation, its Bylaws, the laws of the State of California, the Supplemental Rules, and the ICDR Rules of Arbitration. The Panel does not find that there are “relevant principles of international law and applicable international conventions” that would assist it in the task now before it.

68. The review undertaken by the Panel is based on an objective and independent standard, neither deferring to the views of the Board (or the

BGC), nor substituting its judgment for that of the Board. As the IRP in the *Vistaprint v. ICANN* Final Declaration stated (ICDR Case No. 01-14-0000-6505, 9 October 2015:

123. The Bylaws state the IRP Panel is 'charged' with 'comparing' contested actions of the board to the Articles and Bylaws and 'declaring' whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgement in taking a decision believed to be in the best interests of ICANN. In the IRP Panel's view this more detailed listing of a defined standard cannot be read to remove from the Panel's remit the fundamental task of comparing actions or inactions of the Board with the articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstance may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard the ICANN Board's discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measured.

124. The Panel agrees with ICANN's statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As *Vistaprint* has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.

125. The IRP Panel is aware that three other IRP Panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN's Board. All of the have reached the same conclusion: the

board's conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard without any presumption of correctness. (Footnote omitted).

69. In this regard, the Panel concludes that neither the California business judgment rule nor any other applicable provision of law or charter documents compels the Panel to defer to the BGC's decisions. The Bylaws expressly charge the Panel with the task of testing whether the Board has complied with the Articles and Bylaws (and, as agreed by ICANN, with the AGB). Bylaws, Article IV, Section 3.11, c provides that an "IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." Additionally, the business judgment rule does not in any event extend under California law to breaches of obligation as contrasted with its application to the exercise of discretionary board judgment within the scope of such an obligation.

70. An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed. Thus, the Dissent's focus on whether Dot Registry should have succeeded in its application for community priority is entirely misplaced. As counsel for ICANN explained:

Mr. LeVee: \*\*\*

. . . the singular purpose of an independent review proceeding, as confirmed time and again by other independent review panels, is to test whether the conduct of the board of ICANN and only of the

board of ICANN was consistent with ICANN's articles and with ICANN's bylaws.

Hearing Tr., p. 75, l. 24 – p. 76, l. 5.

B. Nature of Declaration

71. The question has arisen in some prior Declarations of IRP Panels whether Panel declarations are “binding” or “non-binding.” While this question is an interesting one, it is clear beyond cavil that this or any Panel’s decision on that question is not binding on any court of law that might be called upon to decide this issue.

72. In order of precedence from Bylaws to Applicant Guidebook, there have been statements in the documents which the Panel, or a reviewing court, might consider in its determination as to the finality of an IRP Panel Declaration.

73. As noted, above, Bylaws, Article IV, Section 3.11, c specifies that an “IRP Panel shall have the authority to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Bylaws, Article IV, Section 3.11, d provides that the IRP Panel may “recommend that the Board stay any action or decision . . . until such time as the Board reviews and acts upon the opinion of the IRP. Article IV, Section 3.21 provides that “[t]he declarations of the IRP Panel . . . are final and have precedential value.”



74. The ICDR Rules contains a provision that “[a]wards . . . shall be final and binding on the parties.” ICDR Rules, Art. 27(1).

75. The Applicant Guidebook requires that any applicant “AGREE NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.” AGB, Module 6, Section 6 (all caps as in original).

Assuming *arguendo* this waiver would be found to be effective, it would not appear to reach the question of finality of a Panel Declaration.

76. One Panel has declared that its declaration is non-binding (*ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, at ¶134), while another has declared that its declaration is binding. *DCA Trust v. ICANN*, ICDR Case No. 50-2013-001083, Declaration on IRP Procedures, August 14, 2014, at ¶¶ 98, 100-107, 110-111, and 115.

77. Other panels have either expressed no opinion on this issue, or have found some portion of the declaration binding, and another portion non-binding. Further, the Panel understands that this issue may have arisen before one or more courts of law, but that no final decisions have yet been rendered.

78. Since any declaration we might make on this issue would not be binding on any reviewing court, the Panel does not purport to determine whether its declaration is binding or non-binding.

C. The Merits

1) The EIU, ICANN Staff, and the BGC Were Obligated to Follow ICANN's Articles and Bylaws in Performing Their Work in this Matter

79. Whether the BGC is evaluating a Reconsideration Request or the IRP Panel is reviewing a Reconsideration Determination, the standard to be applied is the same: Is the action taken consistent with the Articles, the Bylaws, and the AGB?

80. The BGC's determination that the standard for its evaluation is that a requestor must demonstrate that the ICANN staff and/or the EIU acted in contravention of established policy or procedure is without basis.

81. In response to the three reconsideration requests at issue, the BGC states that "ICANN has previously determined that the reconsideration process can be properly invoked for challenges to determinations rendered by third party service providers, such as EIU, where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination." Reconsideration Determination of Reconsideration Requests 14-30, 14-32, 14-33, 24 July 2014, Section IV, at 7-8.

82. For this proposition, the BGC cites its own decision in the *Booking.com B.V. v. ICANN* Reconsideration Request Determination 13-5,

1 August 2013. In that case the BGC references a previous section of the Bylaws, that contains language currently in Section IV, 2, a, which states in pertinent part, that a requestor may show it has been “adversely affected by one or more staff actions or inactions that contradict ICANN policy(ies).”

83. Curiously, the BGC ignores Article IV, Section 1, entitled ‘PURPOSE,’ which sets out the purpose of the Accountability and Review provisions. Article IV, Section 1 applies to both reconsiderations by the BGC, as well as to the IRP process. It states: “In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article 1 of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. . . .” (Emphasis added).

84. Indeed, in its Call for Expressions of Interest for a New gTLD Comparative Evaluation Panel, including from the EIU, ICANN insisted that the evaluation process employed by prospective community priority panels “respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.” As discussed, *infra*, at ¶¶ 101 – 106, all of these principles are embodied in ICANN’s Bylaws, and

are applicable to conduct of the BGC, ICANN staff and the authority exercised by the EIU pursuant to contractual delegation from ICANN.

85. ICANN further required all applicants for evaluative panels, including the EIU, to include in their applications a statement of the applicants' plan for ensuring that the above delineated principles are applied. ICANN Call for Expressions of Interest (Exhibit R-12), Section 5.5 at 6.

86. Subsequent to its engagement by ICANN, the EIU prepared the Community Priority Evaluation Guidelines, Version 2.0 (27 September 2013 (Exhibit R-1), under supervision from ICANN, incorporating the same principles. At page 22 of the Guidelines, it states: "The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest and non-discrimination. Consistency of approach in scoring Applications will be of particular importance." (Emphasis added). These CPE Guidelines "are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB."

87. Even if one were to accept the BGC's contention that it only need look to whether ICANN staff or the EIU violated "established policies and procedures," nowhere has ICANN argued that fairness, transparency, avoiding potential conflicts of interest, and non-discrimination are **not** established policies and procedures of ICANN. Indeed, given that all of these criteria are called out in provisions of ICANN's Articles and Bylaws

as quoted elsewhere in this declaration, it would be shocking if ICANN were to make such an argument.

88. Accordingly, the Panel majority declares that in performing its duties of Reconsideration, the BGC must determine whether the CPE (in this case the EIU) and ICANN staff respected the principles of fairness, transparency, avoiding conflicts of interest, and non-discrimination as set out in the ICANN Articles, Bylaws and AGB. These matters were clearly raised in Dot Registry's submissions. The Panel majority declares that the BGC failed to make the proper determinations as to compliance by ICANN staff and the EIU with the Articles, Bylaws, and AGB, let alone to undertake the requisite due diligence or to conduct itself with the transparency mandated by the Articles and Bylaws in the conduct of the reconsideration process.

89. The Panel majority further declares that the contractual use of the EIU as the agent of ICANN does not vitiate the requirement to comply with ICANN's Articles and Bylaws, or the Board's duty to determine whether ICANN staff and the EIU complied with these obligations. ICANN cannot avoid its responsibilities by contracting with a third party to perform ICANN's obligations. It is the responsibility of the BGC in its reconsideration to insure such compliance. Indeed, the CPEs themselves were issued on the letterhead of ICANN, not that of the EIU, and Module 5 of the Applicant Guidebook states that "ICANN's Board of Directors has

ultimate responsibility for the New gTLD Program.” AGB, Module 5, at 5-4.

90. Moreover, ICANN tacitly acknowledged as much by submitting the Declaration of EIU Contact Information Redacted

of the Economist Intelligence Unit, the person who negotiated the services agreement with ICANN. EIU Contact Information Redacted also served as Project Director for EIU’s work on behalf of ICANN.

91. In his declaration, EIU Contact Information Redacted states that the EIU is “not a gTLD decision-maker, but simply a consultant to ICANN.” “The parties agreed that EIU, while performing its contracted functions, would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process.”

92. Further, as noted above in paragraph 8 of EIU Contact Information Redacted Declaration, Section 10 of the EIU SoW provides that “ICANN will be free in its complete discretion to decide whether or not to follow [EIU’s] determination,” that “ICANN will be solely responsible to applicants . . . for the decisions it decides to issue,” and that “each decision must be issued by ICANN in its own name only.”

93. Moreover, EIU did not act on its own in performing the CPEs that are the subject of this proceeding. ICANN staff was intimately involved in the process. The ICANN staff supplied continuing and important input on the CPE reports, See, documents produced to the Panel in response to the Panel’s Document Production Order, ICANN \_DR-00461-466. DR00182-

194, DR 00261—267, DR00228-234, DR00349-355, DR-00547-553, DR00467- 473 and DR00116-122.

94. One example is particularly instructive. In its Request for Reconsideration for *.inc*, Dot Registry complained that “the Panel repeatedly relies on its ‘research.’ For example, the Panel states that its decision not to award any points to the **.INC** Community Application for 1-A Delineation is based on ‘[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an *.inc*’ and also that ‘[b]ased on the Panel’s research there is no evidence of incs from different sectors acting as a community as defined by the Applicant Guidebook.” “Thus, the Panel’s ‘research’ was a key factor in its decision not to award at least four (but possibly more) points to the *.inc* Community Application. However, despite the significance of this ‘research,’ the Panel never cites any sources or gives any information about its substance or the methods or scope of the ‘research.’” Dot Registry Request for Reconsideration re *.inc*, § 8, B at 5-6.

95. The BGC made short shrift of this argument. “The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to ‘cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” (Citations omitted.) “As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to ‘perform independent

research, if deemed necessary to reach informed scoring decisions.”

(Citations omitted). “The Requestor cites no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope or methods of its independent research.” Reconsideration Response, § V.B at 11.

96. A review of the documents produced and the ongoing exchange between the EIU and the ICANN staff reveal the origin of the “research” language found in the final version of the CPEs.

97. The original draft CPEs prepared by the EIU, dated 19 May 2014 at page 2, paragraph beginning “However . . .” contain no reference to any “research.” See DR00229, 00262, and 00548.

98. The first references to the use of “research” comes from ICANN staff. “Can we add a bit more to express the research and reasoning that went into this statement? . . .Possibly something like, ‘based on the Panel’s research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00468. “While I agree, I’d like to see some substantiation, something like . . . ‘based on our research we could not find any widespread evidence of LLCs from different sectors acting as a community.’” DR00548.

99. The CPEs as issued read in pertinent part at page 2, in paragraph beginning “However . . .,” “Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC. Based on the Panel’s research, there



is no evidence of LLCs from different sectors acting as a community as defined in the Applicant Guidebook.”

100. Counsel for ICANN at the hearing acknowledged that ICANN staff is bound to conduct itself in accordance with ICANN's Articles and Bylaws.

Panelist Donahey: So when you hear the word “ICANN” or see the word “ICANN in the bylaws or articles you believe that that is a , is a reference to ICANN’s board and its constituent bodies?

Mr. LeVee: Including its staff, yes

Panelist Kantor: My chair anticipated a question I was going to ask, but he combined it with a question about constituent bodies. I believe I heard, Mr. LeVee, that you said that while the CPE panel is not bound by the provisions I identified, ICANN staff is. Is that correct?

[Mr. LeVee:] Yes. ICANN views its staff as being obligated to conform to the various article and bylaw provisions that you cite.

Hearing Tr., p. 197, l. 20 – p. 198, l.1; p. 199, l. 17 - p. 200, l. 2 (emphasis added).

101. The facts that ICANN staff was intimately involved in the production of the CPE and that ICANN staff was obligated to follow the Articles and Bylaws, further support the Panel majority's finding that ICANN staff and the EIU were obligated to comply with ICANN's Articles and Bylaws. Moreover, when the issues were posed in the Reconsideration Requests, in the course of determining whether or not ICANN staff and the EIU had acted in compliance with the Articles, Bylaws, and the AGB, the BGC was obligated under the Bylaws to exercise due diligence and care in having a reasonable amount of facts in front of them and exercise independent

judgment in taking the decision believed to be in the best interests of ICANN.

## 2) The Relevant Provisions of the Articles and Bylaws and Their Application

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. Articles of Incorporation, Art. 4

In performing its mission, the following core values should guide the decisions and actions of ICANN:

\*\*\*\*

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. Bylaws, Art. I, § 2. CORE VALUES.

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. Bylaws, Art. II, § 3. Non-Discriminatory Treatment.

The Board shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Bylaws, Art. III, §1.

In carrying out its mission as set out in these bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of these bylaws. Art. IV, § 1.

103. In addition, the BGC failed several transparency obligations. As well as failing to enforce the transparency obligations in the Articles, Bylaws, and AGB with respect to the research purportedly undertaken by the EIU, the BGC is also subject to certain requirements that it make public the staff work on which it relies. Bylaws, Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the

matter, which comments shall be made publicly available on the Website.”  
Bylaws, Art. IV.2.14 provides that “The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.”

104. The Panel is tasked with determining whether the ICANN Board acted consistently with the provisions of the Articles and Bylaws. Bylaws Article IV, Section 3.11, c states that “[t]he IRP Panel shall have the authority to declare whether an action of inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As accepted by ICANN, the Panel is also tasked with determining whether the ICANN Board acted consistently with the AGB. Moreover, the Bylaws provide:

Requests for [] independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision believed to be in the best interests of the company?

Bylaws. Art. IV, §3.4.

ICANN's counsel stated at the hearing that the concept of inaction or the omission to act is embraced within "actions of the Board."

Panelist Kantor: At an earlier stage in these proceedings, the panel asked some questions, and we were advised that action here includes both actions and omissions. Does that apply to conduct of ICANN staff or only to conduct of the ICANN Board?

Mr. LeVee: Only to Board.

Hearing Tr., p. 192, l. 25 – p. 193, l. 6.

105. Thus, ICANN confirmed that omissions by the Board to comply with its duties under the Articles and Bylaws constituted breaches of the Articles and Bylaws for purposes of an IRP. See, *also*, ICANN's response to Dot Registry's Submission, ¶ 10 (10 August 2015) ("the only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN's Articles or Bylaws in acting (or failing to act) with respect to that conduct.") and Letter of Jeffrey A. LeVee, Jones, Day LLP, to the Panel, October 12, 2015, at 6 ("ICANN agrees with the statements in Paragraph 53 of the Booking.com IRP Panel's Declaration that . . . the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board . . . .")

106. As discussed, *supra*, at ¶¶ 47-52, Dot Registry contended that the CPE lacked transparency, such as the subject of the research performed, the sources referenced in the performance of the research, the manner in which the research was performed, the results of the research, whether the researchers encountered sources that took issue with the results of

the research, etc. Thus, Dot Registry adequately alleged a breach by ICANN staff and the EIU of the transparency obligations found in the Articles, Bylaws, and AGB.

107. Dot Registry further asserted that it was treated unfairly in that the scoring involved double counting, and that the approach to scoring other applications was inconsistent with that used in scoring its applications. *Id.*

108. Dot Registry alleged that it was subject to different standards than were used to evaluate other Community Applications which underwent CPE, and that the standards applied to it were discriminatory. *Id.*

109. Yet, the BGC failed to address any of these assertions, other than to recite that Dot Registry had failed to identify any “established policy or procedure” which had been violated.

110. Article IV, Section 3.4 of the Bylaws calls upon this Panel to determine whether the BGC, in making its Reconsideration Decision “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision believed to be in the best interests of the company.”

Consequently, the Panel must consider whether, in the face of Dot Registry’s Reconsideration Requests, the BGC employed the requisite due diligence and independent judgment in determining whether or not ICANN staff and the EIU complied with Article, Bylaw, and AGB obligations such as transparency and non-discrimination.

111. Indeed, the BGC admittedly did not examine whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations. It failed to make any reasonable investigation or to make certain that it had acted with due diligence and care to be sure that it had a reasonable amount of facts before it.

112. An exchange between Panelist Kantor and counsel for ICANN underscores the cavalier treatment which the BGC accorded to the Dot Registry Requests for Reconsideration.

Panelist Kantor: Mr. LeVee, in those minutes or in the determinations on the reconsideration requests, is there evidence that the Board considered whether or not the CPE panel report or any conduct of the staff complied with the various provisions of the bylaws to which I referred, core values, inequity, nondiscriminatory treatment, or to the maximum extent open and transparent.

Mr. LeVee: I doubt it. Not that I'm aware of. As I said, the Board Governance Committee has not taken the position that the EIU or any other outside vendor is obligated to conform to the bylaws in this respect. So I doubt they would have looked at that subject.

Hearing Tr., p. 221, l. 17 – p. 222, l. 8.

113. Notably, the Panel question above inquired as to whether the Board considered *either* the conduct of the CPE panel (*i.e.*, the EIU) or the conduct of ICANN staff. Counsel's response that he doubted whether consideration was given relied solely upon the BGC's position that *the EIU* was not obligated to comply with the Bylaws. Regardless of whether that position is correct, ICANN acknowledges that the conduct of *ICANN staff* (as described *supra*, at ¶¶89-101) is bound by the Articles, Bylaws, and AGB. ICANN's argument fails to recognize that in any event the conduct

of ICANN staff is properly the subject of review by the BGC when raised in a Request for Reconsideration, yet no such review of the allegedly discriminatory and non-transparent conduct of ICANN staff was undertaken by the BGC.

114. One of the questions on which an IRP Panel is asked to “focus” is whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts” in front of it. In making this determination, the Panel must look to the allegations in order to determine what facts would have assisted the BGC in making its determination.

115. As discussed, *supra*, at ¶¶ 51 and 94 - 95, the requestor argued that the EIU repeatedly referred to “research” it had performed in making its assessment, without disclosing the nature of the research, the source(s) to which it referred, the methods used, or the information obtained. This is effectively an allegation of lack of transparency.

116. Transparency was yet another of the principles which an applicant for the position of Community Priority Evaluator, such as EIU, was required to respect. Indeed, an applicant for the position was required to submit a plan to ensure that transparency would be respected in the evaluation process. *See, generally, supra*, ¶¶ 17 – 18.

117. Transparency is one of the essential principles in ICANN’s creation documents, and its name reverberates through its Articles and Bylaws.



118. In ICANN's Articles of Incorporation, Article 4 refers to "open and transparent processes." Among the Core Values listed in its Bylaws intended to "guide the decisions and actions of ICANN" is the "employ[ment of] open and transparent policy development mechanisms." Bylaws, Art. I, § 2.7.

119. Indeed, ICANN devotes an entire article in its bylaws to the subject. Article III of the Bylaws is entitled, "TRANSPARENCY." It states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Bylaws, Art. III, § 1.

120. Moreover, in the very article that establishes the Reconsideration process and the Independent Review Process, it states in Section 1, entitled "PURPOSE:"

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III. Emphasis added.

121. By their very terms, these obligations govern conduct not only by the Board, but by "ICANN," which necessarily includes its staff.

122. It seems fair to say that transparency is one of the most important of ICANN's core values binding on both the ICANN Board and the ICANN

staff, and one that its contractor, EIU, had pledged to follow in its work for ICANN. The BGC had an obligation to determine whether ICANN staff and the EIU complied with these obligations. An IRP Panel is charged with determining whether the Board, which includes the BGC, complied with its obligations under the Articles and the Bylaws. The failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those obligations is itself a failure by the Board to comply with its obligations under the Articles and Bylaws.

123. Has the BGC been given the tools necessary to gather this information as Part of the Reconsideration process? The section on reconsideration (Bylaws, Art. IV, Section 2) provides it with those tools. It gives the BGC the power to “conduct whatever factual investigation is deemed appropriate” and to “request additional written submissions from the affected party, or from other parties.” Bylaws, Art. IV, § 2.3, d and e. The BGC is entitled to “ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the website.” Bylaws, Art. IV, §2.11. The BGC is also empowered to “request information relevant to the request from third parties, and any information collected from third parties shall be provided to the requestor [for reconsideration].” Bylaws, Art. IV, § 2.13.

124. The requestor for reconsideration in this case also complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to

other successful applicants. If this were true, the EIU would not only have failed to respect the principles of fairness and non-discrimination it had assured ICANN that it would respect, it would not have lived up to its own assurance to all applicants for CPEs in its CPE Guidelines (Exhibit R-1) that “consistency of approach in scoring applications will be of particular importance.” *See, supra*, ¶¶ 18 and 83.

125. The BGC need only have compared what the ICANN staff and EIU did with respect to the CPEs at issue to what they did with respect to the successful CPEs to determine whether the ICANN staff and the EIU treated the requestor in a fair and non-discriminatory manner. The facts needed were more than reasonably at hand. Yet the BGC chose not to test Dot Registry’s allegations by reviewing those facts. It cannot be said that the BGC exercised due diligence and care in having a reasonable amount of facts in front of it.

126. The Panel is called upon by Bylaws Art. IV.3.4 to focus on whether the Board, in denying Dot Registry’s Reconsideration Requests, exercised due diligence and care in having a reasonable amount of facts in front of it and exercised independent judgment in taking decisions believed to be in the best interest of ICANN. The Panel has considered above whether the BGC complied with its “due diligence” duty. Here the Panel considers whether the BGC complied with its “independent judgment” duty.

127. The Panel has no doubt that the BGC believes its denials of the Dot Registry Reconsideration Requests were in the best interests of ICANN.

However, the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment in taking those decisions. The only documentary evidence in the record in that regard is the text of the Reconsideration Decisions themselves and the minutes of the BGC meeting at which those decisions were taken. No witness statements or testimony with respect to those decisions were presented by ICANN, the only party to the proceeding who could conceivably be in possession of such evidence.

128. The silence in the evidentiary record, and the apparent use by ICANN of the attorney-client privilege and the litigation work-product privilege to shield staff work from disclosure to the Panel, raise serious questions in the minds of the majority of the Panel members about the BGC's compliance with mandatory obligations in the Bylaws to make public the ICANN staff work on which it relies in reaching decisions about Reconsideration Requests.

129. Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website."

130. Bylaws Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party."

131. Elsewhere in the Bylaws and the Articles of Incorporation, as discussed above, ICANN undertakes general duties of transparency and accountability that are also implicated by ICANN's decision to shield relevant staff work from public disclosure by structuring the staff work to benefit from legal privilege.

132. The documents disclosed by ICANN to the Panel pursuant to the Panel's document orders do not include any documents sent from BGC members to ICANN staff or sent from any Board members to any other Board members. The privilege log submitted by ICANN in these proceedings does not list any documents either sent from Board members to any ICANN staff or sent from any Board member to any other Board member, only a small number of documents sent from ICANN staff to the BGC. The only documents of the BGC that were disclosed to the Panel are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website.

133. No documents from ICANN staff to the BGC have been disclosed to the Panel. The privilege log lists one document, dated July 18, 2014, which appears to be the ICANN in-house legal counsel submission to the BGC of the "board package" for the July 24, 2014 BGC meeting at which Dot Registry's Reconsideration Requests were considered. The Panel infers that package included an agenda for the meeting, the CPEs themselves and draft denials prepared by ICANN staff, consistent with a

statement to that effect by ICANN counsel at the hearing. As explained by ICANN counsel at the hearing, that package also apparently included ICANN staff recommendations regarding the CPEs and the Reconsideration Requests, prepared by ICANN legal counsel. The Panel presumes the “package” also included Dot Registry’s Reconsideration Requests, setting out Dot Registry’s views arguing for reconsideration.

134. There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after presentation by staff to the BGC. Rather, from that record it would appear that the denials were approved by the BGC without change. It is of course possible that changes were in fact made to the draft denials involving ICANN legal counsel, but not produced to the Panel. However, nothing in the privilege log indicates that to be the case.

135. The privilege log submitted by ICANN in this proceeding also lists one other document dated August 15, 2014, which appears to be the “board package” for the August 22, 2014 BGC meeting at which the BGC *inter alia* approved the Minutes for the July 24 BGC meeting. Since the agenda and the Minutes for that August 22 meeting, as available on the ICANN website, do not show any reference to the gTLDs at issue in this IRP, it would appear that the material in the August 15 privileged document related to this dispute is only the draft of the Minutes for the July 24 BGC meeting, which Minutes were duly approved at the August 22 BGC

meeting according to the Minutes for that latter meeting. Thus, the August 15 privileged document adds little to assist the Panel in deciding whether the Board exercised the requisite diligence, due care and independent judgment.

136. Every other document listed on the privilege log is an internal ICANN staff document, not a BGC document.

137. From this disclosure and from statements by ICANN counsel at the hearing, the Panel considers that no documents were submitted to the BGC for the July 24, 2014 BGC meeting other than the agenda for the meeting, the CPEs and Dot Registry's Reconsideration Requests themselves, ICANN staff's draft denials of those Reconsideration Requests, and explanatory recommendations to the BGC from ICANN staff in support of the denials. Moreover, it appears the BGC itself and its members generated no documents except the denials themselves and the related BGC Minutes. ICANN asserted privilege for all materials sent by ICANN staff to the BGC for the BGC meeting on the Reconsideration Requests.

138. The production by ICANN of BGC documents was an issue raised expressly by the unanimous Panel in Paragraph 2 of Procedural Order No. 4, issued May 27, 2015:

Among the documents produced by ICANN in response to the Panel's document production request, the Panel expected to find documents that indicated that the ICANN Board had considered the recommendations made by the EIU concerning Claimant's Community Priority requests, that the ICANN board discussed those recommendations in a meeting of the Board or in a meeting of one or more of its committees or subcommittees

or by its staff under the ICANN Board's direction, the details of such discussions, including notes of the participants thereto, and/or that the ICANN Board itself acted on the EIU recommendation by formal vote or otherwise; or if none of the above, documents indicating that the ICANN board is of the belief that the recommendations of the EIU are binding. If no such documents exist, the Panel requests that ICANN's counsel furnish an attestation to that effect.

139. By letter dated May 29, 2015, counsel for ICANN made the requested confirmation, referring to the Reconsideration Decisions and appending the BGC meeting minutes for the non-privileged record.

140. It is of course entirely possible that oral conversations between staff and members of the BGC, and among members of the BGC, occurred in connection with the July 24 BGC meeting where the BGC determined to deny the reconsideration requests. No ICANN staff or Board members presented a witness statement in this proceeding, however. Also, there is no documentary evidence of such a hypothetical discussion, privileged or unprivileged. Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff.

141. Counsel for ICANN conceded at the hearing that ICANN legal counsel supplied the BGC with recommendations, but asserted the BGC does not rely on those recommendations.

2 \*\*\* I  
3 will tell you that the Board Governance  
4 Committee is aided by the Office of General  
5 Counsel, which also consults with Board  
6 staff.



7 The Office of General Counsel does  
8 submit recommendations to the Board  
9 Governance Committee, and of course, those  
10 documents are privileged. For that reason,  
11 we did not turn them over. We don't rely on  
12 them in issuing the Board Governance  
13 Committee reports, we don't cite them, and we  
14 don't produce them because they are prepared  
15 by counsel.

Hearing Tr., p. 94, l. 2 – 15.

For several reasons, the assertion that the BGC does not rely on ICANN staff recommendations, and thus is not obligated to make those staff views public pursuant to Bylaws Arts. I.2.7 and I.2.10, is simply not credible.

142. First, according to Bylaws Art. IV.2.14, the BGC is to act on Reconsideration Requests “on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.” Thus, the Bylaws themselves expect the BGC to look to the public written record, including staff views, in making its decisions.

143. Moreover, according to the documents produced by ICANN in this proceeding and the ICANN privilege log, the BGC apparently had no substantive information before it other than the CPEs, the recommendations of ICANN staff regarding the CPEs, including the recommendations of the Office of General Counsel, and the contrary arguments of Dot Registry contained in the Reconsideration Requests. The Minutes for the July 24 BGC meeting state succinctly that “Staff

briefed the BGC regarding Dot Registry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN's acceptance of those Reports."

144. Counsel for ICANN made similar points at the hearing.

12 MR. LEVEE: I can.

13 So the Board Governance Committee  
14 had the EIU, the three EIU reports, and it  
15 had the lengthy challenge submitted by Dot  
16 Registry regarding those reports. As I've  
17 said before, the Board Governance Committee  
18 does not go out and obtain separate  
19 substantive advice, because the nature of its  
20 review is not a substantive review.  
21 So I don't know what else it would  
22 need, but my understanding is that apart from  
23 privileged communication, what it had before  
24 it was the materials that I've just  
25 referenced, EIU's reports and Dot Registry's  
1 reconsideration requests, which had attached  
2 to it a number of exhibits.

3 MR. KANTOR: So in evaluating that  
4 request and the CPE panel report, would it be  
5 correct to say that the diligence and care  
6 the Board Governance Committee took in having  
7 a reasonable amount of facts in front of it,  
8 were those two submissions an [sic] inquiry of  
9 staff which is privileged?

10 MR. LEVEE: Yes.

11 MR. KANTOR: Subclause C: How did  
12 the Board Governance Committee go about  
13 exercising its independent judgment in taking  
14 the decisions it took on the reconsideration  
15 requests? Again, with as much specificity as  
16 you can reasonably undertake.

17 MR. LEVEE: The primary thing I  
18 obviously have to refer you to is the report,  
19 the 23-page report of the Board Governance  
20 Committee. I, I don't have other materials  
21 that I have tendered to the panel to say that  
22 the Board members exercised their independent  
23 judgment, beyond the fact that they wrote a

24 document which goes pretty much point by  
25 point through the complaints that Dot  
1 Registry asserted, evaluated each of those  
2 points independently, and reached the  
3 conclusions that they reached.  
4 MR. DONAHEY: Were there drafts of  
5 that 23-page report?  
6 MR. LEVEE: Yes.  
7 MR. DONAHEY: And were those  
8 produced?  
9 MR. LEVEE: They were not.  
10 MR. DONAHEY: And was that because  
11 they were privileged?  
12 MR. LEVEE: Yes.  
13 MR. KANTOR: Mr. LeVee, what exists  
14 in the record before this panel to show that  
15 the Board Governance Committee exercised its  
16 judgment independent from that of ICANN's  
17 staff, including office [of] general counsel?  
18 MR. LEVEE: The record is simply  
19 that the six voting members of the Board  
20 Governance Committee authorized this  
21 particular report after discussing the  
22 report. I cannot give you a length of time  
23 that it was discussed. I don't have a record  
24 of that, but I can tell you, as reflected in  
25 many other situations where similar questions  
1 have been asked, that the voting members of  
2 the Board take these decisions seriously.  
3 They are then reflected in minutes of the  
4 Board Governance Committee which are  
5 published on ICANN's website.  
6 Candidly, I'm not sure what else I  
7 could provide.

Hearing Tr., at pp. 217-219.

145. The BGC thus had before it substantively only the views of the EIU accepted by ICANN staff (the CPEs), the "reports" (i.e., the reconsideration decisions drafted by staff), the staff's own briefing, and the contrary views of Dot Registry. As the Reconsideration Decisions themselves evidence, the BGC certainly did not rely on Dot Registry's

arguments. The BGC therefore simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff.

146. The Minutes of the July 24, 2014 BGC meeting state that “After discussion and consideration of the Request[s],” the BGC denied the Reconsideration Requests. Similarly, counsel for ICANN argued at the hearing that “the six voting members of the Board Governance Committee authorized this particular report after discussing the report. \*\*\* I can tell you, as reflected in many other situations where similar questions have been asked, that the voting members of the Board take these decisions seriously.”

147. Arguments by counsel are not, however, evidence. ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes. The Panel is well aware that such a *pro forma* statement is regularly included in virtually all corporate minutes recording decisions by board of director committees, regardless of whether or not the discussion was more than rubber-stamping of management decisions.

148. If there is any evidence regarding the extent to which the BGC did in fact exercise independent judgment in denying these Reconsideration Request, rather than relying exclusively on the recommendations of

ICANN staff without exercising diligence, due care and independent judgment, that evidence is shielded by ICANN's invocation of privileges in this matter and ICANN's determination under the Bylaws to avoid witness testimony in IRPs.

149. ICANN is, of course, free to assert attorney-client and litigation work-product privileges in this proceeding, just as it is free to waive those privileges. The ICANN Board is not free, however, to disregard mandatory obligations under the Bylaws. As noted above, Bylaws Art. IV.2.11 provides that "The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website." (emphasis added). Bylaws, Art. IV.2.14 provides that "The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party" (emphasis added). The transparency commitments included in the Core Values found in Bylaws, Art. I, §2 are part of a balancing process. However, the obligations in the Bylaws to make that staff work public are compulsory, not optional, and do not provide for any balancing process.

150. None of the ICANN staff work supporting denial of Dot Registry's Reconsideration Requests was made public, even though it is beyond doubt that the BGC obtained and relied upon information and views submitted by ICANN staff (passed through ICANN legal counsel and thus

subject to the shield of privilege) in reaching its conclusions. By exercising its litigation privileges, though, the BGC has put itself in a position to breach the obligatory requirements of Bylaws Art. IV.2.11 and Art. IV.2.14 to make that staff work public. ICANN has presented no real evidence to this Panel that the BGC exercised independent judgment in reaching its decisions to deny the Reconsideration Requests, rather than relying entirely on recommendations of ICANN staff. Thus, the Panel is left highly uncertain as to whether the BGC “exercise[d] due diligence and care in having a reasonable amount of facts in front of them” and “exercise[d] independent judgment in taking the decision.” And, by shielding from public disclosure all real evidence of an independent deliberative process at the BGC (other than the *pro forma* meeting minutes), the BGC has put itself in contravention of Bylaws IV.2.11 and IV.2.14 requiring that ICANN staff work on which it relies be made public.

#### D. Conclusion

151. In summary, the Panel majority declares that ICANN failed to apply the proper standards in the reconsiderations at issue, and that the actions and inactions of the Board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.

152. The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach. Rather the Panel majority has concluded that, in making its reconsideration decisions, the Board (acting through the BGC) failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publically available the ICANN staff work on which the BGC relied). The Panel majority further concludes that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgment in reaching the reconsideration decisions.

153. The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority. The IRP Panel is tasked specifically "with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." Bylaws, Art. IV, §3.4. This is what the Panel has done.

154. Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution (“ICDR”) totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.

155. The Panel retains jurisdiction for fifteen days from the issuance of this Declaration solely for the purpose of considering any party’s request to keep certain information confidential, pursuant to Bylaws, Article IV, Section 3.20. If any such request is made and has not been acted upon prior to the expiration of the fifteen-day period set out above, the request will be deemed to have been denied, and the Panel’s jurisdiction will terminate.

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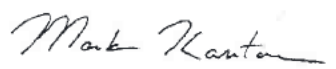
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156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2016

For the Panel Majority

A handwritten signature in cursive script that reads "Mark Kantor".

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Mark Kantor

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M. Scott Donahey, Chair

156. This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

Dated: July 29, 2018

For the Panel Majority

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Mark Kantor

A handwritten signature in dark ink, appearing to read "M. Scott Donahey", is written over a horizontal line.

M. Scott Donahey, Chair

## DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. With the greatest of regard for my two eminent colleagues, I respectfully dissent from their Declaration (“the Declaration”). In my view, Dot Registry LLC’s (“Dot Registry”) Community Priority Evaluation (“CPE”) Applications to operate three generic top level domains (“gTLDs”) (.INC, .LLC, and .LLP) were properly denied, as were Dot Registry’s Reconsideration Requests to the Board Governance Committee (“BGC”) of the Internet Corporation for Assigned Names and Numbers (“ICANN”). Dot Registry’s requests for relief before this Independent Review Proceeding (“IRP”) Panel should have been rejected in their entirety.
2. I offer four preliminary observations:
3. **First**, the Declaration commits a fundamental error by disregarding the weakness of Dot Registry’s underlying CPE Applications. The applications never had a chance of succeeding. The “communities” proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of “communities” under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook (“AGB”), which require applicants to prove “awareness and recognition of [being] a community,” in other words “more . . . cohesion than a mere commonality of interest,”<sup>1</sup> because the businesses in question function in unrelated industries and share nothing in common whatsoever other than their corporate form. As ICANN stated:

*[A] plumbing business that operated as an LLC would not necessarily feel itself to be part of a “community” with a bookstore, law firm, or children’s daycare center simply based on the fact that all four entities happened to organize themselves as LLCs (as opposed to corporations, partnerships, and so forth). Although each entity elected to form as an LLC, the entities literally share nothing else in common.*<sup>2</sup>
4. That foundational flaw in Dot Registry’s underlying CPE Applications alone precluded Dot Registry from succeeding at the CPE stage because failure to prove Criterion #1, “Community Establishment,” deprives an applicant of four points, automatically disqualifying the applicant from reaching the minimum passing score of 14 out of a possible 16 points. Therefore while I do not agree that any violation of ICANN’s Articles of Incorporation (“Articles”) or ICANN’s Bylaws (“Bylaws”) occurred in this case, even if it had, this Panel should have concluded that those violations amounted to nothing more than

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<sup>1</sup> AGB § 4.2.3 (“‘Community’ - Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘*communitas*’ meaning ‘fellowship’ – while still implying more of cohesion than a mere commonality of interest. Notably, as ‘community’ is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.”).

<sup>2</sup> ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2016, ¶ 6.

harmless error.<sup>3</sup>

5. Moreover, the BGC in entertaining a Reconsideration Request is entitled to take its views of the underlying CPE into account in deciding whether or not to exercise its discretion under the Bylaws Article IV.3.d to “conduct whatever factual investigation is deemed appropriate,” Article IV.3.e to “request additional written submissions . . . from other parties,” Article IV.8.11 or to “ask the ICANN staff for its views on the matter.” As ICANN stated in the hearing of this case:

*The fact that you may have your own personal views as to whether the EIU got it right or got it wrong may or may not inform you, your thinking in terms of whether the Board Governance Committee, in assessing the EIU's reports from a procedural standpoint, did so correctly, in essence.*<sup>4</sup>

Hence the BGC’s approach to a Reconsideration Request is in no way necessarily divorced from such views as it may have regarding the underlying subject of the Request.

6. ***Second***, the Declaration purports to limit its analysis to action or inaction of the ICANN Board, but in fact it also examines the application of ICANN’s Articles and Bylaws to ICANN staff and to third-party vendor, the Economic Intelligence Unit (“EIU”). ICANN has conceded that its staff members are subject to its Articles and Bylaws,<sup>5</sup> but ICANN clarified that staff conduct is not reviewable in an IRP,<sup>6</sup> and ICANN has explained that the EIU is neither bound by the Articles or Bylaws, nor may EIU conduct be reviewed in an IRP.<sup>7</sup> The Declaration suggests that it “is *not* assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB.”<sup>8</sup> The Declaration, however, repeatedly concludes that ICANN staff and the EIU are bound by the Articles and Bylaws.<sup>9</sup> Despite the Declaration’s statement to the contrary,<sup>10</sup> I cannot

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<sup>3</sup> I have no quarrel with the Declaration insofar as it recognizes that this Panel should not “substitute our judgment for the judgment of the [CPE Panels] as to whether Dot Registry is entitled to Community priority.” Declaration ¶ 153. However, I disagree with the Declaration’s statement that “the Dissent’s focus on whether Dot Registry should have succeeded in its action is entirely misplaced.” Declaration ¶ 70. ICANN stated that it expects the IRP Panel might consider the merits of Dot Registry’s underlying CPE Applications when resolving this dispute, *See* Hearing Transcript dated 29 Mar. 2016, at 254:14–20, and Dot Registry expressly asked the Panel to rule on its CPE Applications. *See* Claimant’s Post-Hearing Brief dated 8 Apr. 2016, ¶ 21 (“As Dot Registry considers it is the Panel’s role to independently resolve this dispute, it affirmatively requests that the Panel not recommend a new EIU evaluation. Instead, Dot Registry requests that the Panel conclusively decide—based on the evidence presented in the final version of the Flynn expert report, including the annexes detailing extensive independent research—that Dot Registry’s CPE applications are entitled to community priority status and recommend that the Board grant the applications that status.”).

<sup>4</sup> Hearing Transcript dated 29 Mar. 2016, at 254:14–20.

<sup>5</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 196–97, 199–200, 209.

<sup>6</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 187–88, 200.

<sup>7</sup> *See* ICANN’s Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 5–8; ICANN’s Response to Claimant Dot Registry’s Additional Submission dated 10 Aug. 2015, ¶ 9.

<sup>8</sup> Declaration ¶ 152. (Emphasis added.)

<sup>9</sup> *See* Declaration, Heading IV.C(1) and paragraphs 84–89, 100–01, 106, 110, 122, 124.

<sup>10</sup> *See* Declaration ¶ 152 (“There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority’s approach.”).

help but think that the implicit foundation for the Declaration's entire analysis is that ICANN staff and the EIU committed violations of the Articles and Bylaws which, in turn, should have triggered a more vigorous review process by the ICANN Board in response to Dot Registry's Reconsideration Request.

7. In my view, my co-Panelists have disregarded the express scope of their review as circumscribed by Article IV.3.4 of ICANN's Bylaws, which focuses solely on the ICANN Board and not on ICANN staff or the EIU:

*Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

- a. *did the Board act without conflict of interest in taking its decision?*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

8. ***Third***, in concluding that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws,"<sup>11</sup> the Declaration has effectively rewritten ICANN's governing documents and unreasonably elevated the organization's obligations to act transparently and to exercise due diligence and care above any other competing principle or policy. Tensions exist among ICANN's "Core Values." Article I.2 of ICANN's Bylaws states: "Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values."
9. The Declaration recognizes that the "transparency commitments included in the Core Values found in Bylaws, Art. I, § 2 are part of a balancing process," but it goes on to state, in the context of discussing communications over which ICANN claimed legal privilege, that "the obligations in the Bylaws to make [] staff work public are compulsory, not optional, and do not provide for any balancing process."<sup>12</sup> This analysis is misguided. To begin with, Bylaws Article I.2 ("Core Values") concludes thus:

*These core values are deliberately expressed in very general terms, so that*

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<sup>11</sup> Declaration ¶ 151.

<sup>12</sup> See Declaration ¶¶ 149–50.

*they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, **situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.** Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values. (Emphasis added.)*

Moreover, the cited provisions are in no way “compulsory.” Article IV.2.11 states that “the [BCG] **may** ask the ICANN staff for its views on the matter, which comments shall be made available on the Website [of ICANN],” and Article IV.2.14 provides that “The [BCG] shall act on a Reconsideration Request on the basis of the public written record, including information submitted by . . . the ICANN staff . . .” (Emphasis added.) Thus if the BGC chooses not to “ask the ICANN staff for its views on the matter,” no such views become part of the “public written record.” The BGC is not mandated to inquire of the ICANN staff, and there is no indication in the record of the proceedings before the BGC, or in the present proceeding, that the BGC exercised its discretion in that regard. All four of the items listed on ICANN’s privilege log addressed to the BGC that the Declaration cites were originated by attorneys. Furthermore, the Declaration itself in paragraph 150 records that “it is beyond doubt that the BGC obtained and relied upon information and views **submitted** by ICANN staff,” not solicited by the BGC. (Emphasis added.)

10. The Declaration otherwise disregards any “balance among competing values” and focuses myopically on transparency and due diligence while ignoring the fact that ICANN may have been promoting competing values when its Board denied Dot Registry’s Reconsideration Requests. For example:

- ICANN was “[p]reserving and enhancing [its] operational stability [and] reliability” by denying meritless Reconsideration Requests. **(Core Value 1)**
- ICANN was “delegating coordination functions” to relevant third-party contractors (the EIU) and also to ICANN staff in assisting with the Determination on the Reconsideration Requests. **(Core Value 3)**
- ICANN was “[i]ntroducing and promoting competition in the registration of domain names” because there are collectively 21 other competing applications for the three gTLDs in question. **(Core Value 6)**
- ICANN was “[a]cting with a speed that is responsive to the needs of the Internet” because it dealt with meritless Reconsideration Requests in an expedient manner. **(Core Value 9)**

11. ***Fourth***, Dot Registry has gone to great lengths to frame this IRP as an “all or nothing” endeavor, repeatedly reminding the Panel that no appeal shall follow the IRP.<sup>13</sup> Under the guise of protecting its rights, Dot Registry has attempted to expand the scope of the IRP, and, in my view, has abused the process at each step of the way. For example:

- Dot Registry submitted four fact witness statements<sup>14</sup> and a 96-page expert report to reargue the merits of its CPE Applications,<sup>15</sup> none of which were submitted with Dot Registry’s Reconsideration Requests to the BGC, even though Article IV.2.7 of ICANN’s Bylaws permitted Dot Registry to “submit [with its Reconsideration Requests already] all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.”
- Dot Registry insisted that it be allowed to file a 75-page written submission despite the requirement set forth in Article 5 of ICANN’s Supplementary Procedures that “initial written submissions of the parties [in an IRP] shall not exceed 25 pages each in argument, double-spaced and in 12-point font.”<sup>16</sup>
- Dot Registry filed a 70-page written submission in response to limited procedural questions posed by the Panel, using the opportunity to reargue at great length the merits of the proceeding despite the Panel’s warning that “submissions be focused, succinct, and not repeat matters already addressed.”<sup>17</sup>
- Dot Registry requested that the Panel hold an in-person, five-day hearing even though Article IV.3.12 of ICANN’s Bylaws directs IRP Panels to “conduct [their] proceedings by email and otherwise via the Internet to the maximum extent feasible” and Article 4 of ICANN’s Supplementary Procedures refers to in-person hearings as “extraordinary.”<sup>18</sup>
- Dot Registry introduced a fact witness to testify at the hearing<sup>19</sup> in plain violation of Article IV.3.12 of ICANN’s Bylaws (“the hearing shall be limited to argument only”), paragraph 2 of the Panel’s Procedural Order No. 11 (“There will be no live percipient or expert witness testimony of any kind permitted at the hearing. Nor may a party attempt to produce new or additional evidence.”), and paragraph 2 of the Panel’s Procedural Order No. 12 (same).

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<sup>13</sup> See, e.g., Dot Registry’s Additional Submission dated 13 July 2015, ¶ 4.

<sup>14</sup> See Witness Statement of Elaine F. Marshall dated 17 Apr. 2015; Witness Statement of Jeffrey W. Bullock dated 24 Apr. 2015; Witness Statement of Shaul Jolles dated 13 July 2015; and Witness Statement of Tess Pattison-Wade dated 13 July 2015.

<sup>15</sup> See Expert Report of Michael A. Flynn dated 13 July 2015.

<sup>16</sup> See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 4.

<sup>17</sup> See Submission of Dot Registry, LLC on the Law Applicable to ICANN and the Structure of the IRP Proceedings dated 12 Oct. 2015 (see especially paragraphs 29–54); Procedural Order No. 6 dated 26 Aug. 2015, ¶ 2.

<sup>18</sup> See Letter from Dot Registry to the Panel dated 17 Feb. 2015, at 6.

<sup>19</sup> See Hearing Transcript dated 29 Mar. 2016, at 37–42.

12. The Panel has been extremely generous in accommodating Dot Registry's procedural requests, most of which, in my view, fall outside the purview of an IRP. The Declaration loses sight of this context, and ironically the core principle underlying the Declaration's analysis is that Dot Registry has been *deprived of due process and procedural safeguards*. I vigorously disagree. Dot Registry has been afforded every fair opportunity to "skip to the front of the line" of competing applicants and obtain the special privilege of operating three community-based gTLDs. Its claims should be denied. The denial would not take Dot Registry out of contention for the gTLDs, but, as the Declaration correctly acknowledges, would merely place Dot Registry "in a contention set for each of the proposed gTLDs with [all of the other 21 competing] applicants who had applied for one or more of the proposed gTLDs."<sup>20</sup> In this respect, I find the Declaration disturbing insofar as it encourages future disappointed applicants to abuse the IRP system.

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13. Turning to the merits of the dispute, the Declaration determines that ICANN failed to apply the proper standards in ruling on Dot Registry's Reconsideration Requests, and it concludes that the actions and inactions of the ICANN Board violated ICANN's Articles and Bylaws in four respects. I would note that Dot Registry did not specifically ask this Panel to assess whether or not the BGC applied the proper standard of review when evaluating Dot Registry's Reconsideration Requests.<sup>21</sup> Therefore, I believe that the Declaration should not have addressed the BGC's standard of review. As to the four violations, I have grouped them by subject matter ("Discrimination," "Research," "Independent Judgment," and "Privilege") and address each in turn.

### **Discrimination**

14. The Declaration finds that the ICANN Board breached its obligation of due diligence and care, as set forth in Article IV.3.4(b) of the Bylaws, in not having a reasonable amount of facts in front of it concerning whether the EIU or ICANN staff treated Dot Registry's CPE Applications in a discriminatory manner. That is, the ICANN Board should have investigated further into whether the CPE Panels applied an inconsistent scoring approach between Dot Registry's applications and those submitted by other applicants.<sup>22</sup> A critical mistake of the Declaration is its view that Dot Registry, when filing its Reconsideration Requests, actually "complained that the standards applied by the ICANN staff and the EIU to its applications were different from those that the ICANN staff and EIU had applied to other successful applicants."<sup>23</sup> A review of Dot Registry's three Reconsideration Requests

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<sup>20</sup> Declaration ¶ 20.

<sup>21</sup> See Dot Registry's Request for Independent Review Process dated 22 Sept. 2014, ¶ 65; Dot Registry's Additional Written Submission dated 13 July 2015, ¶ 42; Claimant's Post-Hearing Submission dated 8 Apr. 2016, ¶¶ 20-21.

<sup>22</sup> See Declaration ¶¶ 98-100, 103-04, 122.

<sup>23</sup> Declaration ¶¶ 47-48, 124.



filed with the BGC reveals otherwise. In response to issue number 8 on each of the three “Reconsideration Request Forms,” entitled “Detail of Board or Staff Action — Required Information,” Dot Registry listed the alleged bases for reconsideration:

*The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the [.INC/.LLC/.LLP] Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.*<sup>24</sup>

15. As can be discerned from Dot Registry’s own submissions, it raised NO allegations concerning discrimination. Paragraph 22 of the Declaration paraphrases the bases for Dot Registry’s Reconsideration Requests — again, notably NOT including any allegations concerning discrimination — but then the Declaration inexplicably states in paragraph 47 that Dot Registry had alleged “unjustified discrimination (disparate treatment).”
16. My colleagues are mistaken. Dot Registry never asked the BGC for relief on any grounds relating to discrimination. As if Dot Registry’s formal request for relief in its Reconsideration Requests, quoted above, were not clear enough, the remainder of the documents confirms that nowhere did Dot Registry mention or even allude to discrimination. Its Reconsideration Requests do not even use the words “discrimination,” “discriminate,” “discriminatory,” “disparate,” or “unequal.” To the extent that my colleagues take the position that Dot Registry’s discrimination argument was somehow “embedded” within the Reconsideration Requests, I respectfully disagree. At most, Dot Registry referred in passing to an appeals mechanism used in another application (.edu),<sup>25</sup> and it noted, again in passing, that the BGC had ruled a certain way with regard to .MED,<sup>26</sup> but Dot Registry never articulated any proper argument about discrimination. It is undisputed that Dot Registry has alleged discrimination in this IRP<sup>27</sup> — but of course it only raised those arguments after the BGC issued its Determination on Dot Registry’s Reconsideration Requests. By holding the BGC accountable for failing to act in response to a complaint that Dot Registry never even advanced below, the Declaration commits an obvious error.

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<sup>24</sup> See Reconsideration Request for Application 14-30 at 4; Reconsideration Request for Application 14-32 at 3; Reconsideration Request for Application 14-33 at 3.

<sup>25</sup> See Reconsideration Request for Application 14-30 at 16 & n.39; Reconsideration Request for Application 14-32 at 14 & n.39; Reconsideration Request for Application 14-33 at 14 & n.35.

<sup>26</sup> See Reconsideration Request for Application 14-30 at 6-7; Reconsideration Request for Application 14-32 at 4-5; Reconsideration Request for Application 14-33 at 4-5.

<sup>27</sup> See Dot Registry’s Additional Written Submission dated 17 July 2015, at 15-17; Dot Registry’s Submission dated 12 Oct. 2015, at 27-30.

## Research

17. The Declaration finds that the ICANN Board also breached the same obligation of due diligence and care in having a reasonable amount of facts in front of it concerning transparency. More specifically, it concludes that the BGC did not take sufficient steps to see if ICANN staff and the EIU acted transparently when undertaking “research” that went into the CPE Reports.<sup>28</sup> The only references to “research” in the CPE Reports are the same two sentences that are repeated three times verbatim in each of the CPE Reports:

*Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an [INC, LLC, LLP]. Based on the Panel's research, there is no evidence of [INCs, LLCs, LLPs] from different sectors acting as a community as defined by the Applicant Guidebook.*<sup>29</sup> (Emphasis added.)

18. The Declaration traces the origins of this language back to correspondence between ICANN staff and the EIU in which the former suggested that the latter refer to “research” in a draft of what would eventually become the final CPE Reports in order to further “substantiate” the conclusion that INCs/LLCs/LLPs do not constitute “communities.”<sup>30</sup> The Declaration observes that Dot Registry had asserted in its Reconsideration Requests that the CPE Reports “repeatedly relie[d]” upon research as a “key factor” without “cit[ing] any sources or giv[ing] any information about [] the substance or the methods or scope of the ‘research.’”<sup>31</sup> My colleagues are troubled by what they view as ICANN’s Board making “short shrift” of Dot Registry’s position concerning the “research.”<sup>32</sup> The BGC disposed of Dot Registry’s argument as follows:

*The Requestor argues that the Panels improperly conducted and relied upon independent research while failing to “cit[e] any sources or give[] any information about [] the substance or the methods or scope of the ‘research.’” As the Requestor acknowledges, Section 4.2.3 of the Guidebook expressly authorizes CPE Panels to “perform independent research, if deemed necessary to reach informed scoring decisions.[”] The Requestor cites to no established policy or procedure (because there is none) requiring a CPE Panel to disclose details regarding the sources, scope, or methods of its independent research. As such, the Requestor’s argument does not support reconsideration.*<sup>33</sup>

19. The Declaration views this analysis by the BGC as insufficient. It concludes that the

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<sup>28</sup> Declaration ¶¶ 94–99, 106, 111, 115–22.

<sup>29</sup> Community Priority Evaluation Report for “INC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLC” dated 11 June 2014, at 2, 3, 4; Community Priority Evaluation Report for “LLP” dated 11 June 2014, at 2, 3, 4.

<sup>30</sup> Declaration ¶¶ 96–99.

<sup>31</sup> Declaration ¶ 94 (quoting Dot Registry’s Reconsideration Requests).

<sup>32</sup> Declaration ¶ 95.

<sup>33</sup> Determination of the Board Governance Committee Reconsideration Request 14-30, 14-32, 14-33 dated 24 July 2014, at 11 (internal citations omitted).

“failure by the BGC to undertake an examination of whether ICANN staff or the EIU in fact complied with those [transparency] obligations is itself a failure by the Board to comply with its [transparency] obligations under the Articles and Bylaws.”<sup>34</sup>

20. The Declaration suffers from several fatal flaws. To begin with, it consists of a thinly veiled rebuke of actions taken by the EIU and ICANN staff. Although the Declaration does not explicitly so state, it hints at a strong disapproval of the cooperation between the EIU and ICANN staff in drafting the CPE Reports, and it all but says that the EIU and ICANN staff violated ICANN’s transparency policies by citing “research” in the CPE Reports but failing to detail the nature of that “research.” As noted above, however, this Panel’s jurisdiction is expressly limited to reviewing the action or inaction of the ICANN Board and no other individual or entity. ICANN itself has recognized that “the only way in which the conduct of ICANN staff or third parties is reviewable [by an IRP Panel] is to the extent that the Board allegedly breached ICANN’s Articles or Bylaws in acting (or failing to act) with respect to that conduct.”<sup>35</sup> In my opinion, my co-Panelists’ conclusion that ICANN’s Board breached its Articles and Bylaws is driven by their firm belief that ICANN staff and the EIU should have disclosed their research. This reasoning places the “cart before the horse” and fails on that basis alone.
21. Nor has the Declaration given proper consideration to the BGC’s analysis (quoted in paragraph 18 above) or to ICANN’s position as articulated in one of its written submissions to this Panel:

*[T]he CPE Panels were not required to perform any particular research, much less the precise research preferred by an applicant. Rather, the Guidebook leaves the issue of what research, if any, to perform to the discretion of the CPE panel: “The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”*

*[T]he research performed by the EIU is not transmitted to ICANN, and would not have been produced in this IRP because it is not in ICANN’s custody, possession, or control. The BGC would not need this research in order to determine if the EIU had complied with the relevant policies and procedures (the only issue for the BGC to assess with respect to Dot Registry’s Reconsideration Requests).<sup>36</sup>*

Moreover, as noted in paragraph 5 above, it was reasonable for the BGC not to exercise its discretion to inquire into the details of the EIU’s research, given the rather obvious absence of merit in Dot Registry’s CPE submissions for .INC, .LLC, and .LLP.

22. Had my co-Panelists fully considered the BGC’s Determination on the Reconsideration Requests and ICANN’s analysis, they would have found that both withstand scrutiny. Section 4.2.3 of the AGB establishes a CPE Panel’s right — but not obligation — to perform

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<sup>34</sup> Declaration ¶ 122.

<sup>35</sup> ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 10.

<sup>36</sup> See ICANN’s Response to Claimant Dot Registry LLC’s Additional Submission dated 10 Aug. 2015, ¶ 44 (citing AGB § 4.2.3) (emphasis in original).

research, which it “deem[s] necessary to reach [an] informed scoring decision.” The Declaration effectively transforms that discretionary right into an affirmative obligation to produce any research performed by any ICANN personnel or even by third parties such as the EIU. The Declaration cites for support general provisions concerning transparency that, it says, “reverberate[] through [ICANN’s] Articles and Bylaws,”<sup>37</sup> but it notably fails to cite any clause specifically requiring the disclosure of “research.” There is no such clause. ICANN, its staff, and its third-party vendors should not be penalized for having exercised the right to perform research when they were never required to do so in the first place. I disagree with the Declaration which forces the BGC to “police” any voluntary research performed by ICANN staff or the EIU and spell out the details of that research for all unsuccessful CPE applicants during the reconsideration process.

23. In any event, any reader of the underlying CPE Reports rejecting Dot Registry’s applications would be hard pressed to find that the reasoning and conclusions expressed in those reports would no longer hold up if the two sentences referring to “research” had never appeared in those reports. My colleagues are fooling themselves if they think that extracting those ancillary references to “research” from the CPE Reports would have meant that the CPE Panels would have awarded Dot Registry with four points for “Community Establishment.” Any error relating to the disclosure of that research was harmless at best.

### **Independent Judgment**

24. The Declaration cites Article IV.3.4(c) of ICANN’s Bylaws, which instructs IRP Panels to focus on, *inter alia*, whether “the Board members exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company.”<sup>38</sup> It finds that “the record makes it exceedingly difficult to conclude that the BGC exercised independent judgment.”<sup>39</sup> Besides the text of the BGC’s Determination on the Reconsideration Requests and the minutes of the BGC meeting held concerning that determination, which my co-Panelists dismiss as “*pro forma*” and “routine boilerplate,” the Declaration finds nothing to support the conclusion that the BGC did anything more than “rubber stamp” work supplied by ICANN staff.<sup>40</sup> The Declaration chastises ICANN for submitting “no witness statements or testimony” or documents to prove that its Board acted independently.<sup>41</sup> In response to an assertion from ICANN’s counsel that the Board did not rely on staff recommendations, the Declaration retorts, “[That] is simply not credible.”<sup>42</sup> Ultimately, it holds ICANN in violation of Article IV.3.4(c) on the basis that ICANN presented “no real evidence” that the BGC exercised independent judgment.<sup>43</sup>

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<sup>37</sup> See Declaration ¶¶ 117–21.

<sup>38</sup> Declaration ¶ 126.

<sup>39</sup> Declaration ¶¶ 127, 147.

<sup>40</sup> Declaration ¶¶ 126, 140, 147.

<sup>41</sup> Declaration ¶¶ 127, 147.

<sup>42</sup> Declaration ¶ 141.

<sup>43</sup> Declaration ¶¶ 126, 147, 150.

25. The Declaration<sup>44</sup> relies heavily on Articles IV.2.11 and IV.2.14 of ICANN's Bylaws which state:

*The Board Governance Committee may ask the ICANN staff for its views on the matter, which comments shall be made publicly available on the Website.*

*The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN staff, and by any third party.*

26. The Declaration interprets these Articles by finding that the "obligations in the Bylaws to make . . . staff work public are compulsory, not optional."<sup>45</sup>
27. Once again, the Declaration elevates the mantra of transparency above all else. It is worth recalling, as is set forth in paragraph 9 above, that Article IV.2.11 vests in the BGC the right — but not the obligation — to seek staff views. ICANN has explained that there are no records of "staff . . . views" or "information submitted . . . by the ICANN staff," as contemplated by Articles IV.2.11 and IV.2.14. It should be noted that the privilege log submitted by ICANN does show that there were 14 e-mail exchanges between ICANN officials and their counsel relating to Dot Registry, which controverts the "rubber-stamping" conclusion of the Declaration.<sup>46</sup> ICANN's Senior Counsel has even gone so far as to submit a signed, notarized attestation (albeit after being compelled to do so by the Panel)<sup>47</sup> that ICANN had produced all non-privileged documents in its possession responding to the Panel's inquiries concerning ICANN's internal communications.<sup>48</sup> The Panel, nonetheless, deems ICANN's position "simply not credible."<sup>49</sup> Credibility determinations have no place in this IRP, especially in relation to counsel.<sup>50</sup> The Declaration has effectively gutted the meaning of Articles IV.2.11 and IV.2.14 as discretionary tools available to ICANN and converted them into affirmative obligations that ICANN produce enough evidence in an IRP to prove that its Board acted independently.
28. Curiously, the Declaration refers not even once to "burden of proof." It was wise not to do so, notwithstanding that both Dot Registry and ICANN contended that the other Party bore a burden of proof, given that nowhere in the Bylaws relating to the BGC or to this IRP is there

<sup>44</sup> See Declaration ¶¶ 128, 142, 149–50.

<sup>45</sup> Declaration ¶ 149.

<sup>46</sup> See Privilege Log (attached to Letter from ICANN to the Panel dated 19 June 2015).

<sup>47</sup> See Procedural Order No. 6 dated 12 June 2015, ¶ 4.

<sup>48</sup> See Attestation of Elizabeth Le dated 17 June 2015.

<sup>49</sup> Declaration ¶ 151.

<sup>50</sup> Note that the Declaration also repeatedly refers to the "Declaration" submitted by EIU Contact Information Redacted on behalf of ICANN as evidence showing that ICANN staff worked closely with the EIU. See Declaration ¶¶ 14, 15, 36, 43, 90–92. EIU Contact Information Redacted did not submit a traditional "witness statement." He is the EIU Contact Information Redacted of the EIU. He wrote one five-page declaration dated 13 April 2015 that was submitted by ICANN to Dot Registry as part of the document-production process in this dispute.

any provision for a burden of proof. To the contrary, the present IRP is governed by Bylaws Article IV.3.4, which prescribes that this Panel “shall be charged with comparing contested actions of the Board [BGC] to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of [them].” Nevertheless, it is self-evident that the Declaration not only placed the burden on ICANN to prove that its Board acted independently, but the Declaration’s repeated references to the “silence in the evidentiary record”<sup>51</sup> make it clear that the Declaration viewed ICANN’s failure to submit evidence as *the single decisive factor* behind its holding. None of the previous IRP panels has placed the burden on ICANN to disprove a claimant’s case.<sup>52</sup> Why would they? Guided by the mandate of Bylaws Article IV.3.4, the Panel should simply have taken the record before it, compared it to the requirements of the Articles of Incorporation and the Bylaws, weighed the record and the Parties’ arguments, and then, without imposing any burden of proof on either Party, have proceeded to its decision.

29. Applying that approach to this particular dispute should have led the Panel to the two most obvious pieces of evidence on point: the 23-page Determination on the Reconsideration Requests and the minutes of the Board meeting during which its members voted on that Determination. In my view, the 23-page Determination on the Reconsideration Requests is thorough and sufficient in and of itself to show that the ICANN Board fully and independently considered Dot Registry’s claims. Each argument advanced by Dot Registry was carefully recorded, analyzed, dissected, and rejected. What more could be necessary? Another IRP Panel, deciding the dispute in *Vistaprint Limited v. ICANN*, apparently agreed. It stated:

*In contrast to Vistaprint's claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel's lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC's analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel's own analysis.*<sup>53</sup>

30. The minutes of the ICANN Board meeting held on 24 July 2014 also show that “[a]fter discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports.”<sup>54</sup> The Declaration summarily dismisses those

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<sup>51</sup> Declaration ¶ 128.

<sup>52</sup> See Hearing Transcript dated 29 Mar. 2016, at 91:8–18, 174:14–19.

<sup>53</sup> *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel, ¶ 159.

<sup>54</sup> See <https://www.icann.org/resources/board-material/minutes-bgc-2014-07-24-en>.

minutes as “boilerplate” and “*pro forma*.”<sup>55</sup> Here, too, the Declaration is mistaken. It is to be appreciated that the minutes only go into minimal detail, but the Declaration fails to accord any meaning or weight whatsoever to the words “discussion and consideration.” The words must mean what they say: ICANN’s Board “discussed” and “considered” Dot Registry’s Reconsideration Requests and decided to deny them for all of the reasons set forth in the Determination on the Reconsideration Requests.

31. To accept the analysis set forth in the Declaration, one must start from the premise that ICANN’s Board Members had to “wrestle” with difficult issues raised by Dot Registry’s Reconsideration Requests and therefore a long paper trail must exist reflecting inquiries, discussions, drafts, and so forth. A sober review of the record, however, suggests that the Board never needed to engage in any prolonged deliberations, because it was never a “close call.” Dot Registry’s CPE applications only received 5 out of 16 points (far short of the 14 points necessary to prevail), and its Reconsideration Requests largely reargued the merits of its underlying CPE Applications. The ICANN Board assessed and denied Dot Registry’s weak applications with efficiency. It should have no obligation to detail its work beyond that which it has done.
  
32. Instead of doing as it should have done, however, and in addition to converting discretionary powers of the BGC under the Bylaws into unperformed mandatory investigations, the Panel engaged in repeated speculation in paragraph after paragraph: it “infer[red],” para. 133; “presume[d],” para. 133; stated that “it would appear,” para. 134; “consider[ed],” para. 137; found that since “[n]o ICANN staff or Board members presented a witness statement in this proceeding,” and there is “no documentary evidence of such a hypothetical discussion,” i.e., “oral conversations between staff and members of the BGC, and among members of the BGC, . . . in connection with the July 24 session BGC meeting where the BGC determined to deny the reconsideration requests,” . . . “no evidence at all exists [‘apart from *pro forma* corporate minutes of the BGC meeting’] to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff,” para. 140; found that “[t]he BGC . . . simply could not have reached its decision to deny the Reconsideration Requests without relying on work of ICANN staff,” para. 145; and concluded that “ICANN has not submitted any *evidence* to allow the Panel to objectively and independently determine whether references in the Minutes to discussion by the BGC of the Requests are anything more than corporate counsel’s routine boilerplate drafting for the Minutes . . . regardless of whether or not the discussion was more than rubber-stamping of management decisions,” para. 147. (Emphasis in original.)

### **Privilege**

33. Related to the last issue and relying once more on its mistaken interpretation of Articles IV.2.11 and IV.2.14 of ICANN’s Bylaws when viewed in combination as mandating public posting of unsolicited comments from ICANN staff, the Declaration finds that the ICANN

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<sup>55</sup> Declaration ¶ 147.

Board breached its obligation to make ICANN staff work publicly available by claiming legal privilege over communications involving ICANN's Office of General Counsel.<sup>56</sup> It is undisputed that ICANN submitted a three-page privilege log, listing 14 documents, and ICANN's counsel did not hide the fact that ICANN had withheld from its productions those communications concerning Dot Registry that involved ICANN's Office of General Counsel.<sup>57</sup>

34. The question for the Panel is whether ICANN's transparency obligations, particularly those found in the provisions quoted at paragraph 25 above, even as wrongly interpreted by the majority Declaration, prohibited ICANN from claiming legal privilege over communications otherwise reflecting ICANN staff views on Dot Registry's Reconsideration Requests. ICANN's Bylaws could have included limiting language recognizing that ICANN's obligations under Articles IV.2.11 and IV.2.14 to make staff work available to the public would be subject to legal privilege, but the Bylaws do not do so. On the other hand, neither do the Bylaws expressly state that ICANN's transparency obligations trump ICANN's right to communicate confidentially with its counsel, as any other California corporation is entitled to do.<sup>58</sup> Article III of ICANN's Bylaws, entitled "Transparency," does not specifically answer the question before the Panel. My colleagues rely heavily on the first provision of the Article, which states that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner." My colleagues do not cite the only provision found within Article III that does address "legal matters," albeit in the context of Board resolutions and meeting minutes, which suggests that ICANN's general transparency obligations do NOT trump its right to withhold legally privileged communications.<sup>59</sup> As such, I would not have found ICANN in violation of its Bylaws but I would have favored a Declaration adopting an approach similar to that taken recently by another IRP Panel, *Despegar v. ICANN*, in which the Panel rejected all of the claims brought by the claimants but suggested that ICANN's Board address an issue outside of the IRP context.<sup>60</sup> This Panel just as easily could have urged ICANN to clarify how legal privilege fits within its transparency obligations without granting Dot Registry's applications in this IRP.

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<sup>56</sup> Declaration ¶¶ 133, 135-37, 143, 148-50.

<sup>57</sup> Declaration ¶ 141. The Declaration suggests that ICANN has raised both attorney-client privilege and work-product privilege, *see* Declaration ¶¶ 128 and 149, although the last column in ICANN's privilege log lists "attorney-client privilege" as the only applicable privilege to each document listed.

<sup>58</sup> *See* Hearing Transcript dated 29 Mar. 2016, at 211:17-24.

<sup>59</sup> *See* ICANN Bylaws, Article III.5.2 ("[A]ny resolutions passed by the Board of Directors at [a] meeting shall be made publicly available on the Website; provided, however, that any actions relating to . . . legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN) . . . are not appropriate for public distribution, [and] shall not be included in the preliminary report made publicly available."); ICANN Bylaws, Article III.5.4 (same regarding meeting minutes).

<sup>60</sup> *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157-58 ("[A] number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.").



## Conclusion

35. In my view Dot Registry, apparently with the collaboration of the National Association of Secretaries of State (“NASS”), has quite boldly gamed the system, seeking CPEs which all of the other 21 applicants for the three gTLDs in issue thought were obviously unattainable, since they ventured no such applications, in hopes of outflanking, hence defeating, all of them by bulldozing ICANN in the present proceeding. As noted above, the majority Declaration entirely overlooks the fact that the BGC was empowered, but not required, by the rules governing its proceeding to make certain inquiries, and takes no account of how the exercise of the BGC’s discretion in this regard can legitimately be affected by the patent lack of any kind of “community” among all INCs, LLCs, or LLPs. At the hearing I questioned whether the willingness of the NASS to support Dot Registry in its gamble might not be due to its members’ independent interest in the possibility that their enforcement function would be facilitated if Dot Registry’s applications were to be successful:

*JUDGE BROWER: ... Suppose I'm the secretary of state of Delaware or the head of the NASS, and your client comes to me with his proposition of the applications that have been put before us. And the secretary of state says, oh, wow, this is a great enforcement possibility for us. If you get these domain names approved by ICANN and a provision of being able to use it is that one is registered with the secretary of state of one of the states, that's for me, wow, what a great sort of enforcement surveillance mechanism, because I don't have to pay anything for it. It's better than anything we've been able to do, because I will know anyone using the LLC or LLP or INC as a domain name actually has legitimate -- should have a legitimate legal status. So that's my motive, okay? I'll do anything I can to get that done, and he says, sure, I'll sign anything. I'll say they got it all wrong. Does that make -- would that make any difference?*

*MR. ALI: I mean I wouldn't want to speak for the Delaware secretary of state or any other secretary of state. I think that's precisely the sort of question that you could have put to them if they were in front of you. I mean what their motivations were or what their motivations are, I think it would be highly inappropriate for me to try and get. I would not want to offer you any sort of speculation, but I would say that the obverse of not having that I would say surveillance power, they have that anyway if you want to call it surveillance, because the registration, "surveillance" sounds somewhat sinister, particularly in today's environment of being someone who has some background. So I would simply say that the -- by not having this particular institution as we proposed by Dot Registry, the prospects of consumer fraud and abuse are absolutely massive, because if somebody were to gain the rights to these TLDs, or maybe it's not just one company or one applicant, but three different applicants, not a single one of which is based in the United States, just think of the prospect of a company registered who knows where, representing to the world that it's an INC. That would be highly problematic. That would be -- that would create the potential for significant consumer fraud. I mean consumer fraud on the internet is multibillion dollar*

*liability. This stands, if it's not done properly, to create absolute havoc. And so the secretary of state, in his or her execution of his or her mission, might well be motivated by wanting to prevent further consumer fraud, but that's an entirely legitimate purpose. That's really my own speculation.*

*JUDGE BROWER: No, I don't argue with the legitimate purpose. The question is whether it is a basis of community.<sup>61</sup>*

I believe that this exchange speaks for itself.

36. The majority Declaration unilaterally reforms the entire BGC procedure for addressing Reconsideration Requests and also what heretofore has been expected of an IRP Panel. The majority would have done better to stick to the rules itself, and, as the IRP Panel did in *Despegar v. ICANN*, suggest that the ICANN Board “give due consideration” to general issues of concern raised by the Claimant.<sup>62</sup> The present Declaration, in finding the BGC guilty of violating the ICANN Articles and By-Laws, has itself violated them.
37. The majority Declaration intentionally avoids any recommendations to the Board as to how it should respond to this Declaration. This IRP Panel is, of course, empowered to make recommendations to the Board.<sup>63</sup> Since the Declaration, if it is to be given effect, has simply concluded that the BGC violated transparency, did not have before it all of the facts necessary to make a decision, and failed to act independently — all procedural defects having nothing to do with the merits of Dot Registry’s three applications for CPEs — it appears to me that the only remedy that would do justice to Dot Registry, as the majority Declaration sees it, and also to all of the other 21 applicants for the same three gTLDs, hence to ICANN itself, would be for the Board to “consider the IRP Panel declaration at the Board’s next meeting,” as it is required to do under Article IV.3.21 of the Bylaws, and for the BGC to take whatever “subsequent action on th[e] declaration[.]” it deems necessary in light of the findings of the Declaration.<sup>64</sup> In other words, I would recommend that the Board, at most, request the BGC to rehear the original Reconsideration Requests of Dot Registry, making the inquiries and requiring the production of the evidence the majority Declaration has found wanting. Considering the limits of the Declaration, which has not touched on the merits of Dot Registry’s three CPE applications, it would, in my view, be wholly inappropriate for the Board to grant Dot Registry’s request that its three applications now be approved without further ado.
38. For all of the above-mentioned reasons, I would have rejected each of Dot Registry’s claims and named ICANN as the prevailing party. I respectfully dissent.

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<sup>61</sup> Hearing Transcript dated 29 Mar. 2016, at 65:6-67:23.

<sup>62</sup> *Despegar SRL Online v. ICANN*, ICDR Case No. 01-15-0002-8061, Final Declaration ¶¶ 144, 157–58.

<sup>63</sup> ICANN Bylaws, Article IV.3.11(d) (“The IRP Panel shall have the authority to: ... recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”); ICANN Bylaws, Article IV.3.21 (“Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

<sup>64</sup> ICANN Bylaws, Article IV.3.21.

29 July 2016

*Charles N. Brower*

Charles N. Brower



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Sent via email  
August 6, 2016

**Internet Corporation for Assigned Names and Numbers (ICANN)**

**Attn:** Board members  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536 USA  
Phone: +1.310.301.5800  
Fax: +1.310.823.8649  
Email: [correspondence@icann.org](mailto:correspondence@icann.org)

**Re: 9 August 2016 Special Meeting of the ICANN Board of Directors  
regarding agenda item *Dot Registry LLC v. ICANN (01-14-0001-5004)*  
Independent Review Process (“IRP”) Declaration of 29 July 2016**

Dear ICANN Board,

On August 9, 2016, you will hold a Special Meeting to consider next steps in the *Dot Registry LLC v. ICANN* Independent Review Panel (“IRP”) Declaration, among other things. Dot Registry’s IRP Declaration can give us guidance to achieve a favorable outcome for all parties.

Most importantly, the un rebutted evidence must guide the ICANN Board in determining next steps. Namely, the Board must compare the EIU’s seven page CPE Report, absent any citation to research performed, to Navigant’s 90 page expert report, prepared by Michael Flynn, with over 200 external citations to research performed. The Navigant report alone is sufficient and compelling to assist the Board with determining that Dot Registry’s applications should have passed CPE had the EIU done its job neutrally and objectively, with transparency, integrity and fairness. To disregard the Navigant report would be to disregard the IRP ruling in favor of Dot Registry. The ICANN Board has all the evidence before it in this matter and there’s no additional information to discover, as attested by ICANN’s own in-house counsel in the IRP proceeding.

Dot Registry LLC (“Dot Registry”) applications for .INC, .LLC, and .LLP align with the verification/validation requirements in the Government Advisory Committee (“GAC”) Beijing advice on Category 1 highly regulated strings. Dot Registry has received unanimous approval from the National Association of

208 W 19th, Kansas City, MO 64108, USA [dotregistry.org](http://dotregistry.org) 816.200.7080

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Secretaries of State (“NASS”), the collective voice of all 50 U.S. States and Territories Secretaries of State or their equivalents, who do regulate the .INC, .LLC, and .LLP communities in the U.S. and who are in position to determine best practices and compliance with the laws related to corporate formation.

Several of these secretaries of State, including the Honorable Jeffrey Bullock, are interested in expanding the scope of our applications outside the U.S., to include other nations. The Secretaries are willing to work with us to expand outside the U.S. borders and lead by example. The Secretaries of State have vast knowledge of corporate formation and are willing to help develop protocols to secure business registrations and promote eCommerce opportunities throughout other nations. We can go beyond the GAC requirements to work together on developing ecommerce across borders.

Dot Registry proposes that the ICANN Board pass a resolution on August 9, 2016 to proceed to contracting with Dot Registry and sign registry agreements for .INC, .LLC, and .LLP. We would also like the ICANN community to consider earmarking some of the New gTLD funds to help developing nations who want .INC, .LLC, and/or .LLP corporate designations and need the development of International protocols. In addition, Dot Registry would ask that ICANN staff approve contract amendments related to onboarding these developing nations as they are ready, which will not be unreasonably withheld or delayed.

As the first round of New gTLDs winds down, this is a perfect time to “test” if GAC advice on Category 1 highly regulated strings can be successfully implemented, which we know it can be. Developing the necessary PICs is a regulator function, not an ICANN function. ICANN is not in a position to do that; however, our community officials (i.e., Secretaries of State) are in a position to do so.

Dot Registry is the only steward for these highly regulated strings. Standard applicants are not willing to protect them, because if they were, they would have included appropriate safeguards in their applications. If these strings are delegated to a standard applicant, without any mandated PICs such as verification or validation protocols, consumer and business fraud has the ability to escalate out of control.

Dot Registry is committed to building a robust verification/validation system to ensure that a business who owns a .INC, .LLC, or .LLP domain is in good standing  
208 W 19th, Kansas City, MO 64108, USA dotregistry.org 816.200.7080



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with the regulator and the domain name is tied to an actual business. Dot Registry's proposal checks ICANN's boxes for implementing GAC Advice on Category 1 highly regulated strings, a positive resolution of an unfavorable IRP Declaration, and it supports ICANN's mission to operate a secure and stable Internet.

We believe, despite all that we've been through, that the ICANN Board can and will do the right thing on August 9<sup>th</sup> and proceed to contracting with Dot Registry for .INC, .LLC, and .LLP.

Should you have any questions or concerns, you may reach me directly at +1.816.200.7080 Central Time.

**DOT REGISTRY LLC**

Sincerely,

A handwritten signature in black ink, appearing to read "S. Jolles", with a stylized flourish at the end.

Shaul Jolles  
Chief Executive Officer

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-14-0001-5004

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**In the matter of an Independent Review Process**

*DOT REGISTRY, LLC,*

*Claimant,*

*v.*

*INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS ("ICANN"),*

*Respondent*

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**Expert Report of Michael A. Flynn**

July 13, 2015

Navigant Economics  
1999 Harrison Street, Suite 2700  
Oakland, California 94612

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## A. Introduction and Background

1. Claimant Dot Registry, LLC (“Dot Registry”) filed community-based gTLD (“generic Top-Level Domain) applications for the strings .INC,<sup>1</sup> .LLC<sup>2</sup> and .LLP<sup>3</sup> in the gTLD application round that opened on January 12, 2012, under procedures established by the Internet Corporation for Assigned Names and Numbers (“ICANN”). In 2014, these applications apparently underwent three separate Community Priority Evaluations (“CPEs”) supposedly carried out by three separate Community Priority Evaluation Panels of the Economist Intelligence Unit (“EIU”) under contract to ICANN. In three *Community Priority Evaluation Reports* dated June 11, 2014,<sup>4</sup> the EIU found that these three Dot Registry community applications “did not prevail”, owing to the fact that each received just 5 points, well short of the minimum 14 points (out of 16 possible points) needed to be granted “Community Priority” status. Dot Registry has requested an independent review of ICANN’s actions and inactions in connection with the performance and results of these three CPEs under the auspices of a panel of the International Centre for Dispute Resolution (hereinafter, the “ICDR Panel”).<sup>5</sup>
2. In connection with this ICDR proceeding between Dot Registry and ICANN, I have been asked by counsel for Dot Registry to review the record materials, to perform any research or other information gathering I deem necessary, and to form my expert opinion regarding:
  - a. Whether the determinations of the EIU in respect of Dot Registry’s community-based applications for the .INC, .LLC and .LLP gTLDs conformed to the principles and methodology set forth in Module 4 of ICANN’s *gTLD Applicant Guidebook* (the “AGB”),<sup>6</sup> and

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<sup>1</sup> Application 1-880-35979 (the “.INC Application”), attached as Exhibit 4.

<sup>2</sup> Application 1-880-17627 (the “.LLC Application”), attached as Exhibit 5.

<sup>3</sup> Application 1-880-35597 (the “.LLP Application”), attached as Exhibit 6.

<sup>4</sup> These EIU CPE Reports will be referred to, and attached as, respectively, the “.INC Report” (Exhibit 7), the “.LLC Report” (Exhibit 8) and the “.LLP Report” (Exhibit 9).

<sup>5</sup> ICDR Case No. 01-14-0001-5004.

<sup>6</sup> Version 2012-06-04, dated 4 June 2012 (attached as Exhibit 1).

EXPERT REPORT

- b. Whether those determinations are consistent with the EIU's CPE determinations in connection with the .RADIO,<sup>7</sup> .HOTEL,<sup>8</sup> .OSAKA<sup>9</sup> and .ECO<sup>10</sup> community applications.
3. I am aware of the identity of the parties to this ICDR proceeding, their legal counsel and the members of the ICDR Panel. I consider myself to be independent from them, and I do not have a conflict of interest in acting as an expert in this proceeding.
4. I understand that I have an overriding duty to assist the ICDR Panel and to provide independent expert evidence. I also understand that my expert report is to be objective and impartial and that it is to include everything I consider relevant to the opinions I express.
5. A complete list of the documents and related materials I have reviewed in connection with this assignment may be found at **Attachment A**.
6. I have reached the conclusions set forth in this report following my review of the case-related materials that have been provided to me, and other research I have performed, through June 24, 2015. If additional information relevant to my assignment and opinions in this matter becomes available, and if asked to do so by counsel for Dot Registry or the ICDR Panel, I may supplement this report.

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<sup>7</sup> EIU CPE Report on Application 1-1083-39123 dated 11 September 2014 (the ".RADIO Report") and attached as Exhibit 10.

<sup>8</sup> EIU CPE Report on Application 1-1032-95136 dated 11 June 2014 (the ".HOTEL Report") and attached as Exhibit 11.

<sup>9</sup> EIU CPE Report on Application 1-901-9391 dated 29 July 2014 (the ".OSAKA Report") and attached as Exhibit 12.

<sup>10</sup> EIU CPE Report on Application 1-912-59314 dated 6 October 2014 (the ".ECO Report") and attached as Exhibit 13.

## B. Qualifications and Experience

7. I am a Director with Navigant's Oakland, California office. I have been both a testifying and consulting expert economist for over twenty-five years, specializing in antitrust, economic damages, intellectual property, class actions and other complex business litigation and consulting engagements. My *curriculum vitae* may be found at **Attachment B**.
8. Navigant is compensated on an hourly basis at a rate of \$590 per hour for my time spent on this engagement.
9. I have had earlier experience in connection with ICANN's current gTLD expansion program. In 2011, while serving as a consultant to the Association of National Advertisers, I co-authored a letter to Congress recommending that ICANN be required to fulfill its undertakings under its *Affirmation of Commitments*<sup>11</sup> with the U.S. Department of Commerce before embarking on its current gTLD expansion program. Following that, from 2012 through mid-2014, I was an independent, unaffiliated member of the ICANN community, during which time I briefly served as a community volunteer in connection with ICANN's effort to demonstrate, on an *ex post* basis, that its gTLD expansion then currently under way did in fact achieve the stated objectives of increased competition, consumer choice and consumer trust in the Domain Name System (DNS). I discontinued my involvement as a volunteer in 2014 following the U.S. government's announcement of its intention to transfer oversight of ICANN's Domain Name Functions to an appropriate successor.<sup>12</sup>

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<sup>11</sup> <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>

<sup>12</sup> "NTIA Announces Intent to Transition Key Internet Domain Name Functions", press release dated March 14, 2014 (<http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>).

### C. Summary of Conclusions

10. Upon careful study, I conclude that each of Dot Registry's three community applications—for .INC, .LLC and .LLP—should have prevailed in their respective 2014 CPEs and have been awarded community priority status.
11. In particular, I conclude that Dot Registry's community applications for the .INC and .LLP strings should each have received scores of **15 points** (out of the maximum possible score of 16 points), one more than the 14 points each needed to be granted community priority status. Dot Registry's application for the .LLC string should have received the maximum possible score of **16 points**. These three correct scores are in sharp contrast to the identical scores of just 5 points each that the EIU actually awarded to the .INC, .LLC and .LLP applications.
12. The 5-point scores actually received by Dot Registry's .INC, .LLC and .LLP community applications were the result of what I consider to be the EIU failures to adhere to the AGB. These include:
  - a. Making unauthorized modifications to, or applying incorrect interpretations of, the criteria for CPEs set forth in the AGB before then "finding" that the Dot Registry applications failed to satisfy the EIU versions of the AGB criteria.
  - b. The EIU denial of Dot Registry's .INC, .LLC and .LLP community applications turned on its interpretations of just a handful of the AGB criteria:
    - i. Under Criterion #1: What is meant by—and needed to satisfy—the AGB requirement for "awareness and recognition of a community among [a community's] members", especially in view of the fact that this term is not defined by the AGB?
    - ii. Also under Criterion #1: Does the "Organized" criterion require that there be "at least one" entity mainly dedicated to the community, or "only one"? Also, does the "Organized" criterion's "mainly dedicated" term require that this entity have no other responsibilities besides those related to the community at issue?
    - iii. Under Criterion #2: What does it mean for a string to "over-reach *substantially* beyond the community [emphasis added]"? (The AGB does not include a definition or metric for this term.)

- iv. Under Criterion #3: What is the meaning of—or limitation posed by—the AGB requirement for “*appropriate* appeal mechanisms”, especially since the AGB states that with respect to “Enforcement”, “scoring of applications against [this criterion] will be done from a *holistic perspective with due regard for the particularities of the community explicitly addressed* [emphasis added]”?
13. The EIU applied markedly different—and less demanding—interpretations of these criteria in connection with its approval of the .RADIO, .HOTEL, .OSAKA and .ECO community applications. Had the EIU applied the same interpretations to Dot Registry’s applications for .INC, .LLC and .LLP, these applications would have prevailed, in my assessment.

#### D. Overview of ICANN’s Community Priority Evaluation (CPE) Process

14. **Community Priority Evaluation (CPE)** is one of the two methods<sup>13</sup> established by ICANN to resolve “string contention” –the situation in which two or more applicants have applied for the same gTLD—arising under ICANN’s current program to further expand the number of gTLDs.<sup>14</sup> The important point is that ICANN’s rules give priority to “community applications” over other applications for the same string. If there are multiple applicants for a given gTLD string, ICANN’s rules give first “priority” to any “community applicant” for that string. If a community application for a particular string prevails (i.e., achieves the necessary 14 the points) in its CPE, the applicant must be awarded the string over the other non-community applicants vying for the same string. Otherwise, the string contention would be resolved at auction, with the right to contract for the gTLD awarded to the highest winning bidder.
  
15. **Community Applications must prevail in their “Community Priority Evaluation” (CPE).** The CPE is to be conducted in accordance with ICANN’s AGB.<sup>15</sup> ICANN contracted with the EIU to conduct the CPEs of community applications. The EIU has published two documents in connection with its selection by ICANN to perform CPEs:
  - a. **Community Priority Evaluation (CPE) Guidelines Prepared by The Economist Intelligence Unit.**<sup>16</sup> This document explains how the EIU will interpret and implement the AGB’s *Community Priority Evaluation Criteria*. There is a clear statement in its first section titled **Interconnection between Community Priority Evaluation (CPE) Guidelines and the Applicant Guidebook (AGB)** that:

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<sup>13</sup> The other is an auction among the contending applicants.

<sup>14</sup> Prior to the current expansion, there were twenty gTLDs: the first seven (.COM, .NET and .ORG , .EDU, .GOV, .INT, .MIL) were created in the 1980s. Anyone could register a second-level domain name under the first three, but special restrictions limited who could register second-level domains under the last four. Since 2000—but prior to the expansion currently under way—thirteen more gTLDs were added: .BIZ, .INFO, .NAME and .PRO (the “unsponsored” gTLDs) plus.AERO, .COOP, .MUSEUM, .ASIA, .CAT, .JOBS, .MOBI, .TEL and .TRAVEL (the “sponsored” TLDs that imposed restrictions on who could register a second-level domain under each).

<sup>15</sup> Specifically, CPE’s are governed by 4.2.3 *Community Priority Evaluation Criteria* in Module 4 of ICANN’s gTLD APPLICANT GUIDEBOOK, version of 2012-06-04 (the “AGB”) pages 4-9 to 4-19 (Exhibit 1).

<sup>16</sup> Version 2.0 dated September 27, 2013 (the “EIU Guidelines”) is attached as Exhibit 2.

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB. *This document does not modify the AGB framework, nor does it change the intent or standards laid out in the AGB. The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB.* The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process [emphasis added].<sup>17</sup>

Notwithstanding the foregoing, the EIU made material modifications to the AGB framework when applying it to Dot Registry's .INC, .LLC and .LLP applications.<sup>18</sup>

- b. **Community Priority Evaluation Panel and its Processes.**<sup>19</sup> Regarding the CPE evaluations undertaken by the EIU pursuant to the EIU's selection by ICANN, this document reiterates on its first page that:

The evaluation process respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination. *Consistency of approach in scoring applications is of particular importance* [emphasis added].

In my opinion, the EIU did not adhere to this commitment.

16. **The Community Priority Evaluation Criteria** are set forth in Module 4 of the AGB.<sup>20</sup> There are four principal criteria, each worth a possible maximum of 4 points. As mentioned, an application must receive a total score of at least 14 points in order to prevail.
17. **Criterion #1: Community Establishment** (4 points possible) is comprised of two main sub criteria: **1-A Delineation** (2 points) and **1-B Extension** (2 points).

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<sup>17</sup> EIU Guidelines, (Exhibit 2), p. 2.

<sup>18</sup> The resulting modified criteria were not applied during the EIU's review of the .RADIO, .HOTEL, .OSAKA and .ECO community applications. Instead, as I discuss below, these latter applications were effectively given a "pass" regarding these criteria.

<sup>19</sup> This document, attached as Exhibit 3, is dated 7 August 2014, by which point the EIU had already completed 10 of the total of 17 CPEs it has accomplished to date.

<sup>20</sup> Section 4.2.3, pp. 4-9 to 4-19 (attached at Exhibit 1).

- a. Under the **1-A Delineation** prong of **Criterion #1: Community Establishment**, the Community's membership definition is evaluated to determine whether the Community is "clearly delineated, organized, and pre-existing." There are three determinants of the application's score under **1-A Delineation**:
- i. Delineation<sup>21</sup> which in turn requires:
    - 1. A clear and straightforward membership definition, *and*
    - 2. Awareness and recognition of a community (as defined by the applicant) among its members.<sup>22</sup>
  - ii. Organization<sup>23</sup> which in turn requires:
    - 1. Documented evidence of community activities, *and*
    - 2. At least one entity mainly dedicated to the community.
  - iii. Pre-existence<sup>24</sup> which requires that the community must have been active prior to September 2007.
- b. Under the **1-B Extension** prong of **Criterion #1**, the question to be answered is whether the Community is of "considerable size and longevity." There are two components:

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<sup>21</sup> "Delineation' relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low." (AGB, 4-11)

<sup>22</sup> Despite the critical role played by this requirement in the EIU's review of the .INC, .LLC and .LLP applications, the AGB does not provide any definition or explanation for it. In addition, the EIU effectively waived this requirement for the .RADIO, .HOTEL, .OSAKA and .ECO community applications by "finding" the requisite "awareness and recognition of a community" in their respective community definitions themselves. See Exhibits 10 through 13.

<sup>23</sup> "Organized' implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities." (Ibid.)

<sup>24</sup> "Pre-existing' means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007." (Ibid.)



- i. Size<sup>25</sup> which requires that:
  1. The community is of considerable size, *and*
  2. There is awareness and recognition of a community among its members.
- ii. Longevity<sup>26</sup> which requires that:
  1. The community was in existence prior to September 2007, *and*
  2. There is awareness and recognition of a community among its members.

18. **Criterion #2: Nexus between Proposed String and Community** (4 points possible) also imposes two principal sub criteria: **2-A Nexus** (3 points possible) and **2-B Uniqueness** (1 point).

- a. Under the **2-A Nexus** prong<sup>27</sup> of **Criterion #2**, the essential question is whether the string
  - i. *Matches* the name of the community or is a well-known short-form or abbreviation of the community (3 points), *or*
  - ii. *Identifies* the community without matching the name of the community or “over-reaching substantially beyond the community” (2 points), *or*

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<sup>25</sup> “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers.” (Ibid.)

<sup>26</sup> “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature.” (Ibid., 4-12)

<sup>27</sup> “With respect to ‘Nexus’, for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community...for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.” (Ibid., 4-13) The AGB does not define or explain the term “over-reaching substantially”.

- iii. Neither matches nor identifies the community (0 points).
  - b. Under the **2-B Uniqueness** prong of **Criterion #2**, the question is whether the string has any other significant meaning beyond identifying the community. Under the AGB, this question is reached only if the application first achieves a score of 3 or 2 on the **2-A Nexus** prong of **Criterion #2**.<sup>28</sup>
19. **Criterion #3: Registration Policies** (4 points possible) tests the community application along four separate dimensions related to the registration policies that will be applied by registrars to applicants for second-level domain names.<sup>29</sup> There is 1 point possible for each these four elements: **3-A Eligibility**, **3-B Name selection**, **3-C Content and Use** and **3-D Enforcement**.
- a. Because all the three Dot Registry applications met and received 1 point each for each of the first three elements, only the fourth, **3-D Enforcement** is at issue in, and therefore relevant to, this proceeding. The first three are not discussed further in this report.
  - b. Under **3-D Enforcement**, the registration policies (set forth in the community application) that will be applied to prospective registrants of second-level domain names are evaluated to determine whether or not those

Policies include specific enforcement measures (e.g., investigation practices, penalties, take down procedures) constituting a coherent set with *appropriate* appeal mechanisms [emphasis added].<sup>30</sup>

where

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<sup>28</sup> According to the AGB, “uniqueness implies a requirement that the string does identify the community, i.e. scores 2 or 3 for ‘Nexus,’ in order to be eligible for a score of 1 for ‘Uniqueness’.” (Ibid., 4-14)

<sup>29</sup> If its community applications for .INC, .LLC and .LLP succeed, Dot Registry would eventually enter into agreements with *registrars* who would be the ones to actually register eligible second-level domains under .INC, .LLC or .LLP. The focus of the **3-D Enforcement** sub criterion is the set of rules that Dot Registry’s agreements would impose on these registrars to govern their dealings with would-be registrants of second-level domains under .INC, .LLC or .LLP.

<sup>30</sup> Ibid., 4-15. I regard the adjective “appropriate” to be significant, as I explain below.

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the [registration] conditions by registrants [of second-level domains].<sup>31</sup>

20. **Criterion #4: Community Endorsement** (4 points possible) has two components (each worth a maximum of 2 points): **4-A Support** and **4-B Opposition**:

a. Under **4-A Support** (2 points possible), it is determined whether

- i. “Applicant is, or has documented support from, the recognized community institution(s)/member organization(s) or has otherwise documented authority to represent the community (2 points),”<sup>32</sup> *or*
- ii. The Applicant has “documented support from at least one group with relevance, but insufficient support for a score of 2 (1 point),”<sup>33</sup> *where*
- iii. “‘Recognized’ means the institution(s) [or] organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.”<sup>34</sup>

b. Under **4-B Opposition** (2 points possible), the question is whether

- i. There is no opposition of relevance to the application (2 points), *or*

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<sup>31</sup> Ibid., 4-16. A community application was supposed to set out the applicant’s enforcement and appeals mechanisms in the application section titled: **20(e). Provide a description of the applicant’s intended registration policies in support of the community-based purpose of the applied-for gTLD.**

<sup>32</sup> Ibid., 4-17. The AGB adds that “the plurals...for a score of 2 relate to case of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.” Ibid., 4-18.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid., 4-17 and 4-18.

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- ii. The application has relevant opposition from one group of non-negligible size (1 point),<sup>35</sup> *or*
- iii. The application has relevant opposition from two or more groups of non-negligible size (0 points).

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<sup>35</sup> As explained below, there was initial opposition from the European Commission (“EC”) to Dot Registry’s application for the .LLP string on the ground that the “LLP” abbreviation is used in the United Kingdom. However, the EIU erroneously attributed that opposition to all three of Dot Registry’s strings (.INC, .LLC and .LLP) rather than just .LLP. The EIU compounded its error by failing to notice that the EC “opposition” to the .LLP string was withdrawn almost immediately after its initial submission (and long before the EIU consideration of the .INC, .LLC and .LLP applications). See Exhibit 21.

**E. Examination of the EIU’s Review of Dot Registry’s Community Application for the .INC TLD**

21. As set forth in Exhibit 7, the EIU awarded these scores to the Dot Registry community application for the .INC string on the four principal criteria set forth in the AGB:

Criterion #1: Community Establishment	0 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	0 points (out of 4)
Criterion #3: Registration Policies	3 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>2 points (out of 4)</u>
Total	5 points (out of 16)

22. Having awarded it just 5 out of the minimum necessary score of 14 points, the EIU declared that the Dot Registry application for .INC did not prevail:

After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in community priority evaluation.<sup>36</sup>

23. As I explain in greater detail below, had the EIU correctly adhered to the AGB, it instead would have awarded the following scores:

Criterion #1: Community Establishment	4 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	3 points (out of 4)
Criterion #3: Registration Policies	4 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>4 points (out of 4)</u>
Total	15 points (out of 16)

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<sup>36</sup> .INC Report (Exhibit 7), p. 1.

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24. Thus, as I explain below, it is my conclusion that the Dot Registry community application for the .INC TLD would have prevailed if the EIU had evaluated it correctly according to the AGB.

### E.1. .INC Criterion #1: Community Establishment

25. The *community* that is the subject of the Dot Registry application for the .INC string is the **Community of Registered U.S. Corporations**.<sup>37</sup> The AGB specifically provides for such communities under *Criterion 1 Guidelines*:

With respect to “Delineation” and “Extension,” it should be noted that *a community can consist of legal entities* [emphasis added, examples omitted]. All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.<sup>38</sup>

26. Importantly, there is nothing in the AGB specifying how a community must “act” (as a community or anything else) nor does the AGB say anything about how community members must “associate themselves”.<sup>39</sup>
27. This community is clearly delineated. The Community of U.S. Corporations is clearly delineated because membership in it requires the objectively-verifiable satisfaction of explicit, overt requirements. This is because membership requires the successful, active completion of the requirements to register as a corporation with the Secretary State or equivalent authority in one of the U.S. states, territories or the District of Columbia,<sup>40</sup> coupled with the continued maintenance of such registrations in conformity with the applicable laws and regulations. Thus, the .INC community (alternatively, the

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<sup>37</sup> New gTLD Application Submitted to ICANN by Dot Registry LLC for the String INC, posted 13 June 2013, Application ID: 1-880-35979 (“.INC application”) (Exhibit 4), p. 2.

<sup>38</sup> AGB, (Exhibit 1), p. 4-12.

<sup>39</sup> Nevertheless, the EIU specifically faulted the .INC, .LLC and .LLP applications on this very point.

<sup>40</sup> This is the Secretary of State in 37 of the 50 U.S. states and Puerto Rico. The exceptions are: Alaska (Commissioner of the Department of Commerce, Community and Economic Development); Arizona (Arizona Corporation Commission); District of Columbia (Superintendent of Corporations); Hawaii (Director, Department of Commerce and Consumer Affairs); Maryland (Director, Department of Assessments and Taxation); Massachusetts (Secretary of the Commonwealth); Michigan (Director, Department of Licensing and Regulatory Affairs); New Jersey (State Treasurer); New Mexico (Public Regulation Commission); Pennsylvania (Secretary of the Commonwealth); Utah (Director, Division of Corporations and Commercial Code); Virginia (State Corporation Commission); Wisconsin (Secretary, Department of Financial Institutions); Guam (Director, Department of Revenue and Taxation); Northern Marianas Islands (Registrar of Corporations); and U.S. Virgin Islands (Commissioner, Department of Licensing and Consumer Affairs). For ease of exposition, “Secretary of State” will be used to refer to all of these authorities.

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Community of Limited Liability Companies or the Community of Limited Liability Partnerships) has “a clear and straight-forward membership definition” that should have been given a perfect score for Delineation under both the AGB and the EIU Guidelines.

28. There is at least one entity mainly dedicated to the Community of U.S. Corporations. The offices of the Secretaries of State were established by law in each state or territory to administer such registrations, which are the *sine qua non* of membership in the .INC, LLC and LLP communities. It is apparent that even the *EIU Guidelines* permit the several Secretary of State offices to have additional functions and responsibilities (such as, for example, administering elections). According to the *EIU Guidelines*,

“Organized” implies that there is *at least one entity* mainly dedicated to the community, with documented evidence of community activities [emphasis added].<sup>41</sup>

The *EIU Guidelines* immediately add the following:

“Mainly” could imply that *the entity administering the community may have additional roles/functions beyond administering the community*, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization [emphasis added].<sup>42</sup>

29. Nonetheless, the EIU expressed the following view:

In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community *as they have other roles/functions* beyond processing *corporate* registrations [emphasis added].<sup>43</sup>

Interestingly, the EIU used precisely the same wording to dispose of Dot Registry’s .LLC and .LLP community applications, even though the records that LLCs and LLPs file with their respective Secretaries of State obviously are not “corporate” records. This suggests that the Dot Registry community applications for .LLC and .LLP may not have been

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<sup>41</sup> Exhibit 2, p. 4.

<sup>42</sup> Ibid.

<sup>43</sup> .INC Report (Exhibit 7), p, 2,



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evaluated as independent applications, as was required, but rather were evaluated as a group with the .INC application.

30. There is documented evidence of community activities. The publicly accessible records of corporate registrations maintained by the Secretaries of State constitute documented evidence of the activities of the Community of U.S. Corporations. Owing to the fact that these entities are the repositories of the documents needed to accomplish the initial registrations of community members as U.S. corporations and thereafter to maintain these registrations, there is considerable documentary evidence of these defining community activities.
31. The Community of U.S. Corporations has been in active existence since long before September 2007. Corporations have been formed in the U.S. since the early 1800s; thus the Community of U.S. Corporations easily satisfies this criterion.
32. The EIU Guidelines specifically provide that a community consisting of legal entities is permitted by the Applicant Guidebook. The EIU Guidelines specifically say that a community comprised of legal entities is a viable community under the AGB, “provided the requisite awareness and recognition of the community is at hand among the members.”<sup>44</sup> As I explain next, the members of the Community of U.S. Corporations possess that awareness and recognition.
33. The individual members of the .INC community have the requisite awareness and recognition of that community.<sup>45</sup> This is because its members are required to actively complete a number of conscious, overt and externally observable steps to register as corporations in the first place. Thereafter, they must regularly and consciously take additional overt and externally observable actions over time to maintain their memberships (i.e., their corporate registrations) in good standing. Thus, membership in the .INC community must be consciously sought and actively achieved; such membership is neither passive nor inadvertent.
34. Indeed, it is by that decision itself to become a corporation—and to satisfy the many legal steps required to register as a corporation and to maintain that registration—that

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<sup>44</sup> Exhibit 2, p. 6.

<sup>45</sup> The AGB does not provide any further definition or explanation for “awareness and recognition of a community among its members”.

applicants demonstrate (1) their awareness and recognition of the community of corporations and (2) their intention to formally become members of it.

35. So the EIU got it right when it said that the only requirement for membership in the community of corporations “is formal registration as a corporation with the relevant US state.”<sup>46</sup> In other words, it is by their individual decisions to register as corporations and their completion of the steps necessary to do so that the members of the community of corporations evidence their awareness and recognition of that community and their intention to become members of that community. This by itself should have been sufficient to award the application the full 4 points.
36. According to the *gTLD Applicant Guidebook*, there are two criteria that must be achieved in order for Dot Registry’s community application for the .INC TLD to prevail on **Criterion #1: Community Establishment**. The EIU was supposed to determine whether or not the Dot Registry application for the .INC string evidenced the requisite **Delineation** (sub criterion **1-A**) and **Extension (1-B)**. In its CPE Report, the EIU concluded that the Dot Registry application failed both of these prongs of **Criterion #1: Community Establishment**. However, for the reasons explained below, I conclude otherwise.

- **.INC 1-A Delineation**

<b>Maximum score</b>	<b>2 points</b>
<b>EIU score</b>	<b>0 points</b>
<b>Correct score</b>	<b>2 points</b>

37. Dot Registry’s score under sub criterion **1-A Delineation** was supposed to have been determined by whether or not the .INC community demonstrated the necessary Delineation,<sup>47</sup> Organization and Preexistence. According to the EIU’s interpretation of the *Applicant Guidebook*, the Delineation sub criterion in turn required, among other things, an “awareness and recognition of a community (as defined by the applicant) among its

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<sup>46</sup> .INC Report (Exhibit 7), p. 2.

<sup>47</sup> The AGB unhelpfully uses “Delineation” at two different levels of the analytical framework for a community application: First, “1-A Delineation” is the name given to one of the two principal sub criteria under **Criterion #1: Community Establishment** (the other is “1-B Extension”). Then “Delineation” is used a second time to refer to one of the three “sub sub criteria” *under* “1-A Delineation” (the other two are “Organization” and “Pre-existence”). In this report—in an attempt to minimize the obvious potential for confusion—these different-level usages are distinguished as **1-A Delineation** and Delineation, respectively.

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members” as a necessary condition. If the EIU failed the application on this “awareness and recognition of a community among its members” requirement, it did not matter whether the other requirements for Delineation or the requirements for Organization and Preexistence were satisfied. The application would still lose both of the 2 points available under **1-A Delineation**.

Delineation

38. The EIU agreed that the .INC community shows a clear and straightforward membership, thus satisfying the first prong of the Delineation sub criterion:

While broad, the community is clearly defined, as membership requires formal registration as a corporation with the relevant US state. In addition, corporations must comply with US state law and show proof of best practices in commercial dealings to the relevant state authorities.

39. In my opinion, Dot Registry’s .INC community is in fact *better* defined than are the communities at issue in the .HOTEL, .RADIO, .ECO and .OSAKA applications that prevailed before the EIU. Neither the *Applicant Guidebook* nor the *EIU Guidelines* provide a concrete meaning for “define” and “definition”. If these are taken to mean or include—as I would regard as reasonable—a rule or standard that would enable an external observer to confidently say whether or not a particular entity was a community member, it is my opinion that each of the three Dot Registry communities (.INC, .LLC and .LLP) are *better* defined than the communities in the community applications (.HOTEL, .RADIO, .ECO and .OSAKA) that *did* prevail in EIU CPE Evaluations. For example:
40. The application for .HOTEL clearly stated that “only entities which fulfil [the ISO definition of “Hotel”] are members of the Hotel Community and eligible to register a domain name under .hotel.” Next, it quoted that definition (“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available”) before declaring

*“Therefore only entities which fulfill this definition are members of the Hotel Community and eligible to register a domain name under .hotel [emphasis added].”<sup>48</sup>*

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<sup>48</sup> .HOTEL Report (Exhibit 11), p. 2.

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41. But when the applicant then added “hotel marketing organizations”, “associations representing hotels and hotel associations” and “other organizations representing hotels, hotel owners and other solely hotel related organizations” – entities that clearly are *not* hotels under the definition provided by the applicant—the EIU concluded nevertheless that:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel [“a hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.”].<sup>49</sup>

The EIU’s conclusion in respect of .HOTEL makes no sense at all. The applicant’s community definition clearly included entities (such as marketing organizations, associations and organizations representing hotels, etc.) that do *not* satisfy the ISO criterion for what constitutes a hotel.

42. The EIU’s logic in scoring the .RADIO community application for Delineation is even more bewildering. First, the EIU approvingly quoted the applicant for the following:

The Radio industry is composed of a huge number of *very diverse* [emphasis added] radio broadcasters: public and private; international and local; commercial or community-oriented; general purpose, or sector-specific; talk or music; big and small. All licensed radio broadcasters are part of the .radio community, and so are the associations, federations and unions they have created... Also included are the radio professionals, those making radio the fundamental communications tool that it is.

However, the Radio industry keeps evolving and today, many stations are not only broadcasting in the traditional sense, but also webcasting and streaming their audio content via the Internet. *Some are not broadcasters in the traditional sense* [emphasis added]: Internet radios are also part of the Radio community, and as such will be acknowledged by the .radio TLD, as will podcasters. In all cases certain minimum standards on streaming or updating schedules will apply.

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<sup>49</sup> Ibid.

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The .radio community also comprises the often overlooked amateur radio, which uses radio frequencies for communications to small circles of the public. Licensed radio amateurs and their clubs will also be part of the .radio community.

Finally, the community includes a variety of companies providing specified services or products to the Radio industry.<sup>50</sup>

43. Surprisingly, the EIU nonetheless concluded:

*This community definition shows a clear and straightforward membership and is therefore well defined* [emphasis added]. Association with, and membership in, the radio community can be verified through licenses held by professional and amateur radio broadcasters; membership and radio -related associations, clubs and unions; internet radios that meet certain minimum standards; radio-related service providers that can be identified through trademarks; and radio industry partners and providers.<sup>51</sup>

44. Even more surprising is what the EIU concluded next:

*[T]he community as defined in the application has awareness and recognition among its members. This is because the community as defined consists of entities and individuals that are in the radio industry* [footnote omitted], *and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community* [emphasis added].<sup>52</sup>

45. One is left wondering whether the EIU's "standards" have any constancy at all if the EIU is able to conclude that the .RADIO community is "clearly defined" and that, *solely on the basis of their participation in this "clearly defined industry"*, they have "an awareness and recognition of their inclusion in the industry community."

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<sup>50</sup> .RADIO Report (Exhibit 10), pp. 1-2.

<sup>51</sup> Ibid. p. 2.

<sup>52</sup> Ibid.

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46. Applying the EIU's logic to the .INC community (a community that the EIU also found to be "clearly defined"), it necessarily follows that members of the .INC community similarly have "an awareness and recognition of their inclusion" in the .INC community.
47. In any event, I conclude that the .INC community does meet the AGB requirement for Delineation because there is ample evidence that:
- a. membership in the .INC community is both clear and straightforward,
  - b. members of the .INC community possess the requisite awareness and recognition of that community, and that
  - c. INCs from different sectors and regions *do* associate themselves with being part of the broader Community of U.S. Corporations.

Organization

48. According to the EIU, "two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities. The *EIU Guidelines* add that:
- "Mainly" could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer [the community].<sup>53</sup>
49. This requirement is satisfied by the individual Secretaries of State of the U.S. states, territories and the District of Columbia. These entities were constitutionally and/or legislatively established to administer the community of corporations within their respective jurisdictions. Moreover, these constitutional and/or legislative provisions clearly identify the community of corporations authorized to conduct business within their jurisdictions.
50. Inexplicably, the EIU decided otherwise. But it did so after first re-writing the requirements in the AGB and ignoring its own *EIU Guidelines*:

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<sup>53</sup> Exhibit 2, p. 4.

The [.INC] community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, these government agencies are *fulfilling a function*, rather than *representing* the community. In addition, the offices of the Secretaries of State of US states are not *mainly* dedicated to the community as they have other roles/functions beyond processing corporate registrations [emphases added].<sup>54</sup>

51. According to the *Applicant Guidebook* and the *EIU Guidelines*, the relevant question is whether or not the several Secretaries of State are *dedicated* to the community of corporations, not whether they are merely “fulfilling a function” relevant to the community or whether they only “represent” it. It appears that the EIU first rewrote the requirement for Organization and then found that the .INC community failed to satisfy the EIU’s rewritten version.
52. Moreover, the EIU ignored its own *Guidelines*, which clearly provide that “the entity administering the community may have additional roles/functions beyond administering the community.”<sup>55</sup> All that is required is that “*one* of the key or primary purposes/functions of the entity is to administer” [emphasis added] the community.<sup>56</sup>
53. Finally, the EIU decided that the .INC community “does not have documented evidence of community activities” for the reason that “there is no entity mainly dedicated to the community as defined in the .INC application.”<sup>57</sup> This was because, said the EIU, the several Secretaries of State were not *mainly* dedicated to the community of corporations. As discussed above, the EIU ignored its own *EIU Guidelines*, which explicitly allow for the possibility that “the entity administering the community may have additional roles/functions beyond administering the community.”<sup>58</sup>
54. In view of the foregoing, I conclude that there is considerable evidence of community activities. It consists of the overt steps taken, and records created, in connection with the

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<sup>54</sup> .INC Report (Exhibit 7), p. 2.

<sup>55</sup> Exhibit 2, p. 4.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

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individual decisions made on behalf of would be corporations to register as such under the applicable laws, and thereafter to maintain these registrations.

55. Also in view of the foregoing, I conclude that Dot Registry community application for the .INC string does fulfill both requirements for Organization.

Pre-existence

56. The only requirement for Pre-existence is that the .INC community must have been active prior to September 2007. The EIU concluded that this putative community could not possibly have been active prior to that date because it deemed the .INC community to be an invention of the Dot Registry applicant in order “to obtain a sought-after-after corporate identifier as a gTLD string.”<sup>59</sup> The EIU “justified” this conclusion on the ground that “corporations would typically not associate themselves with being part of the [.INC] community as defined by the applicant.”<sup>60</sup> The EIU did not offer any research or other evidence to support this assertion.
57. In my opinion, the EIU is clearly in error. First, it is implicitly imposing a requirement of its own invention—rather than one set forth in the AGB—regarding how putative community members must “associate themselves.” Second, there is ample evidence showing that corporations *do* associate themselves with being part of the community of U.S. corporations writ large. Such evidence is outlined below.
58. In view of the foregoing, it is my opinion that Dot Registry’s .INC application actually satisfies all three of the requirements—Delineation, Organization and Pre-existence—for **1-A Delineation**. The EIU should have awarded it the maximum possible 2 points.

- **.INC 1-B Extension**

<b>Maximum score</b>	<b>2 points</b>
<b>EIU score</b>	<b>0 points</b>
<b>Correct score</b>	<b>2 points</b>

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<sup>59</sup> .INC Report (Exhibit 7), p. 3.

<sup>60</sup> Ibid.



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59. Next, according to the AGB, Dot Registry’s score under sub criterion **1-B Extension** was supposed to be determined by whether or not the .INC community demonstrated the necessary Size and Longevity. But the EIU held that each of these two sub criteria also required the necessary “awareness and recognition of a community (as defined by the applicant) among its members.”<sup>61</sup> Supposedly unable to detect the requisite “awareness and recognition of a community,” the EIU was unpersuaded by the fact that the .INC community met the other requirements for Size and Longevity. *Essentially, the EIU failed Dot Registry’s applications for .INC, .LLC and .LLP solely because the EIU did not find an “awareness and recognition” of a community among the respective members. To the EIU, this justified its decision to award 0 points under both 1-A Delineation and 1-B Extension in spite of the fact that these applications met all of the other AGB requirements. The loss of all 4 points under Criterion #1: Community Establishment effectively guaranteed that Dot Registry’s applications for .INC, .LLC and .LLP would not prevail.*

Size

60. The EIU conceded that the .INC community is of considerable size because it “is large in terms of [its] number of members [citing figures from the Dot Registry application on the number of new U.S. corporations registered in a single year and the total number currently registered].”<sup>62</sup>
61. But the EIU discounted this showing on the ground that the .INC community did not have the requisite “awareness and recognition of a community among its members.”

This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. *Research showed* that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an INC. *Based on the Panel’s research*, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. These incorporated firms would therefore not typically associate themselves with being part of the community as defined by the applicant [emphases added].<sup>63</sup>

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid. p. 3.

<sup>63</sup> .INC Report (Exhibit 7), p. 3 2. It would be very useful—and likely illuminating—to be able to review the EIU’s “research”. See Section J below.

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62. I have already addressed this particular misapprehension on the part of the EIU. To repeat, I find nothing in the AGB regarding how community members are supposed to “associate themselves”. And the EIU’s misapprehension is amply refuted by the examples below, which show that corporations do associate among themselves as corporations in general, without necessarily limiting themselves to particular industries, locales or sectors. There is no indication as to what research the EIU conducted.
63. In my opinion, the EIU should have concluded that Dot Registry’s .INC application satisfied both requirements for Size.

Longevity

64. The AGB requires that two conditions be fulfilled in order for Dot Registry’s .INC application to meet the Longevity sub criterion: the .INC community must demonstrate longevity and it must display an awareness and recognition of a community among its members. The EIU decided that the .INC application did neither, based on its previous misapprehensions that (a) the .INC community was “construed” because “corporations would typically not associate themselves with being part of the [.INC] community”, and (b) the putative .INC community “does not have awareness and recognition of a community among its members.”<sup>64</sup>
65. Both of these judgments by the Panel are in error, as has already been explained above. Accordingly, I conclude that Dot Registry’s .INC application satisfied the Longevity requirement under **1-B Extension**.
66. Because the .INC application had also met the conditions for Size, the Panel should have awarded it the maximum possible 2 points for **1-B Extension**.
67. Next, I address the EIU CPE Panel’s general conclusions that Dot Registry’s .INC community failed to fulfill either of the two AGB requirements for Organization under **1-A Delineation**, namely that there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

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<sup>64</sup> .INC Report (Exhibit 7), p. 4.

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68. There are several entities dedicated to the Community of U.S. Corporations. Chief among them is the **National Association of Secretaries of State (NASS)**<sup>65</sup> that was cited in Dot Registry's application for .INC.

69. According to the NASS website

Founded in 1904, the **National Association of Secretaries of State (NASS)** is the nation's oldest, nonpartisan professional organization for public officials. Members include the 50 states, the District of Columbia, Puerto Rico and American Samoa. NASS serves as a medium for the exchange of information between states and fosters cooperation in the development of public policy. The association has key initiatives in the areas of elections and voting and state business services, as well as issues-oriented Task Forces. NASS Committees cover a range of topics related to the Office of the Secretary of State/Lieutenant Governor...NASS is a 501(c)(3) non-profit that utilizes its support from *corporate affiliates* to help further the association's stated mission by funding daily operations, supporting high-caliber programming at NASS conferences, underwriting NASS research, surveys and other educational materials [emphasis added].<sup>66</sup>

70. The membership of the **NASS** itself is limited to public officials such as Secretaries of State and Lieutenant Governors. According to the NASS website

Most NASS member offices handle the registration of domestic and/or foreign corporations (profit and non-profit). Transactions include filings of incorporation, partnerships (including limited partnerships), articles of merger/consolidation, and articles of dissolution.<sup>67</sup>

71. On the NASS home page, the first two Featured Links are titled "Prevent Business ID Theft" and "Find Business Services". After these, the link to "Get Help with Voting" is listed third. This appears to undermine the EIU CPE Panel's dismissal of Secretaries of State on the ground that

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<sup>65</sup> Website: <http://www.nass.org>

<sup>66</sup> "About NASS," accessed June 2015, <http://www.nass.org/about-nass/about/>

<sup>67</sup> <http://www.nass.org/state-business-services/corporate-registration/>

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[T]he offices of the Secretaries of State of US states are not mainly dedicated to the [community of corporations] as they have other roles/functions beyond processing corporate registrations.<sup>68</sup>

72. Importantly, NASS prominently features the “NASS Corporate Affiliate Program”<sup>69</sup> as “an excellent way to share ideas and build relationships with key state decision makers while supporting the civic mission of [NASS].” These Corporate Affiliates include applicant Dot Registry LLC<sup>70</sup> and are listed individually at the NASS website.<sup>71</sup> NASS also publishes “Surveys and Reports”<sup>72</sup> that are primarily for the benefit of corporations and other businesses. These include:

- *Report: State Strategies to Subvert Fraudulent Uniform Commercial Code Filings* (Released 2012; updated April 2014)
- *NASS Summary of Business Entity Information Collected by States* (March 2014)
- *NASS Survey on Administrative Dissolution of Business Entities* (March 2014)
- *White Paper Streamlining for Success: Enhancing Business Transactions with Secretary Of State Offices* (February 2014)
- *Updated NASS Company Formation Task Force Report and Recommendations* (September 2012)
- *NASS White Paper - Developing State Solutions to Business Identity Theft: Assistance, Prevention, and Detection* (January 2012)

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<sup>68</sup> .INC Report (Exhibit 7), p. 2.

<sup>69</sup> <http://www.nass.org/corppaffiliates/about-corp-affiliate-program/>

<sup>70</sup> Posted on the NASS website is a white paper authored by Dot Registry LLC titled “ICANN New gTLD Process” (**white-paper-dot-registry-winter 15.pdf**) that was distributed at the NASS Winter 2015 meetings.

<sup>71</sup> <http://www.nass.org/contact/corp-affiliates/>

<sup>72</sup> These are listed at <http://www.nass.org/reports/surveys-a-reports/>

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- *NASS Business Identity Theft Toolkit & NASS Business Identity Theft Fact Sheet* (July 2011)
- *Updated Report: State Business Entity Laws* (May 2009)

73. Perhaps the EIU CPE Panel's certainty that

[T]here is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these incorporated firms would associate themselves with being part of the community [of U.S. corporations] as defined by the applicant.<sup>73</sup>

can partially be explained by the fact that corporations are legal, not human, persons. They can and do act only through their officers and their boards of directors. It is through such actions on the part of their officers and their boards, including their interactions with their regulators, that corporations also demonstrate their awareness and recognition of a community.

74. Despite the EIU CPE Panel's apparent certainty that they do not exist, there are many societies, associations and other organizations whose membership and activities coincide with the Community of U.S. Corporations. Importantly, none of these are limited to particular industries or regions of the U.S. They include:

75. **The Business Roundtable.**<sup>74</sup> According to its website:

Business Roundtable members are the chief executive officers of leading U.S. companies. Collectively, *they represent every sector of the economy* [emphasis added] and bring a unique and important perspective to bear on policy issues that impact the economy. Roundtable members are thought leaders, advocating for policy solutions that foster U.S. economic growth and competitiveness.

...

*Business Roundtable was established in 1972* through the merger of three existing organizations.... These groups founded Business Roundtable on the belief that in a

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<sup>73</sup> .INC Report (Exhibit 7), p. 2.

<sup>74</sup> Website: <http://businessroundtable.org/>

pluralistic society, the business sector should play an active and effective role in the formation of public policy.

76. **The National Association of Corporate Directors (NACD).**<sup>75</sup> According to its website

The National Association of Corporate Directors is the recognized authority focused on advancing exemplary board leadership and establishing leading boardroom practices. Informed by more than 35 years of experience, NACD delivers insights and resources that more than 15,000 corporate director members rely upon to make sound strategic decisions and confidently confront complex business challenges. NACD provides world-class director education programs, national peer exchange forums, and proprietary research to promote director professionalism, ultimately enhancing the economic sustainability of the enterprise and bolstering stakeholder confidence. Fostering collaboration among directors, investors, and governance stakeholders, NACD is shaping the future of board leadership.

77. **The Society of Corporate Secretaries & Governance Professionals.**<sup>76</sup> According to its website:

Founded in 1946, the Society of Corporate Secretaries and Governance Professionals, Inc. (the "Society") is a non-profit organization (Section 501(c)(6)) comprised principally of corporate secretaries and business executives in governance, ethics and compliance functions at public, private and not-for-profit organizations. Members are responsible for supporting their board of directors and executive management in matters such as board practices, compliance, regulation and legal matters, shareholder relations and subsidiary management.

The Society seeks to be a positive force for responsible corporate governance, providing news, research and "best practice" advice and providing professional development and education through seminars and conferences. The Society is administered by a national staff located in New York City, by members who

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<sup>75</sup> Website: <https://www.nacdonline.org/>

<sup>76</sup> Website: <http://www.governanceprofessionals.org>

serve on board and standing committees and through the member activities of 21 local chapters.

78. **The Society of Corporate Compliance and Ethics (SCCE).**<sup>77</sup> According to its website

The Society of Corporate Compliance and Ethics (SCCE) is a 501(c)6 member-based association for regulatory compliance professionals. SCCE was established in 2004 and is headquartered in Minneapolis, MN. We provide training, certification, networking, and other resources to nearly 5,000 members. Our members include compliance officers and staff from a wide range of industries. The need for guidance in meeting regulatory requirements extends to a wide range of sectors, including academics, aerospace, banking, construction, entertainment, government, financial services, food and manufacturing, insurance, and oil, gas and chemicals. SCCE assists compliance managers and corporate boards in all. Our [events](#), [products](#), and [resources](#) aim to educate and update our members with the latest news and resources available. We offer training, certification, and publications committed to improving the quality and acknowledgment of the compliance industry. SCCE helps members protect their companies and advance their careers through services including education, updates on regulatory requirements and enforcement, and access to a rich professional network. SCCE currently has more almost 5,000 members. Plus over 2,500 compliance professionals hold the Corporate Compliance & Ethics Professional (CCEP) certification and over 500 hold the Corporate Compliance & Ethics Professional-International (CCEP-I).

79. In view of the NASS and the other organizations discussed above, it is my opinion that the EIU erred when it concluded that

[T]his application [for .INC by Dot Registry] refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string, *as these corporations would typically not associate themselves with being part of the community as defined by the applicant* [emphasis added].<sup>78</sup>

80. In particular, the EIU erred in concluding that

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<sup>77</sup> Website: <http://www.corporatecompliance.org>

<sup>78</sup> .INC Report (Exhibit 7), p. 4.

[C]orporations operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC. Based on the Panel’s research, *there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these incorporated firms would associate themselves with being part of the community as defined by the applicant* [emphases added].<sup>79</sup>

Again, the AGB requires only that the constituents of a community be *members* of that community. There is no requirement that members of a community “*act*” as a community (whatever that might mean). Moreover, as I have shown above, there is ample evidence of INCs from different regions and economic sectors acting as members of—and associating themselves with—being part of the Community of U.S. Corporations that Dot Registry has defined. Again, it is not clear to me what research was undertaken by the EIU.

## E.2. .INC Criterion #2: Nexus between Proposed String and Community

81. In applying this criterion, the EIU CPE Panel was supposed to determine whether or not Dot Registry’s .INC string is commonly known by others as the identification/name of the community of registered U.S. corporations (for a score of 3 points) or whether that .INC string closely describes that community without “over-reaching substantially beyond” the community of registered U.S. corporations.”<sup>80</sup>
82. In its community application, Dot Registry itself disclosed that the .INC string is used outside of the U.S.:

Our research indicates that Inc. as [a] corporate identifier is used in three other jurisdictions (Canada, Australia, and the Philippines) though their formation regulations are different from the United States in their entity designations would not fall within the boundaries of our community definition.<sup>81</sup>

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<sup>79</sup> .Ibid., p. 2.

<sup>80</sup> AGB, p. 4-13 (Exhibit 1)

<sup>81</sup> .INC Application (Exhibit 4), p. 6.



- **.INC 2-A Nexus**

<b>Maximum score</b>	<b>3 points</b>
<b>EIU score</b>	<b>0 points</b>
<b>Correct score</b>	<b>2 points</b>

83. To receive the maximum, score of 3 points for **2-A Nexus**, Dot Registry’s .INC string must match the community of registered US corporations or be a well-known short-form or abbreviation of the community name. To receive a partial score of 2 points for Nexus, the [.INC] string must identify the community where “identify” means that the applied-for [.INC] string should closely describe the community [of registered U.S. corporations] or community members, without over-reaching *substantially* beyond that community.<sup>82</sup>
84. The EIU CPE Panel faulted the Dot Registry application on the supposed ground that
- The applied-for string (.INC) over-reaches *substantially*, as the string indicates a wider or related community of which the applicant is a part that is not specific to the applicant’s community...While the string identifies the name of the community, it captures a wider geographical remit than the [.INC] community has, as the corporate identifier is used in Canada, Australia and the Philippines. *Therefore, there is a substantial over-reach* between the proposed [.INC] string and [the community of registered U.S. corporations] as defined by the applicant [emphases added].<sup>83</sup>
85. It is unclear how—and according to what standard or metric—the Panel determined that the usage of “Inc.” in Australia, Canada and the Philippines caused the Dot Registry application (targeting the community of U.S. corporations) amounts to *substantial* overreach.
86. Based on the dictionary meaning of “substantial”,<sup>84</sup> the use of “Inc.” in Australia, Canada and the Philippines would have to be so “considerable” or “great” in comparison to its use in the U.S. that such usage would “largely” but not “wholly” equal to its usage in the U.S.

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<sup>82</sup> AGB, p. 4-13.

<sup>83</sup> .INC Report (Exhibit 7), pp. 4-5.

<sup>84</sup> According to the *Merriam Webster’s Collegiate Dictionary* (10<sup>th</sup> ed.), “substantial” is defined as “considerable in quantity: significantly great” (Definition 3 b) or “being largely but not wholly that which is specified” (Definition 5).

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itself. In my opinion, this would require that the economic magnitude/significance of the usage of “Inc.” in these three countries amounts to, at a minimum, significantly more than half of the appropriately-measured economic magnitude of its usage in the U.S. itself.

87. But on closer examination, it is clear that the EIU did not regard it as necessary to provide any quantification of the supposed “over-reach” in order to determine whether or not it was “substantial”. Instead, the EIU decided for itself that *any* over-reach was *ipso facto* “substantial,” without there being any need to measure it.<sup>85</sup>
88. According to the AGB, only if a string “over-reach[es] *substantially* [emphasis added] beyond the community” would a community application be denied any points whatsoever under **2-A Nexus**. Importantly, the AGB does not provide any metric for determining whether any “over-reach” —even assuming it exists at all—is “substantial”. Presumably, if an applied-for string “over-reaches” only slightly, this should result in a score of 2 points. It would not be grounds for giving a community application 0 points under the **2-A Nexus** criterion, sufficient to ensure that the application could not prevail.
89. It appears that the EIU took it upon itself to first re-write the AGB criteria. Where the AGB is concerned only with *substantial* over-reach (something it neither defines nor quantifies), the EIU effectively dropped the *substantial* condition and decided that *any* “over-reach” —no matter how small or even trivial—is *ipso facto substantial*. Here is the criterion as restated by the EIU:
- “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.<sup>86</sup>
90. In short, *any* “geographical or thematic remit” that is “wider” than the community—no matter by how little or how much, quantitatively speaking—is deemed to be a “substantial over-reach” by the EIU that justifies awarding the community application at issue 0 points under **2-A Nexus**.
91. It is my considered view that Dot Registry’s .INC string qualifies for at least a score of 2 points under **2-A Nexus** because it is commonly known as the identifying abbreviation for U.S. corporations. To the extent that “Inc.” is also used in Canada, Australia and the Philippines, such usage is not *substantial*, as I demonstrate next.

<sup>85</sup> EIU Guidelines (Exhibit 2), p. 7.

<sup>86</sup> EIU Guidelines (Exhibit 2), p. 6.

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92. To test whether or not Dot Registry's .INC TLD string *substantially* overreaches, the EIU first should have assembled and analyzed data showing the incidence of the corporate delimiters "Inc." and "Corp." (in comparison to other possible business entity abbreviations such as "Ltd.", "GmbH", AB, SARL, and the like) in countries other than the U.S. Next, it should have determined the economic significance of such usage (for example, by determining the relative number and size of the business entities in Canada, Australia and the Philippines that use "Inc." or "Corp." and then compared that economic significance to the economic significance of U.S. companies that use "Inc." or "Corp.")
93. What the EIU should have done was to identify and analyze representative data on the actual usage of "Inc." in each of Australia and Canada and the Philippines in comparison to its usage in the U.S. But again, it does not appear that the EIU made any effort even to investigate, much less to quantify, the economic significance of the non-U.S. usage.<sup>87</sup>
94. Upon investigation, it does appear that "Inc." is used in Australia, but not to designate corporations. Instead, its use there appears to be restricted to nonprofit associations. In Canada, "Inc." is used along with "Ltd.", "Limited", "Corporation" and "Incorporated". "Inc." also is used in the Philippines along with the abbreviations "Corp." and "Co." (although it also appears that the use of "Co." is reserved for partnerships in the Philippines.) I was unable to find any use of "Inc." (or "Incorporated") in any other country.
95. Next I turned to the actual incidence and economic significance of the usage of "Inc." in each of the three countries that Dot Registry identified. In order to do this, it first was necessary to identify and analyze a large, representative, publicly-available data set showing the distribution and economic significance of all corporate identifiers in each of Australia, Canada, the Philippines and the U.S.
96. I elected to use the *Forbes Global 2000* data set published by Forbes on May 7, 2014.<sup>88</sup> This data set identified the largest 2,000 of the world's public companies, based on a composite ranking using four metrics measured as of April 1, 2014: sales, profits, assets and market

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<sup>87</sup> As noted above, the EIU appears to have looked no further than the information volunteered by Dot Registry itself.

<sup>88</sup> <http://www.forbes.com/sites/forbespr/2014/05/07/forbes-11th-annual-global-2000-the-worlds-biggest-public-companies/>. See Exhibit 14.

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value.<sup>89</sup> I chose to use the fourth metric—market value (alternatively, market capitalization or “market cap”)—as the measure of each company’s relative economic significance.

97. A total of 560 U.S. corporations were included in the *Forbes Global 2000*. These 560 corporations had an aggregate market capitalization of \$18,188.1 trillion dollars.<sup>90</sup> I adopted this figure as an appropriate proxy for the usage of “Inc.” or “Corp.” in the U.S. Then the relevant question I sought to answer was: What was the corresponding market capitalizations of the *Forbes Global 2000* companies in Australia, Canada and the Philippines that use the identifiers “Inc.” or “Corp.”?
98. It is my opinion that a comparison of these equivalent market capitalization figures for Australia, Canada and the Philippines to the \$18,188.1 trillion market cap of the 560 U.S. corporations in the *Forbes Global 2000* would provide a reasonable basis for determining the extent to which the use of “Inc.” or “Corp.” in these three countries was economically significant. This in turn would be an appropriate basis for determining whether or not Dot Registry’s .INC string *substantially* “over-reaches” the community of U.S. corporations. Here is what I found:
99. A total of 36 Australian business entities were included in the 2014 edition of the *Forbes Global 2000* data set. As I have tabulated in Exhibit 14, these 36 firms had an aggregate market capitalization of \$1,008.7 billion, or 5.5% percent of the aggregate market cap of the U.S. corporations in the same data set. Next, using information available in the *Forbes* data set, I was able to readily determine the identifier used by 29 of these 36 Australian entities: just one used “Inc.”; all of the remaining 28 were officially designated as “Ltd.” or “Limited”.
100. From this, I estimated that 1/29—or just 3.4%—of the Australian aggregate market cap of \$1,008.7 trillion (or \$34.8 billion) should be attributed to Australian entities using “Inc.” or “Corp.” This \$34.8 billion amounted to only 0.2% of the aggregate market capitalization of the 560 U.S. Corporations in the *Forbes Global 2000*. (Exhibit 14)
101. Similarly, a total of 57 Canadian businesses were listed in the 2014 *Forbes Global 2000* data set with an aggregate market capitalization of \$1,210.0 billion, or 6.7 percent of the

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<sup>89</sup> Measured in U.S. dollars as of April 1, 2014, after conversion from the local currencies by Forbes.

<sup>90</sup> All four metrics reported in the *Forbes Global 2000* are measured in U.S. dollars, which greatly facilitated my calculations.

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aggregate market cap of the 560 U.S. corporations in the data set. Again, using other information available in the *Forbes* data, I estimated that 75.5% (i.e., 37/49) of these Canadian corporations were identified by “Inc.” or “Corp.” (The rest used “Ltd.” or “Limited”.)

102. From this, I estimated that 75.5% of the Canadian aggregate market cap of \$1,210.0 billion in the *Forbes* data set, or \$913.7 billion, could be attributed to Canadian entities using “Inc.” or “Corp.”
103. A total of 10 Filipino business entities were included in the 2014 edition of the *Forbes Global 2000* data set. As summarized in Exhibit 14, these 10 firms had an aggregate market capitalization of \$72.2 billion, or 0.4% percent of the aggregate market cap of the 560 U.S. corporations in the *Forbes* data. Then, using other information contained in the *Forbes* data set, I determined that 6 out of 9 or 66.7% used the identifiers “Inc.” or “Corp.”<sup>91</sup>
104. This enabled me to estimate that 66.7% of the aggregate \$72.2 billion in market capitalization—or \$48.1 billion—should be attributed to Filipino entities that used the “Inc.” or “Corp.” identifiers.
105. This finally allowed me to answer the question: In comparison to their usage in the U.S., can the usage of “Inc.” or “Corp.” in Australia, Canada and the Philippines *combined* be considered *substantial*? Put differently, is the non-U.S. usage of the .INC string so great that it “over-reaches substantially” beyond the U.S.?
106. As a result of the foregoing analysis (summarized in Exhibit 14), I have concluded that the Dot Registry’s restriction of the .INC string to the U.S. does *not* amount to *substantial* “over-reach”. This is because the best estimate of the aggregate market capitalization of the companies in Australia, Canada and the Philippines using the “Inc.” or “Corp.” identifier in the *Forbes Global 2000* is \$34.8 billion + \$913.7 billion + \$48.1 billion, or a total \$996.6 billion. This is just 5.5%—not a *substantial* fraction<sup>92</sup>—of the total market capitalization of \$18,188.1 billion of the 560 U.S. corporations in the *Forbes* data.
107. But the data I analyzed do show that there is some—albeit small—usage of “Inc.” outside the U.S. While such usage is not “substantial”, it still means that the .INC string does not

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<sup>91</sup> The others used “Co.”, which I understand identifies a general partnership in the Philippines.

<sup>92</sup> Specifically, it does not even begin to approach—much less exceed—half of the total market capitalization of the U.S. corporations in the *Forbes* data.

identify *only* U.S. corporations. While Dot Registry’s definition of the .INC community cannot be characterized as *excessively* broad, it does result in some “over-reach.” I conclude that this limits it to a score of 2 points on the **2-B Nexus** criterion.

- **.INC 2-B Uniqueness**

<b>Maximum score</b>	<b>1 point</b>
<b>EIU score</b>	<b>0 points</b>
<b>Correct score</b>	<b>1 point</b>

108. According to the EIU

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application *and must also have a score of 2 or 3 on Nexus*.

109. As has already been shown above, the Dot Registry application for the .INC string should have been given a score of 2 on the **2-A Nexus** criterion. Consequently, the only remaining question is whether or not the .INC string has any other significant meaning. The EIU did not address this question on the ground that it had determined (erroneously, in my opinion) that the Dot Registry application for the .INC string should be awarded 0 points for **2-A Nexus**.

110. While I understand that some in the ICANN community have suggested that the .INC string also signifies “Incomplete” or “Incoming”, it also is my understanding that these suggestions appear to have originated with rival, non-community applicants for the .INC string. In any event, it is difficult to imagine that the EIU would have taken these suggestions seriously if it had actually evaluated the Dot Registry application under **2-B Uniqueness** on the merits.

**E.3. .INC Criterion #3: Registration Policies**

111. In the EIU’s original evaluation, the Dot Registry application for the .INC string was awarded the maximum of 1 point for each of the first three sub criteria (**3-A Eligibility**, **3-B Name Selection** and **3-C Content and Use**) but 0 points for the **3-D Enforcement**, the fourth sub criterion.

112. I concur with the EIU’s analysis and scoring of the Dot Registry application on the **3-A Eligibility**, **3-B Name Selection** and **3-C Content and Use** sub criteria.

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- **.INC 3-A Eligibility**

<b>Maximum score</b>	<b>1 point</b>
<b>EIU score</b>	<b>1 point</b>
<b>Correct score</b>	<b>1 point</b>

- **.INC 3-B Name Selection**

<b>Maximum score</b>	<b>1 point</b>
<b>EIU score</b>	<b>1 point</b>
<b>Correct score</b>	<b>1 point</b>

- **.INC 3-C Content and Use**

<b>Maximum score</b>	<b>1 point</b>
<b>EIU score</b>	<b>1 point</b>
<b>Correct score</b>	<b>1 point</b>

113. However, I understand that the EIU faulted the Dot Registry application for the .INC string under the **3-D Enforcement** criterion on the ground that, while it did articulate specific enforcement measures, it did not outline an “appropriate” appeals mechanism. I disagree.

- **.INC 3-D Enforcement**

<b>Maximum score</b>	<b>1 point</b>
<b>EIU score</b>	<b>0 point</b>
<b>Correct score</b>	<b>1 point</b>

114. The EIU found that Dot Registry’s application for the .INC string did not meet the criterion for **3-D Enforcement**, on the ground that—while it did include the requisite enforcement measures—it did not satisfy the AGB requirement for an appeals process:

The [Dot Registry] applicant outlined policies that include specific enforcement measures constituting a coherent set. For example, if a registrant wrongfully applied for and was awarded a second level domain name, the right to hold this domain name will be immediately forfeited. (Comprehensive details are provided in Section 20e of the applicant documentation). However, the application did not outline *an appeals process* [emphasis added]. The

Community Priority Evaluation panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement.<sup>93</sup>

115. But in so ruling, the EIU misstated the requirement that the Dot Registry supposedly failed to meet. The AGB requires only “*appropriate* appeals mechanisms”, and states further that:

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

...

With respect to...“Enforcement,” scoring of applications against [this sub criterion] will be done from a *holistic perspective, with due regard for the particularities of the community explicitly addressed*. [Example omitted] More restrictions do not automatically result in a higher score. *The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD* and demonstrate continuing accountability to the community named in the application [emphases added].<sup>94</sup>

116. The community-based purpose of Dot Registry’s .INC TLD is

To build confidence, trust, reliance, and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Corporations. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Registered Community of Corporations. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant’s right to conduct business in the United States.

...

*The “.INC” gTLD will be exclusively available to members of the Community of Registered Corporations, as verified through the records of each registrant’s Secretary of State’s office (or other state official where applicable)* [emphasis added].<sup>95</sup>

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<sup>93</sup> .INC Report (Exhibit 7), p. 6.

<sup>94</sup> AGB (Exhibit 1), p. 4-16.

<sup>95</sup> .INC Application (Exhibit 4), p. 7.



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117. It is important not to overlook the fact that the fundamental requirement for membership in the .INC community—and the right to register a second-level domain under the .INC TLD—is the possession and maintenance of a valid corporate registration with office of the appropriate Secretary of State. In this regard, the records of the relevant Secretary of State’s office are dispositive: Either the would-be registrant of a second-level .INC domain is validly registered with that Secretary of State, or it is not.
118. The essential point is that in order to register a second level domain under .INC, an applicant must be a duly, currently registered Corporation as determined by the relevant Secretary of State. That determination would *not* be Dot Registry’s or its registrars’ to make; their role would be limited to verifying that the applicant has secured the necessary registration from the relevant Secretary of State or equivalent authority and that that registration is current.
119. Dot Registry will verify that the registrant of a second-level domain is a registered U.S. corporation at the time of its registration.<sup>96</sup> Thereafter a registrant’s “active” status would be verified on an annual basis with the relevant Secretary of State, as detailed in the Dot Registry application for .INC:
- Dot Registry or its designated agent will annually verify each registrant’s community status. Verification will occur in a process similar to the original registration process for each registrant, in which the registrars will verify each registrant’s “Active” status with the applicable state authority. Each registrar will evaluate whether its registrants can still be considered “Active” members of the Community of Registered Corporations...<sup>97</sup>
120. But because only duly registered corporations would be allowed to register second level domains under .INC, and because the several Secretaries of State are the ultimate arbiters of whether or not a putative corporation is indeed duly registered, it would not be within the authority of Dot Registry to provide a mechanism by which a would-be applicant could “appeal” a determination by a Secretary of State to Dot Registry or its registrars. The latter must respect the Secretary of State’s determination.

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<sup>96</sup> .INC Application (Exhibit 4) at p. 7.

<sup>97</sup> Ibid.

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121. I also note that the Dot Registry application for the .INC string does provide opportunities for redress on issues that would not raise the possibility that Dot Registry or its registrars were arrogating the authority of the relevant Secretary of State. For example, Dot Registry's application did provide for a "quasi appeals process" in the event it was unable to verify an applicant's eligibility for the .INC string with the relevant Secretary of State. This is because the application made explicit allowance for a 30 day probationary period to allow registrants to directly address the relevant Secretary of State.

Any registrant found to be "Inactive," or [ceases to be registered with the State, is dissolved and/or forfeits the domain for any reason, or is administratively dissolved by the State] will be issued a probationary warning by their registrar, allowing for the registrant to restore its active status or resolve its dissolution with the applicable Secretary of State's office. If the registrant is unable to restore itself to "Active" status within the defined 30 day probationary period, their previously assigned ".INC" will be forfeited....

[A]ny entity acquiring a ".INC" domain through the processes described in this guideline that does not meet the registration criteria and wishes to maintain the awarded domain will be allowed a 30 day grace period after the renewal verification process to correct any non-compliance issues in order to continue operating their acquired domain.<sup>98</sup>

122. Dot Registry has also committed to implementation of the full panoply of ICANN's registrant rights protection mechanisms, including but not limited to:

Support for and interaction with the Trademark Clearinghouse ("Clearinghouse"); use of the Trademark Claims Service; segmented Sunrise Periods allowing for the owners of trademarks listed in the Clearinghouse to register domain names that consist of an identical match of their listed trademarks; subsequent Sunrise Periods to give trademark owners or registrants that own the rights to a particular name the ability to block the use of such name; [and] stringent takedown policies in order to properly operate the registry.<sup>99</sup>

Dot Registry will provide all ICANN required rights mechanisms, including Trademark Claims Service, Trademark Post-Delegation Dispute Resolution

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<sup>98</sup> Ibid., pp. 17-18.

<sup>99</sup> Ibid., p. 18.

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Procedure (PDDRP), Registration Restriction Dispute Resolute Procedure (RRDRP), UDRP, URS and Sunrise service.<sup>100</sup>

123. If the EIU had actually taken the “holistic perspective” called for by the AGB, it would have given “due regard for the particularities” of the .INC community discussed above, and awarded Dot Registry’s .INC application the maximum possible 1 point available under **3-D Enforcement**.

124. At the same time, it should be noticed how vague, unformed or merely aspirational were the provisions for an “appropriate appeals mechanism” for certain community applications (.RADIO, .HOTEL, .ECO, .GAY and .ART submitted by Dadotart) that nonetheless were awarded the maximum possible score for **3-D Enforcement** by the EIU.<sup>101</sup>

125. The .RADIO application provided only that

An appeals process is available for all administrative measures taken in the framework of the enforcement program. The first instance of the appeals process is managed by the .radio Registry, while appeals are heard by an independent alternative dispute resolution provider.<sup>102</sup>

This is the *entirety* of the provision for an appropriate appeals process in the .RADIO community application.

126. The EIU concluded that the .ART (Dadotart) community application satisfied the requirement for an appeals mechanism on the basis of this provision (again, quoted in its entirety):

An appeals process will be available for all administrative measures taken in the framework of the enforcement program. The first instance of the appeals process will be managed by the registry service provider. The PAB [“Policy Advisory Board”] set up by Dadotart provides the second and last instance of an appeals process by itself or entrusted to an alternative

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<sup>100</sup> .INC Application (Exhibit 4) at p. 23.

<sup>101</sup> .RADIO application (Exhibit 16), .HOTEL application (Exhibit 17), .ECO application (Exhibit 19), .GAY application (Exhibit 20), .ART application (Exhibit 18).

<sup>102</sup> .RADIO application (Exhibit 16), p. 24.

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dispute resolution provider the charter of the appeals process will be promulgated by the PAB.<sup>103</sup>

127. And interestingly, the words “appeal” or “appeals” do not appear *at all* in the .HOTEL and .ECO community applications. Yet the EIU awarded each the maximum possible 1 point score for **3-D Enforcement**, saying

There is also an appeals mechanism, whereby a registrant has the right to request a review of a decision to revoke its right to hold a domain name.<sup>104</sup>

and

There is also an appeals mechanism, whereby a registrant has the right to seek the opinion of an independent arbiter approved by the registry.<sup>105</sup>

**E.4. .INC Criterion #4: Community Endorsement**

128. This section of my report relates to the .INC community as identified and defined in the Dot Registry application.

- **.INC 4-A Support**

<b>Maximum score</b>	<b>2 points</b>
<b>EIU score</b>	<b>1 point</b>
<b>Correct score</b>	<b>2 points</b>

129. According to its CPE Report, the EIU determined that the Dot Registry application only “partially” met the criterion for **4-A Support**, in that it had documented support from at least one group with relevance to the .INC community. But the EIU did not award the maximum possible score of 2 points because the Dot Registry application did not have “documented support” from the “recognized” community institution(s), where

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<sup>103</sup> .ART (Dadotart) application (Exhibit 18).

<sup>104</sup> .HOTEL report (Exhibit 11), p. 5.

<sup>105</sup> .ECO report (Exhibit 13), p. 8.

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“recognized” means the institution(s) that are clearly recognized by the community members as representative of the community.

130. I am baffled by the EIU’s “determination”. First of all, there can be no question that the Secretaries of State for the several U.S. states and the National Association of Secretaries of State (NASS) *are* recognized by U.S. corporations as representing the community of corporations. Nevertheless, the EIU once again invoked the notion that there is a meaningful distinction between government entities (in particular, the respective Secretaries of State of U.S. states) “fulfilling a function” as opposed to “representing the community” and, specifically, that the Secretaries of State of U.S. states

are not the recognized community institutions...as these government agencies are fulfilling a function, rather than representing the community.<sup>106</sup>

One cannot help but notice that, in the context of the .OSAKA community application,<sup>107</sup> the EIU apparently was not troubled by the fact that the Osaka Prefectural government (the “entity mainly dedicated to the community”) was merely fulfilling its function. The EIU’s unwillingness to afford the same deference to US Secretaries of State or to their National Association is strikingly inconsistent.

131. It also is important to underscore the fact that the several Secretaries of State are either elected or appointed governmental officers. As such, they lack the freedom available to a non-governmental body or private organization to simply favor or even endorse one applicant for a particular string over rival applicants. But it must not be forgotten that:
- a. Several state-level Secretaries of State as well as NASS clearly expressed the position that the .INC TLD should be awarded *only* to a community applicant,
  - b. These same Secretaries of State and NASS were aware of the Dot Registry community application for the .INC string,
  - c. The Dot Registry application was the *only* community application for that string, and

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<sup>106</sup> .INC Report (Exhibit 7), p. 2.

<sup>107</sup> See the .OSAKA Report (Exhibit 12).

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- d. These Secretaries of State and NASS communicated with ICANN at the request of Dot Registry. This constellation of facts strongly suggests that the several Secretaries of State and NASS—while not permitted to officially endorse it—nevertheless are in support of the Dot Registry application for the .INC string.<sup>108</sup>

132. Next I address the several complaints referenced in the EIU’s CPE report, namely that “[T]he viewpoints expressed in these letters were not consistent across states” and that

- a. Dot Registry “was not the recognized [.INC] community institution.”
- b. Nor did Dot Registry “have documented authority to represent the [.INC] community.”
- c. Nor did Dot Registry have “documented support from a majority of the recognized community institutions.”

133. The EIU has acknowledged that it did receive letters of support from “a number” of Secretaries of State:

The application included letters from a number of Secretaries of State of US states, which were considered to constitute support from groups with relevance, as each Secretary of State has responsibility for corporate registrations and the regulations pertaining to corporate formation in its jurisdiction.<sup>109</sup>

But the EIU summarily dismissed these letters on the ground that

These entities are not the recognized community institution(s)/member organization(s), *as these government agencies are fulfilling a function, rather than representing the community* [emphasis added].<sup>110</sup>

The viewpoints expressed in these letters were not consistent across states. While several US states expressed clear support for the applicant during the

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<sup>108</sup> I understand that NASS was a joint requestor on Dot Registry’s Reconsideration Requests.

<sup>109</sup> .INC Report (Exhibit 7), p. 7.

<sup>110</sup> Again, this is an irrelevant, meaningless distinction that is nowhere to be found in the AGB that I have already addressed above.

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Letters of Support verification process, others either provided qualified support, refrained from endorsing one particular applicant over another, or did not respond to the verification request.<sup>111</sup>

But I am not aware of any evidence that the EIU reached out to *every* explicit or implicit member of the .RADIO, .HOTEL, .OSAKA and .ECO communities or that it received an expression of “clear support” from *each* such member. Therefore, this appears to be another example of the EIU’s uneven treatment of the Dot Registry community applications, compared to the treatment the EIU accorded to the .RADIO, .HOTEL, .OSAKA and .ECO community applications.

134. In arguing that the EIU should have awarded the maximum possible 2 points to the .INC application for sub criterion **4-A: Support**, I both rely on and distinguish this passage from the AGB’s Criterion 4 Guidelines:

With respect to ‘Support,’ it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations... Also with respect to ‘Support,’ the plurals and brackets for a score of 2 relate to cases of multiple institutions/organizations. In such cases there must be documented support from institution/organizations representing a majority of the overall community addressed in order to score 2.<sup>112</sup>

135. I would argue first that the National Association of Secretaries of State is “the only national Association relevant to” the .INC community and that the .INC application has documented support from NASS. Second, in view of the fact that measured by the value of the registered corporations, the Delaware Secretary of State arguably represents the majority of U.S. corporations. His support for the Dot Registry .INC application can therefore be seen as evidence of majority support. This conclusion is further supported by the several additional letters of support offered by other Secretaries of State for the Dot Registry .INC application.

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<sup>111</sup> .INC Report (Exhibit 7), p. 7.

<sup>112</sup> AGB (Exhibit 1), p. 4-18.

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136. Since the Dot Registry application for the .INC TLD has the support of both NASS and the Delaware Secretary of State, the EIU should have awarded it the maximum 2 points for **4-A: Support**.

- **.INC 4-B Opposition**

<b>Maximum score</b>	<b>2 points</b>
<b>EIU score</b>	<b>1 point</b>
<b>Correct score</b>	<b>2 points</b>

137. According to its CPE Report, the EIU determined that the Dot Registry application only “partially” met the criterion for Opposition “as the application received relevant opposition from one group of non-negligible size:”

The [.INC] application received several letters of opposition, *one of which was determined to be relevant opposition* from an organization of non-negligible size. This opposition was from a community that was not identified in the application *but which has an association to the applied-for string*. Opposition was on the grounds that limiting registration to US registered *corporations* only would unfairly exclude non-US businesses [emphases added].<sup>113</sup>

138. I have recently been able to review email correspondence<sup>114</sup> between ICANN and the EIU regarding this particular “finding”. That correspondence confirms that the European Commission (“EC”) was the source of the supposedly “relevant opposition” that was submitted as an “Application Comment”<sup>115</sup> on behalf of the EC on 4 March 2014. However, the only specific concern raised in that EC comment was in respect of Dot Registry’s separate community application for the .LLP string, not the .INC application. *There never was any relevant “opposition” to Dot Registry’s .INC application.*

139. In any event, just three weeks later, the EC submitted a follow-up “Application Comment”<sup>116</sup> dated 25 March 2014 stating that its concern regarding Dot Registry’s .LLP application had been resolved and that the EC was withdrawing its previous “Comment”.

<sup>113</sup> .INC Report (Exhibit 7), p. 7.

<sup>114</sup> ICANN\_DR-00215-217 and attached as Exhibit 21.

<sup>115</sup> Ibid., Comment ID: tjwufnw.

<sup>116</sup> Ibid., Comment ID: 7s164151.



Notably, in this follow-up “Application Comment”, the EC specifically asked “that ICANN forward a copy of this communication to the Economist Intelligence Unit.”

140. Based on the email correspondence I reviewed, the EIU dismissed its lapse on the ground that it cost Dot Registry’s .INC application only 1 point at most and “this would have had no material impact on the final outcome of the [.INC] evaluation.”<sup>117</sup>
141. But in light of this recently produced email correspondence between ICANN and the EIU, it is clear that *there actually never was any relevant opposition at all* to Dot Registry’s .INC community application. The EIU should have awarded it the maximum score of 2 points that were possible under the **4-B Opposition** criterion.<sup>118</sup>

#### E.5. .INC Conclusion

142. It is my conclusion that, had the EIU CPE Panel correctly followed the AGB, and if it had accorded Dot Registry’s .INC application the same the same degree of deference it appears to have employed in connection with the .HOTEL, .RADIO and .OSAKA TLD applications, it would have awarded Dot Registry’s community application for the .INC string 15 points, one more than the 14 point minimum it needed to prevail.

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<sup>117</sup> ICANN\_DR-00215-217 and attached as Exhibit 21.

<sup>118</sup> While the EIU appears to have tried to minimize its error as “not material”, it actually should be seen as troubling: First, the EC opposition was *never* about Dot Registry’s .INC application. That should immediately have been apparent to both the EIU Panel and ICANN. Therefore, it is immaterial whether or not both the original EU “opposition” (to the .LLP application) and the EC’s subsequent withdrawal of that “opposition” were communicated to ICANN during the 14-day window that began on 19 February 2014. The more troubling fact is that ICANN and the EIU either never noticed—or did not care—that (1) the supposed EU “opposition” was to an entirely different string (.LLP), and (2) that opposition was withdrawn within three weeks of the date it was communicated to ICANN and nearly 80 days before the date of the EIU CPE Report on the .INC string.

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**F. Summary of the EIU’s Review of Dot Registry’s Community Applications for the .LLC and .LLP TLDs**

143. In its *Community Priority Evaluation Reports* (“EIU CPE Reports”) dated 11 June 2014 for applicant Dot Registry’s .LLC<sup>119</sup> and .LLP<sup>120</sup> strings, the EIU CPE Panel awarded scores that were identical to those given Dot Registry’s .INC application:

Criterion #1: Community Establishment	0 points (out of 4)
Criterion #2: Nexus between Proposed String and Community	0 points (out of 4)
Criterion #3: Registration Policies	3 points (out of 4)
<u>Criterion #4: Community Endorsement</u>	<u>2 points (out of 4)</u>
Total	5 points (out of 16)

144. Having awarded each of the .LLC and .LLP applications just 5 out of the minimum necessary score of 14 points, the Panel declared that the Dot Registry applications for .LLC and .LLP did not prevail.

145. For the same reasons set forth above in connection with Dot Registry’s application for the .INC TLD, had the Panel correctly adhered to ICANN’s AGB and its own *EIU Guidelines*, and had the Panel accorded the .LLC and .LLP applications the same degree of deference it gave to the .HOTEL, .RADIO, .ECO and .OSAKA TLD applications, it would have awarded both the .LLC and the .LLP application more than the 14 points needed to prevail.

**F.1. .LLC and .LLP: Criterion #1: Community Establishment**

146. The *community* that is the subject of the Dot Registry application for the .LLC string is defined as businesses registered as Limited Liability Companies within the United States or its territories.<sup>121</sup> The *community* that is the subject of the Dot Registry application for the .LLP string is defined as businesses registered as Limited Liability Partnerships within the United States or its territories.<sup>122</sup>

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<sup>119</sup> Dated 11 June 2014 for Application ID 1-880-17627 (Exhibit 8).

<sup>120</sup> Dated 11 June 2014 for Application ID 1-880-35508 (Exhibit 9).

<sup>121</sup> .LLC Application (Exhibit 5), p. 12.

<sup>122</sup> .LLP Application (Exhibit 6), p. 12.

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147. As noted above with respect to the .INC application, the AGB specifically provides for such communities under Criterion 1 Guidelines:

With respect to “Delineation” and “Extension,” it should be noted that *a community can consist of legal entities* [emphasis added, examples omitted]. All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.<sup>123</sup>

148. These communities are clearly delineated. The Community of U.S. Limited Liability Corporations and the Community of U.S. Limited Liability Partnerships are both clearly delineated because membership in each requires the objectively-verifiable satisfaction of explicit, overt requirements. This is because membership requires successful, active completion of the requirements to register as an LLC or LLP with the Secretary State or equivalent authority in one of the U.S. states, territories or the District of Columbia,<sup>124</sup> coupled with the continued maintenance of such registrations in conformity with applicable laws and regulations. I conclude that the .LLC and .LLP communities have “a clear and straight-forward membership definition” that should have been scored high for Delineation under both the AGB and the EIU Guidelines.
149. There is at least one entity mainly dedicated to the LLC and LLP communities. The offices of the Secretaries of State were established by law in each state or territory to administer the LLC and LLP business registrations, which are the *sine qua non* of membership in these communities. To respond to the EIU’s apparent misunderstanding, the *EIU Guidelines* do permit the offices of the Secretaries of State offices to have additional functions and responsibilities, such as, for example, administering elections. It cannot be disputed that administering their respective jurisdictions’ LLC and LLP communities is a key purpose and function of these offices.
150. There is documented evidence of community activities. The publicly accessible records of LLC and LLP registrations maintained by the Secretaries of State constitute documented evidence of the activities of the LLC and LLP communities. Owing to the fact that these entities are the repositories of the documents needed to accomplish the initial registrations of community members as U.S. LLCs or LLPs and thereafter to

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<sup>123</sup> AGB (Exhibit 1), p. 4-12.

<sup>124</sup> See footnote 40 above.

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maintain these registrations, there is considerable documentary evidence of these defining community activities.

151. Both the .LLC community and the .LLP community have been in active existence since before September 2007. I understand that the first U.S. LLC was formed under Wyoming law in the late 1970s. In 1980, the U.S. Internal Revenue Service issued a letter ruling accepting LLCs, and by 1996, nearly every U.S. state had an LLC statute. LLPs have been common in the U.S. since the 1990s, and by 1996, over 40 U.S. states had adopted LLP statutes. In light of the foregoing, I conclude that both the .LLC community and the .LLP community were in existence before 2007.
152. The EIU Guidelines provide that a community consisting of legal entities is permitted by the AGB. The *EIU Guidelines* specifically say that a community comprised of legal entities is a viable community under the AGB, “provided the requisite awareness and recognition of the community is at hand among the members.” For the reasons given in the next paragraph, I conclude that the members, respectively, of the LLC Community and of the LLP Community have the requisite awareness and recognition.
153. The individual members of both the .LLC community and the .LLP community have the requisite awareness and recognition of their communities.<sup>125</sup> This is because their respective members must consciously make a choice as to which community they want to be a member of and then actively complete a number of overt and externally observable and verifiable steps in order to register themselves as either limited liability companies or limited liability partnerships in the first place. Thereafter, they must regularly and consciously take additional overt and externally observable actions to maintain their memberships in either the .LLC community or the .LLP community in good standing. Thus, membership in either the .LLC community or the .LLP community must be consciously sought and actively achieved; such membership is neither passive nor inadvertent and membership in the community is readily verifiable.<sup>126</sup>

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<sup>125</sup> Again, the AGB does not provide any definition or explanation for “awareness and recognition of a community among its members”.

<sup>126</sup> The EIU agreed that both the .LLC community and the LLP community show a clear and straightforward membership. By the standard implicit in the EIU’s approval of the .RADIO, .HOTEL and .OSAKA community applications, that fact—combined with the fact that active, legal steps were needed in order to become members of both these communities—should have been sufficient to demonstrate that the members of the .LLC and .LLP communities have the requisite awareness and recognition of a community among their respective members.

154. The Dot Registry applications for the .LLC and .LLP TLDs satisfy the requirements under **Criterion #1: Community Establishment** because they evidence the requisite **Delineation** (sub criterion 1-A) and **Extension (1-B)**. Although the EIU concluded that each of the .LLC and the .LLP applications failed both of these prongs of **Criterion #1: Community Establishment**, I conclude otherwise, for the reasons explained below.

- **.LLC and .LLP: 1-A Delineation**

<b>Maximum score</b>	<b>2 points</b>
<b>EIU score</b>	<b>0 points</b>
<b>Correct score</b>	<b>2 points</b>

Delineation

155. The Panel agreed that both the .LLC and the .LLP communities show a clear and straightforward membership. Thus each application satisfies the first prong of the Delineation sub criterion. The EIU agrees.

While broad, the [.LLC] community is clearly defined, as membership requires formal registration as a limited liability company with the relevant US state. In addition, limited liability companies must comply with US state law and show proof of best practice[s] in commercial dealings to the relevant state authorities.<sup>127</sup>

Also, according to the EIU:

While broad, the [.LLP] community is clearly defined, as membership requires formal registration as a limited liability partnership with the relevant US state (LLPs operate in about 40 US states). In addition, limited liability partnerships must comply with US state law and show proof of best practice[s] in commercial dealings to the relevant state authorities.<sup>128</sup>

156. In my opinion, the Panel was in error when it concluded that LLCs and LLPs

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<sup>127</sup> .LLC Report (Exhibit 8), p. 2.

<sup>128</sup> .LLP Report (Exhibit 9), p. 2.

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operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an [LLC or LLP]. Based on the Panel’s research, *there is no evidence of LLCs [or LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these limited liability companies [or limited liability partnerships] would associate themselves with being part of the community as defined by the applicant* [emphases added].<sup>129</sup>

157. It is by the actions they take *to become and remain* LLCs and LLPs that these entities associate themselves with being part of these communities as defined by Dot Registry. Again, the *Applicant Guidebook* requires only that the constituents of a community be *members* of that community. There is no requirement that members of a community must “*act*” as a community, whatever that might mean. Businesses make conscious decisions—legally, commercially and in respect of their tax liabilities—as to why they choose to organize as an LLC, LLP or INC. Through this choice of legal organization they make certain representations to the public-at-large and to other businesses regarding their business, tax status and regulatory obligations. Largely, the drivers that lead a business in any one industry sector to choose a particular legal form will be the same as those for a business in another business sector. In my opinion, there is, therefore, no doubt that there are distinct, identifiable and relevant communities associated with the LLC, LLP and INC corporate identifiers.
158. As I discussed above in connection with Dot Registry’s .INC community, both the .LLC and the .LLP communities actually are *better* defined than were the communities at issue in the .HOTEL, .RADIO, .ECO and .OSAKA applications that prevailed before the EIU. As I noted earlier, the AGB and the *EIU Guidelines* do not provide a concrete meaning for “define” and “definition”. If these are taken to mean or include a rule or standard that would enable an external observer to confidently say whether or not a particular entity was a community member, it is my opinion that the .LLC and .LLP communities are *better* defined than the communities in the community applications (.HOTEL, .RADIO, .ECO and .OSAKA) that prevailed in the EIU’s evaluations.
159. Because the evidence shows that

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<sup>129</sup> .LLC Report (Exhibit 8) and .LLP Report (Exhibit 9), respectively, p. 2.

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- membership in the .LLC and .LLP communities is both clear and straightforward,
- members of the .LLC and .LLP communities possess the requisite awareness and recognition of their respective communities, and even that
- both LLCs and LLPs from different sectors and regions of the U.S. *do* associate themselves with being part of, respectively, the broader community of U.S. limited liability companies or the broader community of U.S. limited liability partnerships,

I conclude that the both the .LLC community and the .LLP community meet the AGB requirement for Delineation.

Organization

160. For the same reasons given above at paragraphs 48 through 55 regarding the EIU's scoring of Dot Registry's .INC community application, I conclude that Dot Registry's .LLC and .LLP community applications also fully meet the AGB requirements for Organization.
161. As is the case with the .INC community, this requirement is satisfied by the individual Secretaries of State of the U.S. states, territories and the District of Columbia. These entities were constitutionally and/or legislatively established to administer the LLC and LLP communities within their respective jurisdictions. Moreover, the records of the Secretaries of State of the U.S. states, territories and the District of Columbia clearly identify the community of LLCs and the community of LLPs authorized to conduct business within their respective jurisdictions.
162. As it did in respect of the .INC community application, the EIU decided that neither the .LLC nor the .LLP applications met the AGB requirements for Organization. But to get to this conclusion, the Panel first needed to rewrite the relevant AGB requirements:

The [.LLC or .LLP] community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for *corporate* [sic] registrations and the regulations pertaining to [sic] *corporate* formation are vested in each individual US state, these government agencies are *fulfilling a function*, rather than *representing* the community. In addition, the

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offices of the secretaries of State of US states are not *mainly* dedicated to the community as they have other roles/functions beyond processing corporate registrations [emphases added].<sup>130</sup>

163. As a preliminary matter, LLCs and LLPs are not corporations, and the appearance in the quotation above of the “corporate” adjective strongly suggests that the Panel merely cut and pasted the conclusion quoted above from its .INC CPE Report. In other words, it does not appear that the Panel actually carried out any specific research relevant to the .LLC or .LLP communities to reach this conclusion.
164. But as I have noted above in connection with Dot Registry’s .INC application, the proper question under the AGB is whether or not the several Secretaries of State are dedicated to the .LLC and .LLP communities, not whether they are merely “fulfilling a function” relevant to these communities or whether they merely “represent” them. I conclude that the Panel was able to “find” that the .LLC and .LLP community applications failed to satisfy the AGB requirement for Organization only after effectively rewriting that requirement.
165. I am equally perplexed by the Panel’s supposed “finding” in respect of both the .LLC and .LLP applications that the Secretaries of State “are not *mainly* dedicated to the [.LLC and .LLP communities] as they have other roles/functions [emphasis added].” As I have pointed out earlier, the Panel ignored what the AGB and its own *Guidelines* have to say regarding Organization. The AGB explains that:

“Organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.<sup>131</sup>

The EIU’s own *Guidelines* add this further explanation:

*“Mainly” could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization [emphasis added].*<sup>132</sup>

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<sup>130</sup> Ibid.

<sup>131</sup> AGB (Exhibit 1), p. 4-11.

<sup>132</sup> EIU Guidelines (Exhibit 2), p. 4.



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166. There is sufficient documented evidence of .LLC and .LLP community activities. It consists of the overt steps taken and records created in connection with the individual decisions made on behalf of would be LLCs and LLPs to register as such under the applicable laws, and thereafter to maintain these registrations in good standing.
167. Yet the Panel’s sole justification for its identical findings that the .LLC and .LLP communities “[do] not have documented evidence of community activities” was that “there is no entity *mainly* dedicated to the community” in the .LLC and .LLP applications.<sup>133</sup> Because there is no such requirement in either the AGB or the *EIU Guidelines*, I conclude that the EIU had no basis for concluding that those applications did not fulfill the AGB conditions for Organization.
168. The previously discussed **National Association of Secretaries of State (NASS)**<sup>134</sup> also constitutes an entity mainly dedicated to the .LLC and .LLP communities. According to the NASS website
- Most NASS member offices handle the registration of domestic and/or foreign corporations (profit and non-profit). Transactions include filings of incorporation, *partnerships (including limited partnerships)*, articles of merger/consolidation, and articles of dissolution [emphasis added].<sup>135</sup>
169. There are at least three LLCs listed among the NASS Corporate Affiliates.<sup>136</sup> The first two Featured Links listed on the NASS home page (“Prevent Business ID Theft” and “Find Business Services”) and NASS “Surveys and Reports”<sup>137</sup> are relevant to LLCs and LLPs. As previously noted, these include:

*Report: State Strategies to Subvert Fraudulent Uniform Commercial Code Filings*  
(Released 2012; updated April 2014)

*NASS Summary of Business Entity Information Collected by States* (March 2014)

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<sup>133</sup> .LLC Report (Exhibit 8), p. 3 and .LLP Report (Exhibit 9), p. 2

<sup>134</sup> Website: <http://www.nass.org>.

<sup>135</sup> <http://www.nass.org/state-business-services/corporate-registration/>.

<sup>136</sup> <http://www.nass.org/contact/corp-affiliates/>.

<sup>137</sup> These are listed at <http://www.nass.org/reports/surveys-a-reports/>.

*NASS Survey on Administrative Dissolution of Business Entities* (March 2014)

*White Paper Streamlining for Success: Enhancing Business Transactions with Secretary Of State Offices* (February 2014)

*Updated NASS Company Formation Task Force Report and Recommendations* (September 2012)

*NASS White Paper - Developing State Solutions to Business Identity Theft: Assistance, Prevention, and Detection* (January 2012)

*NASS Business Identity Theft Toolkit & NASS Business Identity Theft Fact Sheet* (July 2011)

*Updated Report: State Business Entity Laws* (May 2009)

170. In view of the foregoing, I conclude that Dot Registry community applications for the .LLC and .LLP strings fulfill both requirements for Organization.

Pre-existence

171. The only requirement for Pre-existence is that the .LLC and .LLP communities must have been active prior to September 2007. However, the EIU decided that these communities could not possibly have been active prior to that date because it deemed them to be Dot Registry's inventions in order "to obtain a sought-after-after *corporate*<sup>138</sup> identifier as a gTLD string [emphasis added]."<sup>139</sup> As was the case with Dot Registry's .INC application, the EIU sought to justify this conclusion on the ground that limited liability companies and limited liability partnerships "would typically not associate themselves with being

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<sup>138</sup> As I have noted, the EIU did not appear to notice or care that neither LLCs nor LLPs are *corporations*, meaning that the EIU's use of the adjective "corporate" was clearly inappropriate. This supports the inference that the EIU did not independently evaluate each of the .INC, .LLC and .LLP applications. Rather, it appears likely that the Panel simply "cut and pasted" the text of its findings in connection with the .INC application into its CPE Reports for .LLC and .LLP. Note that all three CPE Reports bear the same 11 June 2014 date.

<sup>139</sup> .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 3.

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part of the community as defined by the applicant.”<sup>140</sup> (The Panel did not offer any research or other evidence to support this statement.)

172. This last conclusion by the EIU CPE Panel appears to be clearly erroneous. As previously discussed, it is predicated on a requirement of the EIU’s own invention—one not found in the AGB—regarding how supposed community members must “associate themselves.”
173. In summary, it is my conclusion that Dot Registry’s .LLC and .LLP community applications do satisfy all three of the requirements— Delineation, Organization and Pre-existence – for **1-A Delineation**. The EIU CPE Panel should have awarded each of these applications the maximum possible 2 points.

- **.LLC and .LLP: 1-B Extension**

<b>Maximum score</b>	<b>2 points</b>
<b>EIU score</b>	<b>0 points</b>
<b>Correct score</b>	<b>2 points</b>

174. According to the AGB, Dot Registry’s scores under sub criterion **1-B Extension** were supposed to be determined by whether or not the .LLC and .LLP communities demonstrated the necessary Size and Longevity. But as it did in connection with the Delineation sub criterion, the EIU CPE Panel held that each of these two sub criteria first required “awareness and recognition of a community (as defined by the applicant) among its members.” After declaring this “awareness and recognition” to be nonexistent, the Panel simply discounted the evidence showing that the .LLC and .LLP applications met the other requirements for Size and Longevity.

Size

175. The Panel concurred that both the .LLC and .LLP communities are of considerable size.
176. But the Panel discounted this showing on the ground that the .LLC and .LLP communities did not have the requisite “awareness and recognition of a community among [their] members”. Using the same language (complete with typo) it offered in connection with its rejection of the .INC application, the EIU offered this explanation:

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<sup>140</sup> Ibid.

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This is because [alternatively, limited liability companies and limited liability partnerships] operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an [LLC or LLP]. Based on the Panel's research, there is no evidence of [LLCs or LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. These [limited liability companies or limited liability partnerships] would therefore not typically associate themselves with being part of the community as defined by the applicant.<sup>141</sup>

177. I have already addressed this misapprehension on the part of the Panel. But to repeat, I can find nothing in the AGB regarding how community members are supposed to “act” or “associate themselves”.
178. Since the EIU agreed that the communities in the .LLC and .LLP applications were both of considerable size, and since the overt actions taken by members to join the .LLC and .LLP communities evidence their “awareness and recognition” of these communities, the EIU should have concluded that Dot Registry's .LLC and .LLP applications satisfied both of the AGB requirements for Size.

Longevity

179. The AGB required that two conditions be fulfilled in order for Dot Registry's .LLC and .LLP applications to meet the Longevity sub criterion: each of these two communities must demonstrate longevity and each must display an awareness and recognition of a community among its members. However, the Panel decided that the .LLC and .LLP applications did neither, based on its previous misapprehensions that (a) the .LLC and .LLP communities were “construed” because LLCs and LLPs would typically not associate themselves with being part of the communities defined by Dot Registry, and (b) these putative communities do “not have awareness and recognition of a community among its members.”

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<sup>141</sup> Ibid.

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180. As I have explained above, it is my opinion that both of these judgments by the Panel are erroneous. I conclude that Dot Registry’s .LLC and .LLP applications satisfied the Longevity requirement under **1-B Extension**.

181. Because both the .LLC and .LLP applications also met the conditions for Size, the Panel should have awarded them the maximum possible 2 points for **1-B Extension**.

**F.2. .LLC and .LLP: Criterion #2: Nexus between Proposed String and Community**

182. In applying this criterion, the EIU CPE Panel was supposed to determine whether or not the .LLC and .LLP strings applied for by Dot Registry (a) match the names of, respectively, the community of limited liability companies and the community of limited liability partnerships or are well-known short-forms or abbreviations for those communities, and (b), have no other significant meanings beyond identifying these two communities.

- **.LLC: 2-A Nexus**

<b>Maximum score</b>	<b>3 points</b>
<b>EIU score</b>	<b>0 points</b>
<b>Correct score</b>	<b>2 points</b>

183. To receive the maximum score for **2-A Nexus**, the .LLC and .LLP strings must *match* the communities of U.S. limited liability companies and U.S. limited liability partnerships, respectively, or be well-known short-forms or abbreviations of these community names.<sup>142</sup> In either case, the .LLC and .LLP strings must not “over-reach *substantially* [emphasis added]” beyond their respective communities.<sup>143</sup>

184. According to the AGB, for an applied-for string to receive a score of 3 for **2-A Nexus**, it should be the case that the string is “*commonly* known by others as the identification/name of the community [emphasis added].” To qualify for a score of 2, “the applied-for string should closely describe the community or the community members, without over-reaching *substantially* beyond the community [emphasis added].”

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<sup>142</sup> AGB (Exhibit 1), pp. 4-12 to 4-14.

<sup>143</sup> Ibid.

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185. So the correct scores for the .LLC and .LLP strings under **2-A Nexus** should have been determined by whether or not these strings are *commonly* known by others to refer to **U.S.** limited liability companies and **U.S.** limited liability partnerships (for a score of 3 points) or, at a minimum, by whether any over-reach by the “LLC” and “LLP” strings beyond these U.S. communities is “substantial”. In the latter case, a score of 2 points would be indicated if such “over-reach” exists but is not substantial.
186. Using identically the same language that it employed in connection with the .INC application (including its reference to a “corporate identifier”), the EIU CPE Panel faulted the Dot Registry application for the .LLC string under **2-A Nexus** on the ground that

The applied-for string (.LLC) over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While the string identifies the name of the community, it captures a wider geographical remit than the [.LLC] community has, as the *corporate* [sic] identifier is used in other jurisdictions (outside the US). Therefore, there is a *substantial* over-reach [emphasis added] between the proposed [.LLC] string and [the community of registered U.S. limited liability companies] as defined by the applicant [emphases added].<sup>144</sup>

187. The Panel rendered identically the same judgment (and with the same misplaced reference to a “corporate identifier”) regarding Dot Registry’s application for the .LLP string under the **2-A Nexus** sub criterion:

The applied-for string (.LLP) over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While the string identifies the name of the community, it captures a wider geographical remit than the [.LLP] community has, as the *corporate* [sic] identifier is used in Poland, the UK, Canada and Japan, amongst others. Therefore, there is a *substantial* over-reach [emphasis added] between the proposed [.LLP] string and [the community of registered U.S. limited liability partnerships] as defined by the applicant [emphases added].<sup>145</sup>

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<sup>144</sup> .LLC Report (Exhibit 8), pp. 4-5.

<sup>145</sup> .LLP Report (Exhibit 9), pp. 4-5.

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188. I do not understand how the EIU decided that the .LLC string “over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community.”<sup>146</sup> In particular, the EIU does not appear to have conducted any independent research or fact-finding before rendering this judgment. Dot Registry’s .LLC application does not name any other countries that supposedly use the “LLC” string, saying only:

LLC is a recognized abbreviation in all 50 states and US territories denoting the registration type of a business entity. Our research indicates that while other jurisdictions use LLC as a corporate identifier, their definitions are quite different and there are no other known associations or definitions of LLC in the English language.<sup>147</sup>

Even if some non-U.S. jurisdictions have established business forms that, closely or distantly, are functional approximations of U.S. LLCs, *none* of these are called LLCs or are referred to by the English term “limited liability company”.

189. I am equally perplexed by the EIU’s finding that “The applied-for string (.LLP) over-reaches *substantially* [emphasis added], as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community.”<sup>148</sup> Again, the EIU does not appear to have conducted any independent research or fact-finding before arriving at this judgment. I note that Dot Registry’s .LLP application did volunteer that

Our research indicates that LLP as a corporate identifier is used in eleven other jurisdictions (Canada, China, Germany, Greece, India, Japan, Kazakhstan, Poland, Romania, Singapore, and the United Kingdom) though their formation regulations are different from the United States and their entity designations would not fall within the boundaries of our [.LLP] community definition.<sup>149</sup>

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<sup>146</sup> .LLC Report (Exhibit 8), p. 4.

<sup>147</sup> .LLC Application (Exhibit 5), p. 17.

<sup>148</sup> .LLP Report (Exhibit 9), p. 4.

<sup>149</sup> .LLP Application (Exhibit 6), p. 17.

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But seizing on the information volunteered by Dot Registry itself, the EIU concluded immediately that:

While the [.LLP] string identifies the name of the community, it captures a wider geographical remit than the community has, as the *corporate* [sic] identifier is used in Poland, the UK, Canada and Japan, amongst others. Therefore, there is *substantial over-reach* between the proposed string and the community as defined by the applicant [emphases added].<sup>150</sup>

190. The EIU’s conclusions that both the .LLC and .LLP strings “over-reach substantially” is particularly troubling. According to the AGB, a string must “over-reach *substantially* beyond the community” before the EIU would be allowed to deny any points under **2-A Nexus**. As I have already pointed out, the AGB does not provide a metric for determining whether any “over-reach” – even assuming it exists at all – is “substantial”. If an applied-for string “over-reaches” only somewhat rather than “substantially”, a community application should still be awarded 2 points under **2-A Nexus**.
191. But the EIU first effectively re-wrote the AGB criteria. Where the AGB is concerned only with “*substantial* over-reach” (something it neither defines nor measures), the EIU deems *any* over-reach – no matter how little – to be “*substantial*”:
- “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.<sup>151</sup>
192. In other words, *any* “geographical or thematic remit” that is “wider” than the community – no matter how small or even *de minimis* the supposed “over-reach” – is deemed to be *substantial over-reach* by the EIU and justifies awarding the community application at issue 0 points under **2-A Nexus**. In my view this is incorrect.
193. Insofar as the EIU’s treatment of Dot Registry’s community applications for .LLC and .LLP are concerned, there are two related questions:
- a. Are the strings “LLC” or “LLP”, or the English language business legal forms “limited liability company” or “limited liability partnership” used at all outside of the U.S.?

<sup>150</sup> .LLP Report (Exhibit 9), p. 4.

<sup>151</sup> EIU Guidelines (Exhibit 2), p. 7.



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b. Where the answer is “yes”, is that use *substantial* in comparison to the corresponding use in the U.S.?

194. It does not appear that any non-U.S. country authorizes the formation of limited liability companies. For this reason, no non-U.S. country uses the abbreviation “LLC” to designate a domestic limited liability company. I therefore conclude that Dot Registry’s application for the .LLC string does not “over-reach” at all.
195. With the exception India, Singapore and the United Kingdom, it does not appear that any other English-speaking, non-U.S. country uses the abbreviation “LLP” or the English legal designation “limited liability partnership”. The occurrence of LLPs in the United Kingdom can be distinguished because it is my understanding that UK LLPs actually are more nearly equivalent to U.S. LLCs. Moreover, because the EU has withdrawn the concern it initially expressed regarding Dot Registry’s .LLP application, I conclude that only the use of “LLP” in Singapore and India could even potentially amount to “substantial over-reach”.
196. To support its judgment that “there is a substantial over-reach between the proposed string and the community as defined by the applicant,” the EIU quoted this passage from the Dot Registry community application for the .LLP string:

Our research indicates that LLP as corporate identifier [sic] is used in eleven other jurisdictions (Canada, China, Germany, Greece, India, Japan, Kazakhstan, Poland, Romania, Singapore, and the United Kingdom) though their formation regulations are different from the United States and their entity designations would not fall within the boundaries of our [LLP] community definition.<sup>152</sup>

197. Apparently relying on that Dot Registry statement, the EIU then concluded:

While the [LLP] string identifies the name of the community, it captures a wider geographical remit than the community has, as the corporate identifier is used in Poland, the UK, Canada and Japan, amongst others. Therefore, there is

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<sup>152</sup> .LLP Application (Exhibit 6), p. 17. I understand that the different legal form “limited partnership” or “L.P.” is used in Canada, rather than “limited liability partnership” or “LLP”.

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a substantial over-reach between the proposed string and [the] community as defined by the applicant.<sup>153</sup>

198. Seven of these countries—China, Germany, Greece, Japan, Kazakhstan, Poland and Romania—that supposedly use “LLP” can be discounted immediately because none uses the *English* term “limited liability partnership” or the abbreviation “LLP” to refer to their possibly-equivalent domestic entities. That leaves only Canada, India, Singapore and the United Kingdom as potential sources of any “over-reach”. However, I understand that Canada uses only the different “limited partnership” or “LP” designation, not “LLP”. The U.K. does authorize the use of “LLP”, but I understand that in the U.K. this form actually is equivalent to the U.S. “LLC”, not the U.S. “LLP”. In any event, the European Union (of which the UK is a member), acting through the European Commission, affirmatively notified ICANN that the EC’s earlier opposition to Dot Registry’s .LLP community application “in the particular case of .llp (used in the UK)” was the result of “inaccurate research information” provided by unspecified “other interested parties.”<sup>154</sup>
199. I conclude, therefore, that any “over-reach” by Dot Registry’s “LLP” string would be the result of its use in India and Singapore. Compared to the U.S., where the first LLPs were legally authorized in 1992, LLPs in India and Singapore are more recent phenomena; these were first introduced in Singapore in 2005 and in India around 2009.
200. It is my understanding that the “limited liability partnership” or “LLP” business form is adopted primarily by licensed professionals such as attorneys, accountants and architects who gain the economic efficiencies that can be achieved by combining their individual practices without at the same time incurring liability for their partners’ actions. Therefore, any “over-reach” due to the usage of “LLP” in India or Singapore in comparison to the U.S. should be proportional to the total number of attorneys, accountants and architects in India and Singapore in comparison to the U.S. totals.
201. A reasonable first approximation is that the number of firms comprised of attorneys, accountants and architects in India and Singapore compared to the U.S. should be roughly proportional to the economies of India and Singapore (measured by their respective GDPs) in comparison to the U.S. economy (measured by its GDP).

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<sup>153</sup> .LLP Report (Exhibit 9), p. 4.

<sup>154</sup> Comment submitted to ICANN by Camino Manjon, GAC member, European Commission on 25 March 2014 (Exhibit 21) (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12413>)

202. According to World Bank data, in 2013 the U.S. GDP stood at \$16,768 billion (measured in U.S. dollars). Using the same data source, the GDPs of India and Singapore were \$6,776 billion and \$425 billion, respectively. By this measure, the size of the India and Singapore economies were 40.41% and 2.53%, respectively, of the U.S. economy, or 42.94% combined (i.e., slightly less than 43%).<sup>155</sup>
203. Measured in this way, Dot Registry’s definition of the .LLP community does “over-reach”. However, because I estimate that the usage of “LLP” in India and Singapore combined is only about 43% of its usage in the U.S., I conclude that this “over-reach” is not “substantial”.<sup>156</sup>
204. Again, this is based on the dictionary definition of “substantial”. Under that definition, the usage of “LLP” in India and Singapore would have to be so “considerable” or “great” in comparison to its use in the U.S. that such usage would be “largely” but not “wholly” equal to its usage in the U.S. itself. Because the usage of “LLP” in India and Singapore (in comparison to its usage in the U.S.) would be proportional to the size of these two economies (again, in comparison to the U.S.), “substantial over-reach” would require that the combined size of these two economies would have to be significantly greater than half the size of the U.S. economy.
205. But because there is some “over-reach” implicit in Dot Registry’s application for the .LLP string (even though it is not “substantial”), the AGB specifies that the .LLP application should have received 2 points, rather than the maximum possible 3 points.

- **.LLC and .LLP: 2-B Uniqueness**

<b>Maximum score</b>	<b>1 point</b>
<b>EIU score</b>	<b>0 points</b>
<b>Correct score</b>	<b>1 point</b>

206. According to the EIU

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<sup>155</sup> See Exhibit 15.

<sup>156</sup> Again, I rely on the *Merriam Webster’s Collegiate Dictionary* (10<sup>th</sup> ed.), in which “substantial” is defined as “considerable in quantity: significantly great” (Definition 3 b) or “being largely but not wholly that which is specified” (Definition 5).

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application *and it must also score a 2 or 3 on Nexus* [emphasis added].<sup>157</sup>

207. As I have already been shown above, the Dot Registry applications for the .LLC and .LLP strings should have been given scores of 3 and 2 points, respectively, on the **2-A Nexus** criterion. Consequently, Dot Registry’s scores on the **2-B Uniqueness** criterion depends only on whether the .LLC and .LLP strings have any other significant meaning beyond “Limited Liability Company” and “Limited Liability Partnership”. The EIU did not address this question because it had already decided (wrongly, in my opinion) that Dot Registry’s applications for these two strings amounted to “substantial over-reach”.
208. I have been unable to find any claim that the strings “LLC” and “LLP” have meanings other than “Limited Liability Company” and “Limited Liability Partnership”, respectively. Therefore, I conclude that Dot Registry’s community applications for .LLC and .LLP should have been awarded the maximum possible score of 1 point each for **2-B Uniqueness**,

**F.3. .LLC and .LLP: Criterion #3: Registration Policies**

209. In the EIU’s original evaluations, the Dot Registry applications for the .LLC and .LLP strings were awarded the maximum of 1 point for each of the first three sub criteria (**3-A Eligibility, 3-B Name Selection and 3-C Content and Use**) but 0 points for the fourth sub criterion (**3-D Enforcement**).
210. I concur with the EIU’s analysis and scoring of the Dot Registry application on the **3-A Eligibility, 3-B Name Selection and 3-C Content and Use** sub criteria.

- **.LLC and .LLP: 3-A Eligibility**

<b>Maximum score</b>	<b>1 point</b>
<b>EIU score</b>	<b>1 point</b>
<b>Correct score</b>	<b>1 point</b>

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<sup>157</sup> .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 5.

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- **.LLC and .LLP: 3-B Name Selection**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

- **.LLC and .LLP: 3-C Content and Use**

Maximum score	1 point
EIU score	1 point
Correct score	1 point

211. However, I understand that the EIU faulted the Dot Registry applications for the .LLC and .LLP strings under the **3-D Enforcement** criterion on the ground that, while they did articulate specific enforcement measures, these applications did not outline an appeals process.

- **.INC 3-D Enforcement**

Maximum score	1 point
EIU score	0 point
Correct score	1 point

212. The EIU found that Dot Registry’s applications for the .LLC and .LLP strings did not meet the criterion for **3-D Enforcement**, because while they did include the requisite enforcement measures, these two applications did not satisfy the AGB requirement for an appeals process.

213. But here again, the Panel misstated the requirement that the Dot Registry supposedly failed to meet. The AGB requires only “*appropriate* appeals mechanisms”, and states further that:

“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.

...

With respect to...“Enforcement,” scoring of applications against [this sub criterion] will be done from a *holistic perspective, with due regard for the particularities of the community explicitly addressed*. [Example omitted] More restrictions do not automatically result in a higher score. *The restrictions and corresponding enforcement mechanisms proposed by the applicant should show*

*an alignment with the community-based purpose of the TLD* and demonstrate continuing accountability to the community named in the application.<sup>158</sup>

214. The community-based purpose of Dot Registry's .LLC string is

To build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Limited Liability Companies. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Community of Registered Limited Liability Companies. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant's right to conduct business in the United States.

...

*The ".LLC" gTLD will be exclusively available to members of the Community of Registered Limited Liability Companies, as verified through each applicant's Secretary of States office" (or other state official where applicable) [emphasis added].*<sup>159</sup>

215. Similarly, the community-based purpose of Dot Registry's .LLP string is

To build confidence, trust, reliance and loyalty for consumers and business owners alike by creating a dedicated gTLD to specifically serve the Community of Registered Limited Liability Partnerships. Through our registry service, we will foster consumer peace of mind with confidence by ensuring that all domains bearing our gTLD string are members of the Community of Registered Limited Liability Partnerships. Our verification process will create an unprecedented level of security for online consumers by authenticating each of our registrant's right to conduct business in the United States.

...

*The ".LLP" gTLD will be exclusively available to members of the Community of Registered Limited Liability Partnerships, as verified through each*

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<sup>158</sup> AGB (Exhibit 1), p. 4-16 [emphases added].

<sup>159</sup> .LLC Application (Exhibit 5), p. 7.

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*applicants’s Secretary of States office” (or other state official where applicable)*  
[emphasis added].<sup>160</sup>

216. It is important not to overlook the fact that the fundamental requirement for membership in the .LLC and .LLP communities—and the right to register a second-level domain under these TLDs—is the possession and maintenance of a valid registration as either a limited liability company or a limited liability partnership with the office of the appropriate Secretary of State. In this regard, the records of the relevant Secretary of State’s office are dispositive: Either the would-be registrant of a second-level .LLC or .LLP domain is validly registered with that Secretary of State, or it is not.
217. The essential point is that in order to register a second level domain under .LLC or .LLP, an applicant must be a duly, currently registered LLC or LLP as determined by the relevant Secretary of State. That determination would *not* be Dot Registry’s to make; its role would be limited to verifying that the applicant has secured the necessary registration from the relevant Secretary of State or equivalent authority and that that registration is current.
218. Dot Registry will verify that the registrant of a second-level domain is a registered U.S. corporation at the time of its registration.<sup>161</sup> Thereafter a registrant’s “active” status would be verified on an annual basis with the relevant Secretary of State, as detailed in the Dot Registry applications for the .LLC and .LLP strings.
219. But because only duly registered LLCs and LLPs would be permitted to register second level domains under .LLC or .LLP, and because the several Secretaries of State are the ultimate arbiters of whether or not an applicant is indeed duly registered, it would not be within the authority of Dot Registry to provide a mechanism by which a would-be applicant could “appeal” a determination by a Secretary of State to Dot Registry or its registrars. The latter must respect the Secretary of State’s determination.
220. I also note that the Dot Registry applications for the .LLC and .LLP strings do provide opportunities for redress on issues that would not raise the possibility that Dot Registry or its registrars were arrogating the authority of the relevant Secretary of State. For example, Dot Registry’s applications do provide for a “quasi appeals process” in the event it was unable to verify an applicant’s eligibility for the .LLC or .LLP string with the

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<sup>160</sup> .LLP Application (Exhibit 6), p. 7.

<sup>161</sup> .LLC and .LLP Applications (Exhibits 5 and 6), respectively, p. 7.

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relevant Secretary of State. This is because the application made explicit allowance for a 30 day probationary period to allow registrants to directly address the relevant Secretary of State.

221. Dot Registry has also committed to implementation of the full panoply of ICANN's registrant rights protection mechanisms, including but not limited to:

Support for and interaction with the Trademark Clearinghouse ("Clearinghouse"); use of the Trademark Claims Service; segmented Sunrise Periods allowing for the owners of trademarks listed in the Clearinghouse to register domain names that consist of an identical match of their listed trademarks; subsequent Sunrise Periods to give trademark owners or registrants that own the rights to a particular name the ability to block the use of such name; [and] stringent takedown policies in order to properly operate the registry.<sup>162</sup>

Dot Registry will provide all ICANN required rights mechanisms, including Trademark Claims Service, Trademark Post-Delegation Dispute Resolution Procedure (PDDRP), Registration Restriction Dispute Resolute Procedure (RRDRP), UDRP, URS [and] Sunrise service.<sup>163</sup>

222. If the EIU had actually taken the "holistic perspective" called for by the AGB, it would have given "due regard for the particularities" of the .LLC and .LLP communities discussed above, and awarded both Dot Registry applications the maximum possible 1 point available for **3-D Enforcement**.
223. I also refer to and incorporate here my remarks at paragraphs 124 to 127 above regarding the EIU's determinations in respect of **3-D Enforcement** in connection with certain other community applications.

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<sup>162</sup> .LLC and .LLP Applications (Exhibits 5 and 6), respectively, pp.18-19.

<sup>163</sup> Ibid., p. 24.



**F.4. .LLC and .LLP: Criterion #4: Community Endorsement**

- **.LLC and .LLP: 4-A Support**

<b>Maximum score</b>	<b>2 points</b>
<b>EIU score</b>	<b>1 point</b>
<b>Correct score</b>	<b>2 points</b>

224. The EIU determined that the Dot Registry applications for .LLC and .LLP only “partially” met the criterion for **4-A Support**.<sup>164</sup> While the Panel acknowledged that these applications had documented support from at least one group with relevance to the .LLC and .LLP communities, it did not award the maximum possible score of 2 points because the Dot Registry applications did not have documented support from the “recognized” community institution(s), where “recognized” means the institution(s) that are clearly recognized by the community members as representative of the community.

225. Again, I cannot understand these “determinations”. First of all, there can be no question that the Secretaries of State for the several U.S. states and the National Association of Secretaries of State (NASS) *are* recognized by U.S. LLCs and LLPs as representing these two communities. Instead, the Panel once again invoked its unsupported position that there is a dispositive difference between a government entity’s “fulfilling a function” vs. “representing the community” and specifically that the Secretaries of State of US states

are not the recognized community institutions...as these government agencies are fulfilling a function, rather than representing the community.<sup>165</sup>

As noted earlier, the EIU did not insist that the Osaka Prefectural government (the “entity mainly dedicated to the community”) was merely fulfilling its function. The Panel’s unwillingness to afford the same deference to US Secretaries of State or to their National Association appears to be strikingly inconsistent.

226. Also, as noted earlier, it is important to underscore the fact that the several Secretaries of State are either elected or appointed governmental officers. As such, they lack the freedom available to a non-governmental body or private organization to simply endorse one applicant for a string over competitors. But it must not be forgotten (a) that several

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<sup>164</sup> .LLC and .LLP Reports (Exhibits 8 and 9), respectively, p. 6.

<sup>165</sup> Ibid.

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state-level Secretaries of State as well as NASS clearly expressed the position that the .LLC and .LLP TLDs should be awarded only to a community applicant, (b) that these same Secretaries of State and NASS were aware of the Dot Registry community application for the .LLC and .LLP strings, (c) that the Dot Registry application was the *only* community application for these strings, and (d) that these Secretaries of State and NASS communicated with ICANN at the request of Dot Registry. This sequence of facts argues strongly that the several Secretaries of State and NASS—while not permitted to officially endorse them—do support these two Dot Registry applications.

227. It is also necessary to address the Panel’s complaint that “[T]he viewpoints expressed in these letters [it received from several Secretaries of State] were not consistent across states” and that

While several US states expressed clear support for the applicant during the Letters of Support verification process, others either provided qualified support, refrained from endorsing one particular applicant over another, or did not respond to the verification request.<sup>166</sup>

I can find no evidence in the record that the EIU reached out to *every* environmental organization in the world and insisted on getting positive expressions of “clear support” from each before approving the .ECO community application. Nor did the Panel require such unanimity from every organization relevant to the .RADIO, .HOTEL and .OSAKA applications. I regard this as another example of the Panel’s uneven treatment of these four community applications that it approved, compared to its treatment of the .INC, .LLC, and LLP applications.

228. In arguing that the EIU should have awarded the maximum possible 2 points to the .LLC and .LLP applications for sub criterion **4-A: Support**, I both rely on and distinguish this passage from the AGB’s Criterion 4 Guidelines:

With respect to ‘Support,’ it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations... Also with respect to ‘Support,’ the plurals and brackets for a score of

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<sup>166</sup> .LLC Report (Exhibit 8), p. 7; .LLP Report (Exhibit 9), pp. 6-7.

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2 relate to cases of multiple institutions/organizations. In such cases there must be documented support from institution/organizations representing a majority of the overall community addressed in order to score 2.<sup>167</sup>

229. In this context, I would argue first that the NASS is “the only national Association relevant to” the .LLC and .LLP communities and that these two applications have documented support from NASS.

230. In summary, since the Dot Registry applications for the .LLC and .LLP TLDs do have the support of NASS, the EIU should have awarded each application the maximum 2 points for **4-A: Support**.

- **.LLC and .LLPC 4-B Opposition**

<b>Maximum score</b>	<b>2 points</b>
<b>EIU score</b>	<b>1 point</b>
<b>Correct score</b>	<b>2 points</b>

231. According to its CPE Report, the EIU determined that the Dot Registry community applications for the .LLC and .LLP TLDs only “partially” met the criterion for Opposition “as the[se] application[s] received relevant opposition from one group of non-negligible size:”

The [alternatively, .LLC and .LLP] application received several letters of opposition, *one of which was determined to be relevant opposition* from an organization of non-negligible size. This opposition was from a community that was not identified in the application *but which has an association to the applied-for string*. Opposition was on the grounds that limiting registration to US registered *corporations* only would unfairly exclude non-US businesses [emphases added].<sup>168</sup>

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<sup>167</sup> AGB (Exhibit 1), p. 4-18.

<sup>168</sup> .LLC and .LLP Reports (Exhibits 8 and 9), p. 7.

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232. Again, I have recently been able to review email correspondence<sup>169</sup> between ICANN and the EIU regarding this particular “finding”. That correspondence confirms that the European Commission (“EC”) was the source of the supposedly “relevant opposition” that was submitted as an “Application Comment”<sup>170</sup> on behalf of the European Commission on 4 March 2014. However, the only specific concern raised in that EC comment was in respect of Dot Registry’s separate community application for the .LLP string, not the .LLC or .INC applications.
233. In any event, just three weeks later, the EC submitted a follow-up “Application Comment”<sup>171</sup> dated 25 March 2014 stating that its concern regarding Dot Registry’s .LLP application had been resolved and that the EC was withdrawing its previous “Comment”. Notably, in this follow-up “Application Comment”, the EC specifically asked “that ICANN forward a copy of this communication to the Economist Intelligence Unit.”
234. It appears that the EIU tried to minimize its lapse on the ground that it only cost each of Dot Registry’s applications 1 point and “this would have had no material impact on the final outcome of the evaluation.”<sup>172</sup>
235. But in light of this recently produced email correspondence between ICANN and the EIU, it is clear that *there actually never was any relevant opposition at all* to Dot Registry’s .LLC community application and that the supposed opposition to its .LLP application had been withdrawn. The EIU should have awarded the .LLC and .LLP applications the maximum score of 2 points that were possible under the **4-B Opposition** criterion.

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<sup>169</sup> ICANN\_DR-00215-217 (Exhibit 21).

<sup>170</sup> Exhibit 21, Comment ID: tjwufnw.

<sup>171</sup> Exhibit 21, Comment ID: 7s164151.

<sup>172</sup> While the EIU attempted to minimize its error by characterizing it as “not material”, it actually should be seen as troubling: First, the EU opposition was *never* about Dot Registry’s .LLC application. That should immediately have been apparent to both the EIU and ICANN. Therefore, it is immaterial to Dot Registry’s .LLC application whether or not both the original EU “opposition” (to the .LLP application) and the EU’s subsequent withdrawal of that “opposition” were communicated to ICANN during the 14-day window that began on 19 February 2014. The more troubling fact is that ICANN and the EIU either never noticed—or did not care—that (1) the supposed EU “opposition” was to a different string (.LLP) altogether, and (2) that opposition was withdrawn within three weeks of the date it was communicated.

#### F.5. .LLC and .LLP Conclusion

236. It is my conclusion that, had the EIU correctly followed the AGB and its own *EIU Guidelines*, and if it had applied the same standards it employed in connection with the .HOTEL, .RADIO, and .OSAKA TLD applications, it would have awarded Dot Registry's community application for the .LLC string the maximum possible 16 points, two more than it needed to prevail.
237. Similarly, it is my conclusion that, had the EIU correctly followed the AGB and its own *EIU Guidelines*, and if it had applied the same standards it employed in connection with the .HOTEL, .RADIO, and .OSAKA TLD applications, it would have awarded Dot Registry's community application for the .LLP string a total of 15 points, one more than it needed to prevail.

**G. The clear and manifest differences in the EIU’s treatment of the .RADIO, .HOTEL and .OSAKA community applications compared to .INC, .LLC and .LLP**

238. In this report, I rely on two fundamental assumptions:
- a. The EIU was required to apply the criteria for community applications as written in the AGB, and
  - b. The EIU was required to apply these criteria consistently across different community applications.
239. As supported by the discussion below, I find that the EIU did not apply the criteria for community applications as set forth in the AGB, and it did not apply the criteria consistently across different community applications. It is my opinion that the EIU treated the .INC, .LLC and .LLP applications differently both in terms of the criteria used to judge these applications as well as the standard of scrutiny applied. The EIU was not fair, balanced and consistent in its treatment of the .INC, .LLC and .LLP applications, and it is not possible to conclude that the EIU acted reasonably in exercising whatever discretion it may have been granted under the AGB criteria. Rather, the EIU’s failure to apply the AGB criteria, and its disparate treatment of the .INC, .LLC and .LLP applications with reference to other community priority applications is, in my view, manifest and evident.
240. When reviewing the EIU’s determinations regarding Dot Registry’s applications for the .INC, .LLC and .LLP strings, it is not possible to overlook the instances in which the EIU effectively rewrote the AGB criteria, rather than applying those criteria as written to these three community applications. In comparison to the uncritical, even highly deferential treatment it afforded to the .RADIO, .HOTEL and .OSAKA community applications, the EIU, in denying the applications for the .INC, .LLC and .LLP strings, applied requirements and distinctions that it simply invented out of whole cloth. Then, after finding that the .INC, .LLC and .LLP applications failed to satisfy its rewritten criteria, the EIU announced that these Dot Registry applications “did not prevail.”
241. Another unavoidable feature of the EIU’s determinations is its seeming animus toward the community applications for the .INC, .LLC, and .LLP strings. The EIU appears to have treated these applications with a level of unjustified skepticism—seemingly bordering on hostility—as it effectively condemned them as “construed” communities

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designed “to obtain a sought-after corporate identifier as a gTLD string.” This is evident in the determination that the EIU included conspicuously in its CPE Reports for each of the .INC, .LLC, and .LLP strings:

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after and after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). *The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string*, as [variously, these corporations, these limited liability companies, these limited liability partnerships, and the regulatory authorities and associations] would typically not associate themselves with being part of the community as defined by the applicant. *The community therefore could not have been active prior to the above date* [emphases added].<sup>173</sup>

242. The EIU proceeded to award each these three applications 0 points under **Criteria #1: Community Establishment**, which was sufficient to insure that they would not prevail. At the same time, it accepted uncritically the more poorly delineated and more heterogeneous “communities” proposed in connection with the .RADIO, .HOTEL, and .OSAKA community applications.
243. In its CPE Report on .RADIO (Exhibit 10), the EIU offered this quotation from the European Broadcasting Union application in support of its finding that the .RADIO community “shows a clear and straightforward membership and is therefore well defined”:

The Radio industry is comprised of a huge number of very diverse radio broadcasters: public and private; international and local; commercial or community-oriented; general purpose for sector-specific; talk or music; big and small. All licensed radio broadcasters are part of the .radio community,

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<sup>173</sup> .INC Report (Exhibit 7), p. 3; .LLC Report (Exhibit 8), p. 3; .LLP Report (Exhibit 9), p. 3.

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and so are the associations, federations and unions they have created ... Also included are the radio professionals, those making radio the fundamental communications tool that it is.

However, the Radio industry keeps evolving and today, many stations are not only broadcasting in the traditional sense, but also webcasting and streaming their radio content via the Internet. Some are not broadcasters in the traditional sense: Internet radios are also part of the Radio community, and as such will be acknowledged by the .radio TLD, as will podcasters. In all cases certain minimum standards on streaming or updating schedules will apply.

The .radio community also comprises the often overlooked amateur radio, which uses radio frequencies for communications to small circles of the public. Licensed radio amateurs and their clubs will also be part of the .radio community.

Finally, the community includes a variety of companies providing specific services or products to the Radio industry.<sup>174</sup>

244. In my opinion, this “definition” is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .RADIO “community” to be well-defined:

*This [.RADIO] community definition shows a clear and straightforward membership and is therefore well-defined* [emphasis added]. Association with, and membership in, the radio community can be verified through licenses held by professional and amateur radio broadcasters; membership in radio -related associations, clubs and unions; Internet radios that meet certain minimum standards; radio-related service providers that can be identified through trademarks; and radio partners and providers.<sup>175</sup>

245. One is left to wonder just what—both in general and specifically—are “radio-related associations, clubs and unions”? How would membership in any of these be verified? What are the “certain minimum standards” that define “Internet radios” and how would

<sup>174</sup> .RADIO Report (Exhibit 10), pp. 1-2.

<sup>175</sup> .RADIO Report (Exhibit 10), p. 2.



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these be verified? How do “trademarks” unambiguously identify “radio-related services providers”, and what are these “trademarks”? What is a radio “partner”? What businesses, associations and individuals are “radio partners” or “providers”, and what businesses, associations and individuals would not be so regarded?

246. In its CPE Report on .HOTEL (Exhibit 11), the EIU offered this quotation from the HOTEL Top-Level Domain s.a.r.l application in support of its finding that the .HOTEL community “shows a clear and straightforward membership” and is “clearly defined”:

The .hotel namespace will exclusively serve the global Hotel Community. The string “Hotel” is an internationally agreed word that has a clear definition of its meaning: according to DIN EN ISO 18513:2003, “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available,” *Therefore only entities which fulfill this definition are members of the Hotel Community and eligible to register a domain name under .hotel* [emphasis added] .hotel domains will be available for registration to all companies which are which are member [sic] of the Hotel Community on a local, national and international level. The registration of .hotel domain names shall be dedicated to all entities and organizations representing such entities which fulfill the ISO definition quoted above:

1. Individual Hotels
2. Hotel Chains
3. Hotel Marketing organizations representing members from 1. and/or 2.
4. International, national and local Associations representing Hotels and Hotel Associations representing members from 1. and/or 2.
5. Other organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on [sic] members from 1. and/or 2.

These categories are a logical alliance of members, with the associations and the marketing organizations maintaining membership lists, directories and registers that can be used, among other public lists, directories and registers, to verify eligibility against the .hotel Eligibility [sic] requirements.<sup>176</sup>

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<sup>176</sup> .HOTEL Report (Exhibit 11), p. 2

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247. In my opinion, this “definition” also is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .HOTEL “community” to be “clearly defined”:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership requires entities/associations to fulfill the ISO criterion for what constitutes a hotel. Furthermore, association with the hotel sector can be verified through membership lists, directories and registers.<sup>177</sup>

248. But if—as the applicant HOTEL Top-Level-Domain s.a.r.l stated—only entities which fulfill the DIN EN ISO 18513:2003 definition (that “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available”) are members of the Hotel Community and eligible to register a domain name under .hotel, how could the EIU say the .HOTEL community “was clearly defined”? In the “definition” approvingly quoted by the EIU, the .HOTEL community also includes Hotel Marketing organizations representing individual hotels and hotel chains; international, national and local associations representing Hotels, and Hotel Associations representing individual hotels and hotel chains; and other organizations representing Hotels, Hotel Owners and other solely Hotel related organizations, individual hotels and hotel chains which *are not* included within the DIN EN ISO 18513:2003 definition.

249. In its CPE Report on .OSAKA (Exhibit 12), the EIU offered this quotation from the Interlink Co., Ltd. application in support of its finding that the .OSAKA community “shows a clear and straightforward membership” and is “clearly defined”:

Members of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following:

- a. Legal entities
- b. Citizens
- c. Governments and public sectors
- d. Entities, including natural persons who have a legitimate purpose in addressing community.<sup>178</sup>

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<sup>177</sup> Ibid.

<sup>178</sup> .OSAKA Report (Exhibit 12), p. 2.

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250. It also is my opinion that this “definition” of the .OSAKA community is more ambiguous and less well delineated than those offered by Dot Registry in its applications for the .INC, .LLC and .LLP strings. Nevertheless, the EIU judged the .OSAKA “community” to be “clearly defined”:

This community definition shows a clear and straightforward membership. The community is clearly defined because membership is dependent on having a clear connection to a defined geographic area.<sup>179</sup>

251. But if “members of the [Osaka] community are defined as those who are within the Osaka geographical area *as well as those who self-identify as having a tie to Osaka, or the culture of Osaka,*” who precisely are the “legal entities”, the “citizens”, and the “governments and public sectors” subsumed by this definition? Indeed, how would an outside observer verify such “self-identification”? Geographically, which of these lie outside of Osaka, or even outside of Japan? Where might one find a listing or specific delineation of the “entities, including natural *persons who have a legitimate purpose in addressing the [.OSAKA] community* [emphases added]. Also, what constitutes a “legitimate purpose”? Who are the entities and persons who would not be deemed to have such a “legitimate purpose”?
252. I conclude that none of the “communities” proposed in connection with the .RADIO, .HOTEL and .OSAKA applications actually is “well defined” at all—not even in principle and certainly not in comparison to the communities associated with the .INC, .LLC and .LLP strings. In my opinion, the “definitions” for the .RADIO, .HOTEL and .OSAKA “communities” fail to delineate clear boundaries around their claimed “memberships”. Although the EIU concluded that membership in each could be “verified”, the practical challenges to doing so would be enormous, indeed, impracticable.
253. Where the EIU’s “research” into the operations and organization of the members of the .INC, .LLC and .LLP communities allowed it to conclude that these communities “do not have awareness and recognition of a community among [their] members”<sup>180</sup> and was

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<sup>179</sup> Ibid.

<sup>180</sup> Again, here is the complete statement of the EIU’s finding:

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sufficient to insure that these Dot Registry applications did not prevail, the EIU appears to have found it unnecessary to conduct similar “research” into the operations and organization of the .RADIO, .HOTEL and .OSAKA communities. Instead, the EIU appears to have found the necessary “awareness and recognition of a community among [their] members” *in the community definitions themselves*. For example:

254. The EIU found that the .RADIO community had the requisite “awareness and recognition of a community among its members” simply by virtue of the fact that it was defined to consist of entities and individuals in the radio industry:

[T]he community as defined in the application has awareness and recognition among its members. *This is because the community as defined consists of entities and individuals that are in the radio industry* [footnote omitted], and *as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community* [emphases added].<sup>181</sup>

As I have observed above, the “definition” offered for the .RADIO community reads more like an ad hoc laundry list.

255. The EIU appears to have had an even easier time discerning in “awareness and recognition of a community among its members” in the case of the .HOTEL community. All that it needed to do was to look at the definition proffered for that community:

[T]he community as defined in the application has awareness and recognition among its members. *This is because the community is defined in terms of its*

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[T]he community as defined in the application does not have awareness and recognition of a community among its members. This is because [alternatively, corporations, limited liability companies, and limited liability partnerships] operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities [sic] structure as an [alternatively, INC, LLC and LLP]. Based on the Panel’s research, there is no evidence of [again, INCs, LLCs and LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these [alternatively, incorporated firms, limited liability companies and limited liability partnerships] would associate themselves with being part of the community as defined by the applicant.

<sup>181</sup> .RADIO Report (Exhibit 10), p. 2.

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*association with the hotel industry and the provision of specific hotel services*  
[emphasis added].<sup>182</sup>

It is not clear to me how the mere satisfaction of DIN EN ISO 18513:2003 (“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.”) causes the resulting “community” to have the requisite awareness and recognition among its members.

256. The EIU appears to have had a still easier time discerning the requisite “awareness and recognition of a community” on the part of the members of the .OSAKA community. All it needed was this non sequitur:

[T]he community as defined in the application has awareness and recognition among its members. *This is because of the clear association with the Osaka geographical area, as according to the applicant, “the Osaka Community is largely defined by its prefectural borders* [emphasis added].”<sup>183</sup>

Again, it is anything but clear to me why the fact that “the Osaka Community is largely defined by its prefectural borders” — a questionable assertion at best when that community was vaguely defined to include “those who self identify as having a tie to Osaka, or the culture of Osaka” and “entities, including natural persons who have a legitimate purpose in addressing the [Osaka] community” — was sufficient to insure that the putative Osaka “community” possessed the necessary awareness and recognition among its members.

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<sup>182</sup> .HOTEL Report (Exhibit 11), p. 2.

<sup>183</sup> .OSAKA Report (Exhibit 12), p. 2.

**H. The EIU’s imposition of invented requirements— not present in the AGB— on the .INC, .LLC, strings**

257. All community applicants had to rely on— and adhere to— the same requirements set forth in the final June 2012 version of the AGB. But in comparison to the EIU’s seemingly uncritical treatment of the .RADIO, .HOTEL and .OSAKA applications under the AGB, and in spite of its clear commitment that the *EIU Guidelines* do “not modify the AGB framework, nor does it change the intent or standards laid out in the AGB,” the EIU appears— without input from or disclosure to the applicants— to have first made material modifications to the AGB criteria before applying them *only to* the .INC, .LLC, and .LLP strings.
258. For example, the EIU offered this “explanation” for its decision to award no points to these three applications in connection with the **1-A Delineation** sub criterion under **Criterion #1: Community Establishment**
- Based on the Panel’s research, there is no evidence of INCs [alternatively, LLCs, and LLPs] from different sectors *acting as a community* as defined by the Applicant Guidebook. There is no evidence that these incorporated firms *would associate themselves* with being part of the community as defined by the applicant [emphases added].<sup>184</sup>
259. But in the context of community-based applications, the AGB requires only that the community (and its members) *be* a community. I find nothing in the AGB requiring community members to “*act* as a community”. Nor does the AGB include any requirement regarding whether— or how— community members “would *associate themselves*” with “being part of a community” or anything else. The EIU appears to have made these criteria up on its own. In fact, in my view, businesses do make a conscious and considered decision regarding the form of the business organization they adopt because of what the chosen form of business organization represents by way of rights and regulatory obligations.
260. In connection with the **1-A Delineation** sub criterion under **Criterion #1: Community Establishment**, the EIU also offered this “explanation” to justify its decision to award no points to Dot Registry’s .INC, .LLC and .LLP applications:

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<sup>184</sup> .INC Report (Exhibit 7),, p. 2.

The community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, *these government agencies are fulfilling a function, rather than representing the community*. In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community *as they have other roles/functions beyond processing corporate registrations* [emphases added].<sup>185</sup>

261. The AGB does not even contain the terms “fulfilling a function” and “representing the community”, much less does it state that there is a critical, dispositive distinction between them. In fact, the AGB actually requires only that a community be “organized”, meaning “that there is at least one entity mainly *dedicated* [emphasis added] to the community, with documented evidence of community activities.”<sup>186</sup> Importantly, I can find nothing in the AGB prohibiting this “dedicated entity” from having additional responsibilities.
262. By the EIU’s logic, the Osaka Prefecture (that the EIU deemed to be the entity mainly dedicated to the .OSAKA community) also is merely “fulfilling a function” rather than “representing” the community. Notably, the EIU found documented evidence of community activities for the .OSAKA community by accessing the website of the Osaka Prefectural government.<sup>187</sup> As I explain above, if the EIU had looked at the website of the NASS, it would have found similar evidence of the community activities of the .INC, .LLC and .LLP communities.
263. The EIU often imposed a hierarchical or prerequisite relationship among what actually are separate and mutually independent AGB requirements. At other times, the EIU used “therefore” to link conclusions to premises that actually have no necessary connection at all. These practices on the part of the EIU often resulted in obvious non sequiturs.
264. For example, in its evaluation of the .INC application for Organization (required under **1-A Delineation**), the EIU stated – correctly – that:

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<sup>185</sup> Ibid.

<sup>186</sup> AGB (Exhibit 1), page 4-11.

<sup>187</sup> .OSAKA Report (Exhibit 12), p. 2.

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Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.<sup>188</sup>

As stated, these are logically independent criteria, each capable of being satisfied and verified separately. But the EIU’s “logic” conflates them with its assertion that an applicant’s failure to satisfy one prong *necessarily* requires the conclusion—with no need to conduct any further investigation—that the applicant has also failed the second, independent prong:

As there is no entity that is mainly dedicated to the community as defined in the .INC application, [it follows that] *there is no documented evidence of community activities* [emphasis added].<sup>189</sup>

In other words, by assuming the premise that “there is no entity that is mainly dedicated to the community,” the Panel was able to dismiss even the logical possibility that documented community activities could exist.

265. The EIU used similar “reasoning” in deciding that the .INC community “was not active prior to September 2007”:

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier

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<sup>188</sup> .INC Report (Exhibit 7), p. 2.

<sup>189</sup> Ibid. In fact, there actually is considerable evidence. In addition to the voluminous documentary record created when community members actively seek to join the .INC community and thereafter to maintain their registrations that are maintained by the Secretaries of State, there also is the activity of associations of corporations *qua* corporations, as I have shown above. Similar documentary records combined with the activities of the associations that include LLCs and LLPs that are discussed above constitute similar evidence for the .LLC and .LLP communities.



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as a gTLD string, as these corporations would typically not associate themselves with being part of the community has defined by the applicant. *The community therefore could not have been active prior to the above date* (although its constituent parts were active) [emphasis added].<sup>190</sup>

266. In its evaluation of the .INC application under **1-A Delineation** for Delineation and under **1-B Extension** for both Size and Longevity, the Panel “reasoned” as follows:
- a. Because corporations operate in vastly different sectors, which sometimes have little or no association with one another, and because the Panel’s research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC,<sup>191</sup> it follows that there is no evidence of INCs from different sectors acting as a community as defined by the AGB.
  - b. Therefore, these incorporated firms would not *typically* associate themselves with being members of [the community of corporations].
  - c. Therefore, the community as defined in the .INC application does not have awareness and recognition of a community among its members.
  - d. Therefore, the Dot Registry applications for .INC, .LLC and .LLP did not satisfy the requirements under **1-A Delineation** for Delineation and under **1-B Extension** for both Size and Longevity.
267. In my opinion, the preceding is fraught with errors:
- a. First, is nothing in the AGB requiring communities to “act as a community” or even explaining what that might mean. Again, all the AGB requires is that the putative community *be* a community.
  - b. Even if it were true that “firms are typically organized around specific industries, locales, and other criteria” unrelated to whether or not they are

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<sup>190</sup> .INC Report (Exhibit 7), p. 3.

<sup>191</sup> As explained in the preceding footnote, the EIU’s “research” can be charitably described as, at best, incomplete.

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corporations (and the EIU has not offered evidence to support this assertion), it does *not* “follow” that they cannot *be* a community.”<sup>192</sup>

- c. Whether or not incorporated firms would “*typically* associate themselves with being members” of the community of corporations is irrelevant. I am unable to find a “typicality” test or criterion in the AGB.
- d. “Awareness and recognition of a community” is not defined or explained at all by the AGB. Nor does the AGB make any attempt to explain why such “awareness and recognition of a community” can exist only if community members “act as a community” or “associate themselves with being members”.

268. Despite this, the EIU’s reliance on the above “logic” insured that the Dot Registry community applications for .INC, .LLC and .LLP would receive 0 points under **Criterion #1: Community Establishment**, which in turn assured that these applications would not prevail.

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<sup>192</sup> The communities at issue in the .RADIO, .HOTEL and .OSAKA applications include members whose organizing principles are, at best, only partially or tangentially related to their ostensible communities. These include, for example, the “variety of companies providing specific products or services to the Radio industry” (.RADIO Report, Exhibit 10) It appears that these “products or services” could include anything and their provision to hotels need not be a significant portion of the respective companies’ sales. Where the .HOTEL community was defined to include unspecified “Other organizations representing Hotels, Hotels Owners and other solely Hotel related organizations” (.HOTEL Report, Exhibit 11), that logically could also include chambers of commerce, visitor bureaus, travel organizations and publishers of business directories, to name but a few. Also, “those who self-identify as having a tie to Osaka or the culture of Osaka” (.OSAKA Report, Exhibit 12) could be located anywhere in the world and whose “tie” to Osaka might be secondary at best, or even inconsequential.

**I. The EIU's inconsistent treatment of different community applications.**

269. In my opinion, it is important to understand the instances in which the EIU CPE Panel treated individual community applications differently.
270. Where the .INC community application was faulted by the Panel because it did not have awareness and recognition of a community among its members (owing to the “fact” that corporations “operate in vastly different sectors”), the Panel found that the .RADIO community possessed the requisite awareness and recognition among its members on the basis of little more than this circular, tautological argument:
- [T]he [.RADIO] community as defined in the application has awareness and recognition among its members. This is because the community as defined consists of entities and individuals that are in the radio industry [footnote omitted], and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community.<sup>193</sup>
271. In .HOTEL, the Panel accepted “detailed information” on the website of the International Hotel *and Restaurant* Association (“IH&RA”, described by the applicant as “the only global business organization representing the hotel industry worldwide”<sup>194</sup>) as sufficient to satisfy the requirement for documented evidence of .HOTEL community activities. The Panel appears not to have been troubled by the fact that the IH&RA also appears to be significantly devoted to the *restaurant* industry, which is *not* part of the .HOTEL community as defined by the applicant. Yet the Panel faulted Dot Registry’s .INC application’s citation to the offices of U.S. Secretaries of State for documented evidence of .INC community activities on the ground that “the offices of the Secretaries of States of US states are not mainly dedicated to the [.INC] community *as they have other roles/functions beyond processing corporate registrations* [emphasis added].” The EIU did not seem troubled by this inconsistency.
272. Nonetheless, the EIU found that the definition *alone* of the .HOTEL community was sufficient to demonstrate awareness and recognition of a community among its members “because the [.HOTEL] community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”<sup>195</sup>

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<sup>193</sup> .RADIO Report (Exhibit 10), p. 2.

<sup>194</sup> .HOTEL Report (Exhibit 11), p. 2.

<sup>195</sup> Ibid.

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273. The .INC community was not so fortunate. The Panel judged it to be “a ‘community’ construed to obtain a sought-after corporate identifier as a gTLD string, as these corporations would typically not associate themselves with being part of the community as defined by the applicant.”<sup>196</sup>
274. The EIU reported—on the basis of no apparent research or data—that
- [T]he .HOTEL string nexus closely describes the [HOTEL] community, without overreaching substantially beyond the community. The string identifies the name of the core community members (i.e. hotels and associations representing hotels).<sup>197</sup> However, the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the gTLD. *However, these entities are considered to comprise only a small part of the community.* Therefore the string identifies the community, but does not overreach substantially beyond the community, as the general public will generally associate the string with the community as defined by the applicant [emphasis added].<sup>198</sup>
275. The EIU did not disclose the data or methodology that allowed it to “consider” the “entities that are related to hotels, such as hotel marketing associations, that represent hotels and hotel chains” to “comprise only a small part of” the .HOTEL community. If the EIU had been consistent, it would have concluded that, even though “these entities are considered to comprise only a small part of the community,” their inclusion would still amount to “over-reach”. And if the EIU viewed such “over-reach” in the same manner it employed in connection with the .INC, .LLC and .LLP community applications, it would have concluded that *any* such over-reach was *ipso facto*

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<sup>196</sup> .INC Report (Exhibit 7), p. 3. Again, see above for evidence to the contrary.

<sup>197</sup> This actually is incorrect. The .HOTEL application clearly stated that only entities satisfying the relevant ISO definition—“A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.” (Exhibit 17, p. 2)—are members of the HOTEL community. Thus, hotel marketing organizations; international, national and local associations representing hotels and hotel associations; and other organizations representing hotels, hotel owners and other solely hotel related organizations are not included in the ISO definition and, therefore, not included in the .HOTEL community.

<sup>198</sup> .HOTEL Report (Exhibit 11), p. 4.

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*“substantial”* and would have given the .HOTEL application 0 points under **Criterion #2: Nexus between Proposed String and Community**.

276. This is because the .INC community application was not treated so generously in this respect by the EIU, which concluded (again, without any apparent research or data) that:

The applied-for string (.INC) over-reaches *substantially*, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community... While the string identifies the name of the community, it captures a wider geographical remit than the community has, as the corporate identifier is used in Canada, Australia and the Philippines. Therefore, there is a *substantial* over-reach between the proposed string and the community as defined by the applicant [emphases added].<sup>199</sup>

277. As discussed above, there is a major problem with this judgment by the EIU: the AGB does not specify any metric or ranges of permissible and impermissible values, or, most importantly, a “critical value” beyond which any “over-reach” is deemed “substantial.” Moreover, a close reading of the *EIU Guidelines*—which are intended to clarify, not replace the scoring criteria in the AGB—supports the conclusion that, to the EIU, *any* “over-reach”—no matter how small—would *ipso facto* be “substantial”.<sup>200</sup>

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<sup>199</sup> .INC Report (Exhibit 7), pp. 4-5.

<sup>200</sup> The *EIU Guidelines* (Exhibit 2) state (at p. 7) that “Over-reaching substantially” (which is sufficient to cost a community application all 4 points available under **Criterion #2: Nexus between Proposed String and Community**) “means that the string indicates a wider geographical or thematic remit than the community has.” Elsewhere in this report, I take and explain the position that any geographic “over-reach” must, at a minimum, significantly exceed 50 percent before it can be regarded as “substantial”.

**J. The EIU’s Unsupported, Undocumented and Unverifiable Assertions Regarding its “Research” and “Evidence”**

278. At a number of points in the CPE Reports for the .INC, .LLC, and .LLP community applications, the EIU alluded to its unspecified and undocumented “research” to support broad generalizations that it then used to justify awarding no points whatsoever to the Dot Registry applicant at important steps in CPE process. The following passage is typical:

*Research* showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC [alternatively, LLC and LLP]. Based on *the Panel’s research, there is no evidence* of INCs [alternatively, LLCs and LLPs] from different sectors acting as a community as defined by the Applicant Guidebook. . . . *There is no evidence* that these incorporated firms would associate themselves with being part of the community as defined by the applicant [emphases added].<sup>201</sup>

279. In my view, the EIU should be required to disclose the specific “research” it supposedly conducted in conjunction with its consideration of the .INC, .LLC and .LLP applications and to explain how that specific “research” supports each of its following conclusions:

- a. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC.<sup>202</sup>
- b. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLC.<sup>203</sup>
- c. Firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an LLP.<sup>204</sup>
- d. There is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook.<sup>205</sup>

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<sup>201</sup> .INC, .LLC and .LLP Reports (Exhibits 7, 8 and 9, respectively), p. 2.

<sup>202</sup> .INC Report (Exhibit 7), p. 2.

<sup>203</sup> .LLC Report (Exhibit 8), p. 2.

<sup>204</sup> .LLP Report (Exhibit 9), p. 2.

<sup>205</sup> .INC Report (Exhibit 7), p. 2.

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- e. There is no evidence of LLCs from different sectors acting as a community as defined by the Applicant Guidebook.<sup>206</sup>
- f. There is no evidence of LLPs from different sectors acting as a community as defined by the Applicant Guidebook.<sup>207</sup>
- g. There is no evidence that these incorporated firms would associate themselves with being part of the [INC] community as defined by the applicant.<sup>208</sup>
- h. There is no evidence that these limited liability companies would associate themselves with being part of the [LLC] community as defined by the applicant.<sup>209</sup>
- i. There is no evidence that these limited liability partnerships would associate themselves with being part of the [LLP] community as defined by the applicant.<sup>210</sup>

280. At the same time, the EIU should be asked to explain why it apparently did not find it necessary to look for similar evidence in connection with its evaluations of the .RADIO, .HOTEL and .OSAKA community applications.

281. In any event, I conclude that the EIU's supposed "research" cost each of Dot Registry's applications (for .INC, .LLC and .LLP) all 4 possible points under **Criterion #1: Community Establishment** (i.e., the 2 points that were possible for **1-A Delineation** as well as the 2 points available under **1-B Extension**). Put plainly, the EIU's supposed "research" was sufficient to insure that these three Dot Registry applications could not prevail.

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<sup>206</sup> .LLC Report (Exhibit 8), p. 2.

<sup>207</sup> .LLP Report (Exhibit 9), p. 2.

<sup>208</sup> .INC Report (Exhibit 7), p. 2.

<sup>209</sup> .LLC Report (Exhibit 8), p. 2.

<sup>210</sup> .LLP Report (Exhibit 9), p. 2.

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Respectfully submitted

July 13, 2015



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**Michael A. Flynn**  
**Director**

**BIOGRAPHY**

Mr. Flynn has been both a testifying and consulting expert economist for nearly twenty-five years, specializing in antitrust, economic damages, intellectual property, class actions and other complex business litigation and consulting engagements. In addition to assuming overall responsibility for the preparation of expert submissions, including designing and directing the supporting analyses and drafting the reports themselves, Mr. Flynn also serves as an expert economic consultant to counsel, assisting in preliminary case analysis, discovery strategy, expert discovery and dispositive motions and trial. He has case experience in a broad range of industries, markets and products, including, among others:

- **Insurance** (including business interruption, workers compensation, auto, life, and property and casualty).
- **Healthcare** (including hospital and physician services, brand name prescription drugs and other pharmaceuticals, and medical instruments and hospital products).
- **Energy** (including petroleum, natural gas and gasoline, with specific case experience in production, pipelines, royalties, refining, distribution, and marketing).
- **Professional sports** (including professional sports leagues, teams, stadiums and franchise relocations).
- **Computer and electronics hardware and software** (including network operating systems, digital media software and video game consoles and software).
- **Transportation** (including passenger airlines and waterborne freight).
- **Other consumer and producer goods** (including infant formula, high-pressure laminates, carbon dioxide and consumer credit reports).

Mr. Flynn was enrolled as a National Science Foundation Fellow in the PhD Program in Economics of the Massachusetts Institute of Technology, Cambridge, Massachusetts, from 1971 to 1974, where he completed all general and field qualifying examinations for the PhD degree. Mr. Flynn received his AB degree from the University of California, Berkeley, where he was the recipient of the Department of Economics Citation as the Outstanding Graduating Senior.

## **PROFESSIONAL EXPERIENCE**

- 2012 – Present**    **Navigant Economics, Oakland, California**  
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- 1989 – 2011**    **LECG LLC (formerly The Law & Economics Consulting Group), Emeryville, California**  
*Principal (1999-2011)*  
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*Senior Economist (1989-1995)*
- 1983 – 1988**    **American President Lines, Ltd. (Now APL, Part of NOL Group), Oakland, California**  
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- 1976 – 1982**    **Data Resources, Inc. (now Global Insight, Inc.), Lexington, Massachusetts, and San Francisco, California**  
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## **TEACHING EXPERIENCE**

**Instructor in Economics at Wellesley College (1974-1976), University of Massachusetts (1974-1975) and Boston University (1978).**

Taught undergraduate and graduate courses, including *Introduction to Microeconomics*, *Introduction to Macroeconomics*, *Intermediate Economic Theory*, *Statistics and Econometrics*, *Mathematical Economics*, *Money and Banking*, and *Managerial Economics*.

## **ARTICLES/PUBLICATIONS/PRESENTATIONS**

***An Economic Analysis of the California Energy Commission’s Fuel Delivery Temperature Study and the “Hot Fuel” Allegations*** (White Paper presented to the California Energy Commission, January 2009, and published by the National Institute of Standards and Technology/National Conference on Weights and Measures, *Report of the 94<sup>th</sup> National Conference on Weights and Measures*, NIST Special Publication 1099, November 2009).

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### **ARTICLES/PUBLICATIONS/PRESENTATIONS (cont.)**

***The Economic Analysis of Intellectual Property Damages: Lessons from Recent Cases*** (before the LECG Intellectual Property Conference, San Francisco, California, October 1998.)

***Using Economists to Overcome the Hart-Scott-Rodino Hurdle***, March 1998, San Francisco, California. (Presentation to the *Continuing Legal Education Conference on Mergers, Acquisitions & Joint Ventures* sponsored by Corporate Counsel Institutes and Business Development Associates.)

***Economics*** (with Leonard Waverman and Melvyn Fuss) Chapter 8 in *THE LITIGATOR'S GUIDE TO EXPERT WITNESSES*, Mark J. Freiman and Mark L. Berenblut, eds., 1997.

### **RETENTIONS AS TESTIFYING EXPERT**

***John Mosley, Individually, and Clinton Body Shop, Inc.; Daniel Mosley, Individually, and Clinton Body Shop of Richland Inc. v. GEICO Insurance Company; Progressive Insurance Company; Direct General Insurance Company***, U.S. District Court, Southern District of Mississippi, Jackson Division (Case No. 3:13-cv-00161 LG-JMR).

Expert Report on behalf of GEICO Insurance Company, May 2014.

***Fullerton Medical Group v. Sideman & Bancroft LLP, et al.*** (Civil Case No. 428693) and related case ***Fullerton Medical Group v. Brown & Toland Medical Group, California Pacific Medical Center and Sutter Health System, et al.*** (Civil Case No. 319610), Superior Court of the State of California, County of San Francisco.

Retained on behalf of Defendants, 2007-2008 and 2012-2013.

Deposition Testimony on behalf of Defendants, August 2013.

Trial Testimony on behalf of Defendants, August 2013.

***CenterPoint Energy Services, Inc. v. Air Products, LLC and The Premcor Refining Group, Inc., District Court of Harris County, Texas (295<sup>th</sup> Judicial District Cause No. 2007-70853).***

Expert Report on behalf of Defendants, June 2009

Rebuttal Expert Report on behalf of Defendants, April 2010

Supplemental Expert Report on behalf of Defendants, April 2010

Deposition Testimony on behalf of Defendants, April 2010.

***Fuel Delivery Temperature Study (pursuant to California AB 868)***

Presentation to Staff of the California Energy Commission, November 2009

Presentation to the California Energy Commission, December 2009.

**RETENTIONS AS TESTIFYING EXPERT (cont.)**

***Easley, Hornung, Inc. and Creole Engineering Sales Company, Inc. v. Timothy A. Shimko; Frank E. Piscitelli; Shimko & Piscitelli, a Law Partnership; Carter Dodge; Patrick G. Grattan; and, Geary, Shea, O'Donnell & Grattan, a Law Partnership, et al., California Superior Court, County of San Mateo, Southern Branch (Civil Case No. 436492).***

Report to Counsel on behalf of Defendants, April 2005.

***Novell, Inc. v. Unicom Sales, Inc., et al., U.S. District Court, Northern District of California (Case No. 3:03-cv-02785-MMC).***

Expert Report on behalf of Plaintiff, June 2004.

Supplemental Expert Report on behalf of Plaintiff, July 2004.

Deposition Testimony on behalf of Plaintiff, July 2004.

***Marla McGuire et al. v. Farmers Group Inc. et al., California Superior Court, County of Los Angeles (Civil Case No. BC 216294).***

Expert Declaration on behalf of The Farmers Group, Inc., September 2002.

***Novell, Inc. v. Network Systems Technology, Inc., et al., U.S. District Court for the Northern District of Georgia, Atlanta Division (Civil Action File No. 1:00-cv-0773-RLV).***

Expert Report on behalf of Plaintiff, December 2001.

***Novell, Inc. v. MBC Enterprises, LLC, et al.; Novell, Inc. v. Computer Recyclers, Inc., et al., U.S. District Court for the District of Utah (Consolidated Case 2:98-cv-00200- ST).***

Expert Report on behalf of Plaintiff, June 2000.

Supplemental Expert Report on behalf of Plaintiff, August 2000.

Trial Testimony on behalf of Plaintiff, November 2001.

***Adobe Systems Incorporated v. One Stop Micro dba Signal Computing, et al., U.S. District Court for the Northern District of California (San Jose Division), (Case No. 5:97-cv-20980-JW-PVT).***

Expert Report on behalf of Plaintiff, April 2000.

Reply Expert Report on behalf of Plaintiff, April 2000.

Supplemental Expert Report on behalf of Plaintiff, May 2000.

***Steve Carver, dba Steve Carver Chevron, et al. v. Chevron Company U.S.A., Inc., et al., California Superior Court, County of San Diego (Civil Case No. 658690)***

Declaration on behalf of Defendants, November 1999.

**RETENTIONS AS TESTIFYING EXPERT (cont.)**

***Oakland-Alameda County Coliseum Authority v. CC Partners dba The Golden State Warriors, American Arbitration Association.***

Declaration on behalf of Claimant OACCA, May 1999.  
Expert Report on behalf of Claimant OACCA, June 1999.  
Expert Report on behalf of Claimant OACCA, March 2000.  
Deposition Testimony on behalf of Claimant OACCA, March 2000.  
Testimony before Arbitrator on behalf of Claimant OACCA, April 2000.

***Novell, Inc. v. CPU Distributing, Inc.; Terry L. Green; and Leroy Hunter, U.S. District Court for the Southern District of Texas (Houston Division) (Case No. 4:97-cv-2326).***

Expert Report on behalf of Plaintiff, September 1998.

***Novell, Inc. v. Network Trade Center, Inc. and Mark Bondiett, U.S. District Court for the District of Utah (Case No. 2:95-cv-00523-JTG).***

Testimony before Special Master on behalf of Plaintiff, May 1998.

***Novell, Inc. v. Vandy Micro Corp., et al., U.S. District Court, Central District of California (Case No. 2:96-cv-00507-MRP-Mc).***

Expert Report on behalf of Plaintiff, February 1997.  
Trial Testimony on behalf of Plaintiff, June 1997.

***Novell, Inc. v. Jaco Electronics, Inc., et al., U.S. District Court, Central District of California (Case No. 2:96-cv-00504-MRP-Mc).***

Expert Report on behalf of Plaintiff, February 1997.

***Novell, Inc. v. Softcom Computers, et al., U.S. District Court, Central District of California (Case No. 2:96-cv-00492-MRP-Mc).***

Expert Report on behalf of Plaintiff, February 1997.

***Novell, Inc. v. Micro Supply, Inc., et al., U.S. District Court, Central District of California (Case No. 2:96-cv-000505-MRP-Mc).***

Expert Report on behalf of Plaintiff, February 1997.

## **RETENTIONS AS CONSULTING EXPERT**

***Sky-Med, Inc. dba Pacific Skydiving Hawaii v. Skydiving School, Inc. dba SkyDive Hawaii, U.S. District Court, District of Hawaii (Case No. 13-cv-00193-DKW-BMK)***

Retained on behalf of Defendants, 2014.

***SkyWest Airlines, Inc. and Atlantic Southeast Airlines, Inc. v. Delta Air Lines, State Court of Fulton County, State of Georgia (Civil Action No. 11 EV 011971)***

Retained on behalf of Plaintiffs, 2008-2012.

***In re: ICANN's Expansion of Top Level Domains, Hearings before the U.S. Senate Committee on Commerce, Science & Transportation, December 8, 2011.***

Written submission (with Robert E. Hall) on behalf of the Association of National Advertisers.

***Freedom Medical, Inc. v. Premier Purchasing Partners L.P., Premier Inc., Novation L.L.C., Universal Hospital Services Inc., and Hill-Rom Company Inc., U.S. District Court, Eastern District of Texas (Case No. 5:09-cv-152)***

Retained on behalf of the Premier Defendants, 2010.

***Application of San Pablo Bay Pipeline Company LLC for Approval of Tariffs for the San Joaquin Valley Crude Oil Pipeline before the California Public Utilities Commission***

Retained on behalf of Applicant, 2008-2010.

***Starr International Company, Inc. v. American International Group, Inc. (including counterclaims against Starr International Company and Maurice R. Greenberg by American International Group), U.S. District Court, Southern District of New York.***

Retained on behalf of Starr International Company, 2005-2009.

***Ronald W. De Ruuk, as Bankruptcy Administrator for Holding Tusculum B.V., Claimant, against Louis Dreyfus S.A.S., Respondent, Court of Arbitration, International Chamber of Commerce, Geneva, Switzerland.***

Retained on behalf of Claimant, 2007-2008.

***Consortium Information Services, Inc. aka The Consortium Group v. Equifax, Inc. et al., Superior Court of California, County of Orange.***

Retained on behalf of Defendant, 2007-2008.

**RETENTIONS AS CONSULTING EXPERT (cont.)**

***Amgen, Inc. v. F. Hoffmann-La Roche Ltd., Roche Diagnostics GmbH, and Hoffmann-La Roche Inc.*** (including antitrust counterclaims against Amgen by Roche), U.S. District Court, District of Massachusetts.  
Retained on behalf of Counterclaim Defendant Amgen, 2007.

***High-Pressure Laminates Antitrust Litigation (MDL 1368)***, U.S. District Court, Southern District of New York.  
Retained on behalf of Defendant Wilsonart International, 2002-2006.

***Allianz Insurance Company and Atlantic Richfield Company. v. Olympic Pipe Line Company, et al.*** (and consolidated third-party recovery litigation), U.S. District Court, Western District of Washington.  
Retained on behalf of Plaintiffs, 2003-2005.

***Atlantic Richfield Company v. Allianz Insurance Company, et al.*** (and related litigation), Superior Court of Washington, County of Whatcom.  
Retained on behalf of Defendants, 2001-2003.

***Consolidated Credit Agency v. Equifax, Inc., et al.***, U.S. District Court, Central District of California.  
Retained on behalf of Defendant, 2004-2005.

***Grand Sprinkler Inc. v. The Toro Company***, U.S. District Court, District of Arizona.  
Retained on behalf of Defendant, 2003-2004.

***A&J Liquor Co, Inc., et al. v. State Compensation Insurance Fund***, Superior Court of the State of California, County of San Francisco.  
Retained on behalf of Defendant, 1999-2003.

***Irrigation Services Inc. v. The Toro Company and United Green Mark***, Superior Court of California, County of Orange.  
Retained on behalf of Defendant The Toro Company, 2001-2002.

***United States ex rel. v. Shell Oil Co., et al.***, U.S. District Court, Eastern District of Texas.  
Retained on behalf of Shell Oil Co., 1999-2000.

***ENCAD, Inc. v. Hewlett-Packard Company***, Superior Court of the State of California, County of San Francisco.  
Retained on behalf of Defendant, 2000.

**RETENTIONS AS CONSULTING EXPERT (cont.)**

***eBay, Inc. v. Bidder's Edge, Inc.*, U.S. District Court, Northern District of California (San Jose Division).**

Retained on behalf of Plaintiff, 2000.

***Brand Name Prescription Drugs Antitrust Litigation (MDL 997)*, U.S. District Court, Northern District of Illinois.**

Retained on behalf of Defendant Abbott Laboratories, 1995-1999.

***Lease Oil Antitrust Litigation (MDL 1206)*, U.S. District Court, Southern District of Texas.**

Retained on behalf of Defendants, 1995-1999.

***Oil Changer, Inc. v. Quaker State Corporation and Pennzoil Company*, U.S. District Court, Northern District of California.**

Retained on behalf of Defendants, 1999.

***National Football League v. Oakland Raiders* (and related litigation), U.S. District Court, Central District of California, and Superior Court of the State of California, County of Los Angeles.**

Retained on behalf of the National Football League, 1997-1998.

***Zeneca Limited v. Pharmachemie B.V.*, U.S. District Court, District of Massachusetts.**

Retained on behalf of Plaintiff, 1998.

***Zeneca Limited v. Mylan Pharmaceuticals, Inc.*, U.S. District Court, Western District of Pennsylvania.**

Retained on behalf of Plaintiff, 1998.

***Qualcomm, Incorporated v. Motorola Inc.*, U.S. District Court, Southern District of California.**

Retained on behalf of Plaintiff, 1998.

***Novell, Inc. v. Network Trade Center, Inc., et al.*, U.S. District Court, District of Utah.**

Retained on behalf of Plaintiff, 1996-1998.

***St. Louis Convention and Visitors Commission v. National Football League, et al.*, U.S. District Court, Eastern District of Missouri.**

Retained on behalf of Defendants, 1997.



**RETENTIONS AS CONSULTING EXPERT (cont.)**

***Adobe Systems Incorporated v. Southern Software, Inc., et al.***, U.S. District Court,  
Northern District of California.  
Retained on behalf of Plaintiff, 1997.

***Theresa Aguilar, et al. v. Atlantic Richfield Corporation, et al.***, Superior Court of the  
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Retained on behalf of Defendants, 1997.

***Cadence Design Systems, Inc. v Avant! Corporation***, US District Court, Northern  
District of California.  
Retained on behalf of Plaintiff, 1996.

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California.  
Retained on behalf of Defendant Abbott Laboratories, 1994-1995.

***Carbon Dioxide Industry Antitrust Litigation (MDL 940)***, U.S. District Court, Middle  
District of Florida.  
Retained on behalf of Defendants, 1994-1995.

***Kambiz Ajir, et al. v. Exxon Corporation, et al.***, U.S. District Court, Northern District  
of California.  
Retained on behalf of Defendants, 1995.

***Donelan, et al. v. Abbott Laboratories, et al.***, 18<sup>th</sup> Judicial District Court, Sedgwick  
County, Kansas.  
Retained on behalf of Defendant Abbott Laboratories, 1995.

***Steve Carver, etc., et al. v. Chevron Company U.S.A., Inc., et al.***, Superior Court of the  
State of California, County of San Diego.  
Retained on behalf of Defendants, 1993-1995.

***Federal Trade Commission v. Abbott Laboratories***, U. S. District Court, District of  
Columbia.  
Retained on behalf of Defendant, 1993-1994.

***In the Matter of the Rates of: Nationwide Insurance Company***, Before The  
Insurance Commissioner, State of California.  
Retained on behalf of Applicant, 1994.

**RETENTIONS AS CONSULTING EXPERT (cont.)**

***In the Matter of the Rates of: State Farm Companies, Before The Insurance Commissioner, State of California.***

Retained on behalf of Applicant, 1994.

***In the Matter of the Rates of: 20<sup>th</sup> Century Insurance Companies, Before The Insurance Commissioner, State of California.***

Retained on behalf of Applicant, 1994.

***United States v. Eastman Kodak Co., U.S. District Court, Western District of New York.***

Retained on behalf of Intervenor Fuji Photo Film, 1992-1993.

***Infant Formula Antitrust Litigation (MDL 878), U.S. District Court, Northern District of Florida.***

Retained on behalf of Defendant Abbott Laboratories, 1992-1993.

***In the Matter of: Abbott Laboratories, Docket No. 9523, Before Administrative Law Judge, Federal Trade Commission.***

Retained on behalf of Respondent, 1992-1993.

***In the Matter of: Prudential Insurance Company, et al., before The Insurance Commissioner, State of California.***

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***Texas Instruments, Inc. v. Dell Computer Corp., U.S. District Court, Northern District of Texas.***

Retained on behalf of Plaintiff, 1991-1992.

***Nintendo of America v. Louis Galoob Toys, U.S. District Court, Northern District of California.***

Retained on behalf of Defendant, 1991.

***Atari Corp. v. Nintendo Company, Ltd., U.S. District Court, Northern District of California.***

Retained on behalf of Plaintiff, 1989-1992.

Michael A. Flynn  
Director, Navigant Economics, LLC  
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**PROFESSIONAL AFFILIATIONS**

**Member, American Economic Association**

**Associate Member, Section of Antitrust Law, American Bar Association**

**Veteran, United States Army**

## Attachment A: Documents and Related Materials Reviewed

1 .ART Application (ID 1-1097-20833), Dadotart Inc.  
2 .ART Application (ID 1-1675-51302), EFLUX.ART, LLC  
3 .ART Community Priority Evaluation Report, Application ID 1-1097-20833, September 10, 2014  
4 .ART Community Priority Evaluation Report, Application ID 1-1675-51302, September 10, 2014  
5 .ECO Application (ID 1-912-59314), Big Room Inc.  
6 .ECO Community Priority Evaluation Report, Application ID 1-912-59314, October 6, 2014  
7 .GAY Application (ID 1-1713-23699), dotgay llc  
8 .GAY Community Priority Evaluation Report, Application ID 1-1713-23699, October 6, 2014  
9 .GMBH Application (1-1273-63351), TLDDOT GmbH  
10 .GMBH Community Priority Evaluation Report, Application ID 1-1273-63351, June 11, 2014  
11 .HOTEL Application (ID 1-1032-95136), HOTEL TLD s.a.r.l  
12 .HOTEL Community Priority Evaluation Report, Application ID 1-1032-95136, June 11, 2014  
13 .IMMO Application (ID 1-1000-62742), Starting Dot  
14 .IMMO Community Priority Evaluation Report, Application ID 1-1000-62742, March 17, 2014  
15 .INC Application (ID 1-880-35979), Dot Registry LLC  
16 .INC Community Priority Evaluation Report, Application ID 1-880-35979, June 11, 2014  
17 .LLC Application (ID 1-880-17627), Dot Registry LLC  
18 .LLC Community Priority Evaluation Report, Application ID 1-880-17627, June 11, 2014  
19 .LLP Application (ID 1-880-35508), Dot Registry LLC  
20 .LLP Community Priority Evaluation Report, Application ID 1-880-35508, June 11, 2014  
21 .MLS Application (ID 1-1888-47714), Canadian Real Estate Association  
22 .MLS Community Priority Evaluation Report, Application ID 1-1888-47714, March 17, 2014  
23 .MUSIC Application (ID 1-959-51046), .MUSIC LLC  
24 .MUSIC Community Priority Evaluation Report, Application ID 1-959-51046, October 6, 2014  
25 .OSAKA Application (ID 1-901-9391), Interlink Co., Ltd.  
26 .OSAKA Community Priority Evaluation Report, Application ID 1-901-9391, July 29, 2014  
27 .RADIO Application (ID 1-1083-39123), European Broadcasting Union  
28 .RADIO Community Priority Evaluation Report, Application ID 1-1083-39123, September 10, 2014  
29 .SHOP Application (ID 1-890-52063), GMO Registry, Inc.  
30 .SHOP Community Priority Evaluation Report, Application ID 1-890-52063, March 13, 2015  
31 .TAXI Application (ID 1-1025-18840), Taxi Pay GmbH  
32 .TAXI Community Priority Evaluation Report, Application ID 1-1025-18840, March 17, 2014  
33 .TENNIS Application (ID 1-1723-69677), Tennis Australia Ltd.  
34 .TENNIS Community Priority Evaluation Report, Application ID 1-1723-69677, March 17, 2014  
35 1.email of Tue 2-3-2015 710 PM.pdf  
36 10.Post-Hearing Submission.EIU Process Errors Claimed by Dot Registry.pdf  
37 12.15.2014 Emergency Arbitrator Correspondence.pdf  
38 2.1st link on 1 - ICANN's Application Comments and Program Feedback - View Comments.pdf  
39 2014-03-20 Dot Registry Response to Opposition.pdf  
40 2015.03.05 Booking.com Final Declaration.pdf  
41 3.Resources - ICANN v ICM.pdf  
42 3-25-14\_INC\_Objection\_Withdrawal\_Public Comment.docx  
43 3-25-14\_LLC\_Objection\_Withdrawal\_Public Comment.docx  
44 3-25-14\_LLP\_Objection\_Withdrawal\_Public Comment.docx  
45 3-4-14\_INC\_European Commission opposition\_Public Comment.docx  
46 3-4-14\_LLC\_European Commission opposition\_Public Comment.docx  
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48 4.Independent Review Process Documents.pdf  
49 5.2015-03-27-CEP-IRP-Status-Update - 27mar15.pdf  
50 6.Dot Registry LLC v ICANN - IRP docs.pdf  
51 7.LLC\_Opposition letter of Scott Hemphill.pdf  
52 8.email of 18 Mar re ECO, RADIO, HOTEL and OSAKA materials.pdf  
53 9.Post-Hearing Correspondence 12 17 2014.pdf  
54 Batch 1 - Documents for Expert - Michael Flynn.zip  
55 BGC Determination.pdf  
56 BGC Determination.pdf  
57 BGC Meeting Minutes 24 July 2014.pdf  
58 BGC Meetings Minutes 24 July 2014.pdf  
59 Community Priority Evaluation (CPE) Guidelines Prepared by The Economist Intelligence Unit (v. 2.0, September 27, 2013)  
60 de-barrin-to-chalaby-02may14-en.pdf  
61 Dot Registry Business Registration by GDP-updated.xlsx  
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63 Elaine Marshall NASS Witness Statement - Executed PDF Version.pdf  
64 Forbes Global 2000.May 2014.xlsx  
65 GAC-Board Consultations (2011)).zip  
66 GAY Application & Decisions.zip  
67 GAY Reconsideration Request 1.zip  
68 GAY Reconsideration Request 2.zip  
69 <http://audio.icann.org/new-gtlds/cpe-10sep13-en.mp3>.  
70 <http://businessroundtable.org/>  
71 <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>  
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73 <http://ssrn.com/abstract=1291854>  
74 <http://www.corporatecompliance.org>  
  
75 <http://www.forbes.com/sites/forbespr/2014/05/07/forbes-11th-annual-global-2000-the-worlds-biggest-public-companies/>  
76 <http://www.governanceprofessionals.org>  
77 [http://www.grcdi.nl/gsb/summary\\_%20company%20legal%20forms.html](http://www.grcdi.nl/gsb/summary_%20company%20legal%20forms.html)  
78 <http://www.nass.org>  
79 <http://www.nass.org/about-nass/about/>  
80 <http://www.nass.org/contact/corp-affiliates/>  
81 <http://www.nass.org/corpaffiliates/about-corp-affiliate-program/>  
82 <http://www.nass.org/reports/surveys-a-reports/>  
83 <http://www.nass.org/state-business-services/corporate-registration/>  
84 <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>  
85 [https://en.wikipedia.org/wiki/Limited liability company](https://en.wikipedia.org/wiki/Limited_liability_company)  
86 [https://en.wikipedia.org/wiki/Limited liability partnership](https://en.wikipedia.org/wiki/Limited_liability_partnership)  
87 [https://en.wikipedia.org/wiki/List of countries by GDP %28nominal%29](https://en.wikipedia.org/wiki/List_of_countries_by_GDP_%28nominal%29)  
88 [https://en.wikipedia.org/wiki/Types of business entity](https://en.wikipedia.org/wiki/Types_of_business_entity)  
89 <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12413>  
90 <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12434>  
91 <https://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments>  
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96 <https://gtldresult.icann.org/applicationstatus/applicationdetails/1753>  
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98 <https://gtldresult.icann.org/applicationstatus/applicationdetails/1804>  
99 <https://gtldresult.icann.org/applicationstatus/applicationdetails/1805>  
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101 <https://www.icann.org/en/system/files/correspondence/bullock-to-crocker-20mar14-en.pdf>  
102 <https://www.icann.org/resources/pages/accountability/irp-en>  
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107 <https://www.nacdonline.org/>  
108 ICANN Bates 215-217.pdf  
109 ICANN, gTLD Applicant Guidebook (Version 2012-06004, June 12, 2012)  
110 INC Letters of Opposition.zip  
111 INC Public Comments 2012.zip  
112 INC Public Comments 2014 (1).zip  
113 INC Public Comments 2014 (2).zip  
114 INC Reconsideration Request.zip  
115 INC, LLC & LLP Letters of Support.zip  
116 INC\_Reconsideration Annex 1.pdf  
117 INC\_Reconsideration Request.pdf  
118 Initial MAF comments on ICANN Draft Advice Letter.docx  
119 International Monetary Fund, World Economic Outlook Database, April 2015 edition  
120 Jeffrey Bullock Delaware Witness Statement - Executed PDF Version.pdf  
121 Letter of Robert E. Hall & Michael A. Flynn to Secretary of Commerce.December 7 2011  
122 Letter of Support\_NASS Resolution.pdf  
123 LLC Letters of Opposition.zip  
124 LLC Public Comments 2012.zip  
125 LLC Public Comments 2014 (1).zip  
126 LLC Public Comments 2014 (2).zip  
127 LLC Reconsideration Request.zip  
128 LLC\_Reconsideration Annex 1.pdf  
129 LLC\_Reconsideration Request.pdf  
130 LLP Letters of Opposition.zip  
131 LLP Public Comments 2012.zip  
132 LLP Public Comments 2014 (1).zip  
133 LLP Public Comments 2014 (2).zip  
134 LLP Reconsideration Request.pdf  
135 LLP\_Reconsideration Request.pdf  
136 NASS representing interests of US companies.zip  
137 New Batch 1.zip  
138 New Batch 2.zip  
139 Post-Hearing Correspondence 12.17.2014.pdf  
140 Post-Hearing Submission 12.17.2014.pdf  
141 Post-Hearing Submission 12.17.2014.pdf  
142 Prevailing String CPE Records.zip/ECO Record  
143 Prevailing String CPE Records.zip/HOTEL Record  
144 Prevailing String CPE Records.zip/OSAKA Record

145 Prevailing String CPE Records.zip/RADIO Record  
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148 Public Comment Summaries and Analyses (2007-11).zip  
149 Raghav Sharma, Limited Liability Partnerships in India  
150 Record materials filed to date in ICDR Case No. 01-14-0001-5004 (Dot Registry LLC v. ICANN)  
151 Reply Comments of Michael Flynn re Competition.pdf  
152 Reports.zip  
153 Support & Opposition Correspondence 1.zip  
154 Support & Opposition Correspondence 2.zip  
155 TAB 68 2014-07-17 Re- Response needed- background info on LLC, LLP, INC evaluations.pdf  
156 The Economist Intelligence Unit, CPE Panel and Its Processes, August 7, 2014  
157 Verification Letters of Support.zip  
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**New gTLD Program**  
**Community Priority Evaluation Report**  
Report Date: 11 June 2014

Application ID:	1-880-35979
Applied-for String:	INC
Applicant Name:	Dot Registry LLC

**Overall Community Priority Evaluation Summary**

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

**Panel Summary**

Overall Scoring	5 Point(s)	
Criteria	Earned	Achievable
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	3	4
#4: Community Endorsement	2	4
Total	5	16
<b>Minimum Required Total Score to Pass 14</b>		

Criterion #1: Community Establishment	0/4 Point(s)
1-A Delineation	0/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as identified in the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the community demonstrates insufficient delineation, organization and pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p> <p><u>Delineation</u> Two conditions must be met to fulfill the requirements for delineation: there must be a clear straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.</p>	



The community defined in the application (“INC”) is:

Members of the community are defined as businesses registered as corporations within the United States or its territories. This would include Corporations, Incorporated Businesses, Benefit Corporations, Mutual Benefit Corporations and Non-Profit Corporations. Corporations or “INC’s” as they are commonly abbreviated, represent one of the most complex business entity structures in the U.S. Corporations commonly participate in acts of commerce, public services, and product creation....

A corporation is defined as a business created under the laws of a State as a separate legal entity, that has privileges and liabilities that are distinct from those of its members. While corporate law varies in different jurisdictions, there are four characteristics of the business corporation that remain consistent: legal personality, limited liability, transferable shares, and centralized management under a board structure. Corporate statutes typically empower corporations to own property, sign binding contracts, and pay taxes in a capacity separate from that of its shareholders.

This community definition shows a clear and straightforward membership. While broad, the community is clearly defined, as membership requires formal registration as a corporation with the relevant US state. In addition, corporations must comply with US state law and show proof of best practice in commercial dealings to the relevant state authorities.

However, the community as defined in the application does not have awareness and recognition of a community among its members. This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. There is no evidence that these incorporated firms would associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for delineation.

#### Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

The community as defined in the application does not have at least one entity mainly dedicated to the community. Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, these government agencies are fulfilling a function, rather than representing the community. In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community as they have other roles/functions beyond processing corporate registrations. According to the application:

Corporations can be formed through any jurisdiction of the United States. Therefore members of this community exist in all 50 US states and its territories. Corporation formation guidelines are dictated by state law and can vary based on each State’s regulations. Persons form a corporation by filing required documents with the appropriate state authority, usually the Secretary of State. Most states require the filing of Articles of Incorporation. These are considered public documents and are similar to articles of organization, which establish a limited liability company as a legal entity. At minimum, the Articles of Incorporation give a brief description of proposed business activities, shareholders, stock issued and the registered business address.

The community as defined in the application does not have documented evidence of community activities. As there is no entity that is mainly dedicated to the community as defined in the .INC application, there is no

documented evidence of community activities.

The Community Priority Evaluation panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to a get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string, as these corporations would typically not associate themselves with being part of the community as defined by the applicant. The community therefore could not have been active prior to the above date (although its constituent parts were active).

The Community Priority Evaluation panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

*0/2 Point(s)*

The Community Priority Evaluation panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not demonstrate considerable size or longevity for the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of a considerable size. The community for .INC as defined in the application is large in terms of number of members. According to the application:

With almost 470,000 new corporations registered in the United States in 2010 (as reported by the International Association of Commercial Administrators) resulting in over 8,000,000 total corporations in the US, it is hard for the average consumer to not conduct business with a corporation.

However, as previously stated, the community as defined in the application does not have awareness and recognition of a community among its members. This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. These incorporated firms would therefore not typically associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application only satisfies one of the two conditions to fulfill the requirements for size.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. As mentioned previously, according to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to a get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Community Priority Evaluation panel determined that this application refers to a “community” construed to obtain a sought-after corporate identifier as a gTLD string, as these corporations would typically not associate themselves with being part of the community as defined by the applicant. Therefore, the pursuits of the .INC community are not of a lasting, non-transient nature.

Additionally, as previously stated, the community as defined in the application does not have awareness and recognition of a community among its members. This is because corporations operate in vastly different sectors, which sometimes have little or no association with one another. Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook. These incorporated firms would therefore not typically associate themselves with being part of the community as defined by the applicant.

The Community Priority Evaluation panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

**Criterion #2: Nexus between Proposed String and Community**

**0/4 Point(s)**

**2-A Nexus**

**0/3 Point(s)**

The Community Priority Evaluation panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string identifies the community, but over-reaches substantially beyond the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. “Identify” means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.

The applied-for string (.INC) over-reaches substantially, as the string indicates a wider or related community of which the applicant is a part but is not specific to the applicant’s community. According to the application documentation:

“.INC” was chosen as our gTLD string because it is the commonly used abbreviation for the entity type that makes up the membership of our community. In the English language the word incorporation is primarily shortened to Inc. when used to delineate business entity types. For example, McMillion Incorporated would additionally be referred to as McMillion Inc. Since all of our community members are incorporated businesses we believed that “.INC” would be the simplest, most straightforward way to accurately represent our community.

Inc. is a recognized abbreviation in all 50 states and US Territories denoting the corporate status of an entity. Our research indicates that Inc. as corporate identifier is used in three other jurisdictions (Canada, Australia, and the Philippines) though their formation regulations are different from the United States and their entity designations would not fall within the boundaries of our community definition.

While the string identifies the name of the community, it captures a wider geographical remit than the

community has, as the corporate identifier is used in Canada, Australia and the Philippines. Therefore, there is a substantial over-reach between the proposed string and community as defined by the applicant.

The Community Priority Evaluation panel determined that the applied-for string over-reaches substantially beyond the community. It therefore does not meet the requirements for nexus.

2-B Uniqueness

*0/1 Point(s)*

The Community Priority Evaluation panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. The Community Priority Evaluation panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

**Criterion #3: Registration Policies**

**3/4 Point(s)**

3-A Eligibility

*1/1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.

To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. The application demonstrates adherence to this requirement by limiting eligibility to registered corporations and by cross-referencing their documentation against the applicable US state's registration records in order to verify the accuracy of their application, etc. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.

3-B Name Selection

*1/1 Point(s)*

The Community Priority Evaluation panel determined that the application met the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as name selection rules are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-B: Name Selection.

To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by outlining a comprehensive list of name selection rules, such as requirements that second level domain names should match or include a substantial part of the registrant's legal name, and specifying that registrants will not be able to register product line registrations, amongst other requirements. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Name Selection.

3-C Content and Use	<i>1/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application met the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the rules for content and use are consistent with the articulated community-based purpose of the applied-for TLD. The application received a maximum score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD. The application demonstrates adherence to this requirement by noting that all registrants must adhere to the content restrictions outlined in the applicant’s abuse policies. (Comprehensive details are provided in Section 20e of the applicant documentation). The Community Priority Evaluation panel determined that the application satisfies the condition to fulfill the requirements for Content and Use.</p>	
3-D Enforcement	<i>0/1 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application did not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as the application provided specific enforcement measures but did not include appropriate appeal mechanisms. The application received a score of 0 out of 1 point under criterion 3-D: Enforcement.</p> <p>Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. For example, if a registrant wrongfully applied for and was awarded a second level domain name, the right to hold this domain name will be immediately forfeited. (Comprehensive details are provided in Section 20e of the applicant documentation). However, the application did not outline an appeals process. The Community Priority Evaluation panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement.</p>	

<b>Criterion #4: Community Endorsement</b>	
<i>2/4 Point(s)</i>	
4-A Support	<i>1/2 Point(s)</i>
<p>The Community Priority Evaluation panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.</p> <p>To receive the maximum score for Support, the applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. “Recognized” means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed.</p> <p>The Community Priority Evaluation panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from a majority of the recognized community institution(s)/member organization(s). However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support.</p>	

The application included letters from a number of Secretaries of State of US states, which were considered to constitute support from groups with relevance, as each Secretary of State has responsibility for corporate registrations and the regulations pertaining to corporate formation in its jurisdiction. These entities are not the recognized community institution(s)/member organization(s), as these government agencies are fulfilling a function, rather than representing the community. The viewpoints expressed in these letters were not consistent across states. While several US states expressed clear support for the applicant during the Letters of Support verification process, others either provided qualified support, refrained from endorsing one particular applicant over another, or did not respond to the verification request. Letters of support from other entities did not meet the requirement for relevance based on the Applicant Guidebook criteria, as they were not from the recognized community institutions/member organizations. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

*1/2 Point(s)*

The Community Priority Evaluation panel determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one group of non-negligible size. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received several letters of opposition, one of which was determined to be relevant opposition from an organization of non-negligible size. This opposition was from a community that was not identified in the application but which has an association to the applied-for string. Opposition was on the grounds that limiting registration to US registered corporations only would unfairly exclude non-US businesses. The remaining letters were either from groups/individuals of negligible size, or were not from communities which were not mentioned in the application but which have an association to the applied for string. The Community Priority Evaluation Panel determined that the applicant partially satisfied the requirements for Opposition.

**Disclaimer:** Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <[newgtlds.icann.org](http://newgtlds.icann.org)>.

## **Factual Clarifications Regarding Online Blogged Report in The Register on 3 August 2016 about Dot Registry v. ICANN IRP Final Declaration**

The Register story contains factual errors regarding what the IRP Panel determined in the Final Declaration of the Dot Registry, LLC vs. ICANN IRP. Some of the factual errors are pointed out below, along with clarifications on what the Final Declaration did state.

### **Dot Registry's Arguments Misconstrued as Panel's Findings:**

The story mischaracterizes the Panel's recitation of Dot Registry's claims as if they are the Panel's own findings.

Example One: The story supplies a quote from the Declaration (in bold font and indented), implying that the Panel held that "the EIU failed to identify the research conducted, what the results of the research were, or how such results supported its conclusion." However, this is not a Panel finding, but rather it is the Panel's summary of Dot Registry's argument on the matter. (See Final Declaration, Para. 51.)

Example Two: The story claims that the Panel noted in the Final Declaration that the BGC had "six different ways that it is empowered in the [B]ylaws to carry out an independent investigation" of Dot Registry's claims and it "did none of these." Again, this is not what the Panel held. This was merely the Panel providing a summary of what Dot Registry argued. (See Final Declaration, Para. 53.)

### **Panel made no Determination on the CPE Results or on EIU or ICANN Staff Conduct:**

The Panel explicitly did not make any conclusions as to the EIU's or the ICANN staff's conduct; and explicitly did not determine whether Dot Registry's applications were entitled to community priority.

- "The Panel majority emphasizes that, in reaching these conclusions, the Panel is not assessing whether ICANN staff or the EIU failed themselves to comply with obligations under the Articles, the Bylaws, or the AGB. There has been no implicit foundation or hint one way or another regarding the substance of the decisions of ICANN staff or the EIU in the Panel majority's approach." (Final Declaration, Para. 152)
- "The Panel majority declines to substitute its judgment for the judgment of the CPE as to whether Dot Registry is entitled to Community priority." (Final Declaration, Para. 153)

### **Incorrect References to ICANN's legal team:**

The story inaccurately attributes actions by ICANN staff to ICANN's legal team and replaces the Panel's references to "ICANN staff" with "ICANN's legal team."

- The story stated that "internal emails showed that ICANN's legal team wrote the language [in the CPE Reports] used to disqualify the applications" and "injected the argument [into the CPE Reports] that 'research' carried out by the EIU" led to the CPE results. Neither the emails themselves nor the Panel's descriptions of those emails indicate that ICANN's legal team was involved in providing suggested language for the CPE Reports.

- The Panel did not refer to ICANN’s legal team. Rather, the Panel consistently referred to ICANN staff in relation to the CPE Reports. (See Final Declaration, Paras. 93 - 101.)
- Neither the ICANN legal team nor the ICANN staff “injected” the reference to the EIU’s research nor did staff change or influence EIU decisions. Rather, ICANN New gTLD Program staff suggested (in comment form) that the EIU more fully explain what research the EIU had conducted in reaching its conclusion. The New gTLD Program staff’s margin note suggested a clarification to the terminology in the EIU CPE Report after the scoring had already been completed.
- The story further claims that the EIU in fact conducted no research. However, this is not supported by in the Panel’s findings or even in Dot Registry’s arguments.

**Allegations of Financial Motivation are False:**

The story claims that ICANN is financially motivated for applications to be denied community priority or otherwise be resolved prior to an auction of last resort. This is false.

ICANN encourages parties to resolve contention sets privately. The Guidebook explicitly states that: “Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage.” (Guidebook, Section 1.1.2.10.) Indeed, of the 234 contention sets, 219 have been resolved, only 16 of which have been resolved through an ICANN auction of last resort.

ICANN also has discretion to postpone an auction of last resort if all participants request such a postponement in order to provide additional time for such private resolution; ICANN has done so on each occasion there has been a unanimous request. (Auction Rules for New gTLDs: Indirect Contentions Edition, Section 10 available at <https://newgtlds.icann.org/en/applicants/auctions>.)

The claim that the auction proceeds go into “ICANN’s coffers” is inaccurate. The ICANN Board has publicly announced on several occasions that the auction proceeds are reserved until the community develops and the ICANN Board authorizes a plan for the appropriate use of the funds. A community-based drafting team is currently working on a charter for a Cross-Community Working Group that will create recommendations regarding the use of auction proceeds for Board consideration.