27 SEPTEMBER 2015 NGPC MEETING
Reference Materials

TABLE OF CONTENTS – REFERENCE MATERIALS

REFERENCE MATERIALS TO ICANN NGPC PAPER NO. 2015.09.27.NG1b

Title: **Reconsideration Request 15-13**

Summary Background

While the full background can be found in the documentation attached to these Reference Materials, Reconsideration Request 15-13 brought by Commercial Connect, LLC ("Requester") seeks reconsideration of the Community Priority Evaluation ("CPE") panel's report, and ICANN's acceptance of that report, finding that the Requester did not prevail in CPE for the .SHOP string ("CPE Report"). The Requester also challenges various procedures governing the New gTLD Program, as well as the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for the Requester's application.

The Board Governance Committee ("BGC") considered Reconsideration Request 15-13, concluded that the Requester has not stated proper grounds for reconsideration, and recommended that the New gTLD Program Committee ("NGPC") deny Reconsideration Request 15-13. The NGPC agrees.

Document/Background Links

The following attachments are relevant to the BGC's recommendation regarding Reconsideration Request 15-13.

Attachment A is Reconsideration Request 15-13, submitted on 10 July 2015.

Attachment B is the BGC's Recommendation on Reconsideration Request 15-13, issued on 24 August 2015.

Other Relevant Materials

The Appendices to Reconsideration Request 15-13, available at: https://www.icann.org/en/system/files/files/reconsideration-request-15-13-commercial-connect-with-appendices-10jul15-en.pdf.

The CPE Report finding that the Requester's Application did not prevail in CPE, available at: https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf.

Submitted by:	Amy A. Stathos
Position:	Deputy General Counsel
Date Noted:	11 September 2015
Email:	amy.stathos@icann.org

Request for Reconsideration and Assistance

1. Name:

Commercial Connect, LLC.
Jeffrey Smith
Contact Information Redacted

2. Request for Reconsideration based on

Board Inaction even though Board Action as well as Staff Action and Staff Inaction also apply

3. Description of specific inaction we are seeking for reconsideration.

This motion for reconsideration and request for assistance will encompass a multitude of issues and wrong-doings throughout this new gTLD application process. It is being request based on Staff action as well as inaction along with Board action as well as inaction.

As far as dates are concerned – when the actions have occurred are noted in the particular area of the complaint and inactions have no date as there has been no actions taken to resolve the deficiency.

Since the BCG is part of ICANN's board we are requesting assistance in order to get a Board reaction and/or decision since ICANN's legal department has insisted that its Board has not made any decisions on new gTLD's on which we can formally object.

As a member of the ICANN community since its inception I have been following areas of significant public concern but have been focusing on commerce and new GTLD's since the mid 1990's.

From what I have read on various responses from ICANN's Board Governance Committee (BGC) the purpose for this method of objection is to ask for assistance and/or consideration on ICANN's Staff/Board Action/Inaction and it must be based on established ICANN policies/procedures, documented guidance and/or mission. For this reason I think it is imperative to assist the BGC in understanding the history and significance of our complaint which is focuses on the entire process of new gTLDs.

If there are questions, concerns or requests for verification or any information contained in this request, please contact us and allow us the opportunity to provide clear and concise evidence to support our position. Communication is paramount in reaching mutual goals and we hope that ICANN will do its part in cooperating in this instance.

We followed every step ICANN gave us for 15+ years and we were promised publically by ICANN's board that we would be give first consideration for .shop.

We were an original applicant in 2000 for the .shop TLD. We have been told after our application completed and passed all vetting that our application was neither approved nor denied but in limbo. Initially it was told to us that it was in limbo until the next round of TLD's were release then in 2004 when it was determined that we had no significant community sponsor for our TLD so we were told again that we would have to wait until yet the next round expected in 2006.

Now 15 years after our initial application, we have followed each end every instruction provided by ICANN with dedication and the belief that if we did what ICANN asked then they would keep their word when they announced in a public meeting in 2000 that we would be given first consideration when the gTLD was to be released.

For the new gTLD round in 2012 almost 8 years was devoted to studying and coming up with how and why new gTLDs would be released.

This intense research and findings were finally published in August 8, 2007 by the Generic Names Supporting Organization entitled the Final Report – Introduction of New Generic Top-Level Domains (Final Report). This crucial report helped to summarize over seven (7) years of research, study, analysis and work by hundreds of members which represented hundreds if not thousands of hours or work. In this study they did a fantastic job of stating the Principles, Recommendations and Implementation Guidelines that should be followed when processing new GTLD applications.

The GNSO gave clear indication of what should be expected and why and even went as far as linking ICANN's Mission and Core Values to their reasoning. By utilizing this report, it would assist most of the BGC's consideration pertaining to the new gTLD process as this report reaches the core issues and provides simple resolutions, it is what the AGB was based on and can help to clarify many of the vague or unmentioned procedures missing from the AGB.

From this key document (located at http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm) a group was charged to develop the Applicant Guidebook which was to serve as **BASIC guidelines** for the new gTLD application process. For detailed guidelines the GNSO provided the TLD Final Report. It is an important distinction to understand that the Applicant Guidebook is just a guide which should always refer back to the report from the GNSO which in turn references ICANN's mission, core values, policies and procedures as well as the years of accumulated knowledge earned in past ICANN research and ICANN group meetings.

The document published by the GMSO was accepted and became ICANN's rules and regulations for the new gTLD process. This along with public statement from ICANN promising to assist applicants with the new gTLD process to ensure that everyone that applied and qualified would receive a new gTLD, barred the competition issue which was promised to be resolved fairly.

There has been several references in BGC's decisions that state "*the Guidebook (AGB) was extensively vetted by the ICANN stakeholder community over a course of years and included tens of versions with multiple notice and public comments….*" What the BGC may not fully

comprehend is that the GNSO's Final Report was what was vetted over the years. The AGB was developed based on the principals, procedures and recommendations of the Final Report.

The Applicant Guidebook has been maliciously manipulated where **words and sentences were changed without approval** between drafts which purposely distorted and fogged the procedures to allow for gaming by certain biased parties. You can review different versions of the AGB and look at the minutes and records of what was to be changed and easily identify the unauthorized changes. Therefore, again, it is essential to look at ICANN's Mission, Core Values, Policies and Procedures as well as the GNSO recommendations to consider the expected, proper and agreed upon procedures that the gTLD process should have followed.

Another important fact is that the **AGB does not supersede the GNSO's final report in any way**. The GNSO's final report consists of accumulated statements, rules and regulations that reflect ICANN's Mission, Core Values, Policies and Procedures which are the foundation of the structure, safety and security of the internet. It is also important to note that none of the Mission nor Core Values have been changed or altered which support's the GNSO's Final Report as a true and considerable reference which was what was presented to the applicants as enticement to apply for a new gTLDs. Again, many changes in the AGB occurred without the GNSO's knowledge and consent.

Please do not respond with Time Barred, Not in the Applicant Guidebook (as it is not required to be) or CPE Evaluation substantive issues as excuses to ignore or dismiss this request.

This request which should be backed up by the GNSO's Final Report as well as a multitude of letters to ICANN concerning issues including name similarity, name similarity disputes community consideration and preference as well as CPE evaluations. In other words, it is clearly spelled out how ICANN should treat and consider these requests. Responses such as Time Barred, not in the Applicant Guidebook and using the substantive disagreement with the CPE should be the furthest from the BGC's response. Instead we are urging the BCG to look at consider the fundamental issues this request is pointing out and requesting assistance with. It is very easy for the BCG to dismiss the issues raised with such responses – a fair, equitable and transparent course of action and open communication between parties prior to quick close ended decisions is in everyone's best interest.

It may be easily to say that the AGB replaced the Final Report but this simply is untrue. The Final Report is a representation of ICANN's mission and Core Values, these have not changed and are an active part of how ICANN should function and was published as to what was would be provided with the new gTLD application process.

Our History

As we have stated previously, we have done everything ICANN has instructed us to. We can provide any and all proof of the 15 years of work on this project while attending in excess of 30 ICANN meetings and paying whatever extreme amount of fees all because ICANN promised to make good on their commitment if we did. ICANN also publically announced that if an applicant did not qualify for any portion of this TLD round then they would provide assistance to help the applicant succeed, we need assistance, please help!

As we ask for assistance in the request, so it is also imperative to point out that we are not the only ones having issues and the internet's structure, security, and overall health is at stake.

If the BCG feels that it is not in their scope to assist us and the many others, then please provide an acceptable conduit on which these concerns can be raised and provide us with the information and reasonable time-frame to seek such actions.

ICANN now has the budget, staff and availability to ensure a fair and positive gTLD launch process.

4. Date of Inaction:

7/10/2015 – This is today's date since the inaction is still ongoing

5. On what date did you become aware of the inaction?

7/2/2015 through 7/10/2015 – When we were notified that there is no dispute resolution nor challenge processes for Community Priority Evaluation

6. Describe how you were materially affected by the inaction:

Issues where the GNSO's Final Report has not been followed

Commercial Connect, LLC's dotShop application has faced the following roadblocks which we are requesting assistance with. We have identified basic guidelines that should have been followed to award the .shop TLD to Commercial Connect and where ICANN has failed us. Commercial Connect, LLC has been denied revenue from ICANN's continual delays and imposing new and financially challenging obstacles all with the promise of awarding delegation to operate the .SHOP gTLD. Each and every delay causes substantial material financial harm.

1. **The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.**

   All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants *prior* to the initiation of the process. M1-3 & CV1-11.

   Transparency and predictable criteria is lost when ICANN makes applicants pay $22,000 to unknown CPE evaluators and refuses to provide their identity, their qualifications and rationale behind their choice. Then when inconsistent decisions are made they continue to refuse to provide details on the communications that have taken place with these secretive vendors which makes it practically impossible to provide defense. Since Vendors are to be considered an extension of ICANN and as previously suggested by other motions for reconsideration, the CPE panel is subject to the same transparency and disclosure as ICANN – it is imperative that the credentials of the panel members be made known along with the communications between ICANN and the panel so that

reasonable vetting and knowledge can be obtained if a dispute proceeding is necessitated.

The CPE panel established certain criteria early in the CPE determinations which later, in direct, opposition to those standards (created with .eco decision) scored other applicants such as .gay .music and .shop in the opposite manner. Inconsistency became apparent which proves that objective and measureable criteria was not used in direct conflict with M3 and CV6-9.

2. A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary. IG D

In order to be fair, transparent and non-discriminatory the 2000 application by Commercial Connect LLC for .shop should be honored. Since this application was stated by ICANN's legal department that it was neither approved nor denied and it passed all requirements in 2000, then it is still active and should hold priority in the TLD Application process. This along with the 2000 Board promising priority along with the 2008 GNSO report stating "first come, first served," are all affirmative reasons for granting Commercial Connect, LLC the .shop TLD application. Loss of operating income since 2000 (15 years) along with continued operating and legal expense that Commercial Connect, LLC has endured for the past 15 years are a unreasonable and simply unfair.

3. Community priority processed first IG F

ICANN's commitment to Community Priority has been integral since the 2004 gTLD rounds – this commitment was conveyed in the GNSO Final report mentioned above. This priority simply states that the community application are paramount to representing internet owners and communities and preference should be given to those applicants. This priority was meant to not only provide a mechanism for resolving contention but was also meant to provide these application preference in evaluation and processing.

The opposite has occurred – the community applications will be the last ones approved and ICANN's failure to follow the proper procedures especially in the statement "***Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, THAT CLAIM WILL BE TAKEN ON TRUST***" see statement 9 below.

By ICANN ignoring the string similarity issue they are allowing non-community gTLDs to be created which can and probably will mimic similar community based gTLDs adding immense confusion to all parties as to which string provide which services and representation. This has caused great harm to the Community Applicants as well as the internet as a whole.

4. Strings must not be confusingly similar. M1-3, CV1-6-11 & RFC 1519

In RFC 1591 it clearly discusses the concept of name space. "**Each of the generic TLDs was created for a general category of organizations.**"
http://www.ietf.org/rfc/rfc1591.txt

This issue has still not been address – with the continuing launch of gTLD's and proof showing that the number of registrations being dismally low, it supports the condition stated in RFC 1591 that gTLD's must be made for a category of organizations.

The name similarity issue which is to require scrutiny for TLDs which make look the same, sound the same, means the same or can be confused in any way with one another must be grouped together and only one gTLD would be allowed to exist.

Proof has been provided to this fact by multiple and significant ICANN community members including the GNSO urging ICANN and the gTLD committee to rectify this issue as issuing multiple random and similar gTLDs will only yield very small registrations which in turn would make sustainability unfeasible unless they become acquired by the much larger registries which is what we are seeing and which is the opposite of the previously bragged diversity that many promised the new gTLDs would yield.
Not only does the issue of smaller registrations and threatened sustainability issues arise but the issue of confusion from the internet public on which gTLD is used for what purpose which has a significant impact on the structure, security and stability of the internet.

gTLDs that were intended add security and/or functional value will be contended with others with no such assurances and the general public will be clueless on which string to use.

It is not too late to clean up this debacle and we urge some serious consideration to this issue. At the same point while we are requesting ICANN's to fix these issues we are also urging them to be responsive and do this in a quick and practical manner that will not delay applications that have been in process for over 15 years.

Ignoring this issue will not make it go away but make it exponentially worse – ICANN please step us and help the internet and its end users by addressing this issue sooner rather than later. It should not need to be stated that ICANN is charged with protecting the structure, security and stability of the internet.

5. **There must be a clear and pre-published application process using objective and measurable criteria. M3 & CV6-9**

We have clear and pre-published application process with clear and measureable criteria for the introduction of new gTLD when considering name similarity. All gTLDs would be evaluated by a linguistic panel who was to consider whether or not the strings were similar by asking if they looked the same, sounded the same, had the same or similar meaning, and/or could be confused in anyway by the average internet end user. This simply did not occur – the linguistic panel received incorrect instructions and ICANN made it impossible to object by significantly shortening the time to respond and/or object.

We simply were railroaded into accepting this huge blunder and **ICANN has received more letters on this concern that any other single issue** and they still have continued to ignore the issue and refuse to realize the implications this can have on the registry industry and the confusion it will continue to cause to the internet end-users.

Again we can provide details on this issue as well as copies of these letters if requested.

The string similarity dispute process was also flawed – they were provided no objective and measureable criteria to base their decisions on – the process was flawed and nothing was clear nor pre-published and it failed miserably. Inconsistent results and requesting only certain outcomes be evaluated instead of the entire process lends to discrimination and is simply not fair.

Finally the CPE Process should have never existed. It was clearly stated and committed to the public and applicants through the GNSO Final Report that Community Applicants would be "taken on trust." Even with this ICANN demanded smaller funded community applicants would have to pay a substantial fee to go through a Community Panel Evaluation to try to pass criteria that in no way were objective and measureable.

The BCG states in multiple Motions for Reconsideration that "It is expected that different panels will come to different conclusions with respect to different applicants." This simply is NOT acceptable – if the proper procedures were lined out, properly documented and above all properly understood, then the outcomes would be consistent between all experts on any given panel, nothing was to be left to chance. This flawed thinking is what adds to the confusion and frustration of the entire process. We see this same error in logic with the Similar String Objection process.

While it is not our place to instill rogue logic we do feel it pertinent to point out that no objective criteria should be left to speculation or opinion and most dangerously ignorance – it simply contradicts the term OBJECTIVE and leads to apparent and blatant biases as displayed in the myriad of inconsistent decisions that have been made by the CPE.

As outlined in the GNSO recommendation #9 - ***There must be a clear and pre-published process using objective and measurable criteria.*** *M3 & CV6-9*

If such a clear process that involved objective and measureable criteria existed, then we would expect all panels with any member to come up with similar if not exact results.

In the next section of this request I will detail my issues with our CPE results which the BCG may feel is substantive but what is important here is the lack of objective and easily measureable criteria, inconsistent decisions, some based on untrue statements, and not having a challenge process to refute the findings.

6. **Dispute resolution and challenge processes must be established prior to the start of the process. CV7-9.**

Just because there is no appeal process for the CPE evaluation doesn't mean that there should not be one.

There is no clear dispute resolution process with the gTLD committee not following the AGB by giving the Linguistic panel incorrect instructions

There is no clear dispute resolution process for inconsistent results from the name similarity dispute panel

There is no dispute resolution process for the CPE panel.

All of these require dispute resolution and challenge processes to be developed and implemented. They also must contain objective and measurable reviews completed by industry experts that fully understand the issues being decided upon.

7. **An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.**

   *Commercial Connect, LLC has not received any community objection from a substantial portion of the eCommerce community for neither or our two .shop applications and thus should not be mentioned or considered in any CPE process nor should be a rationale to reduce scoring in the CPE process.

8. **If there is contention for strings, applicants may[29]:**
   a. **i) resolve contention between them within a pre-established timeframe**
   b. **ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;**
   c. **iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.**

   Commercial Connect, LLC. should be awarded community priority in our applications based on trust as provided for in the GNSO Final Report.

9. **Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that *claim will be taken on trust* with the following exceptions:**
   a. **(i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application; and**
   b. **(ii) a formal objection process is initiated.**

   A distinction must be made between defining the term "Community" and determining whether or not an applicant belongs to and/or represents that community.

When discussing the term community it is important to understand the definition of what the definition of a community is. Simply put, ***a community is an identifiable group sharing common characteristics or interests and perceives itself as distinct in some respect from larger society within which it exists.***

Any group can be considered a community if it is identifiable, countable and the members of that community consider themselves part of said community. For the most part, membership this is self-acknowledgement.

As a whole the community applicants did an excellent job of defining their community. Once this is accomplished, the rest is to be taken on trust with a few restrictions as per the Final Report.

7. Describe how others may be adversely affected by the inaction

If left unchecked, similar TLD's will result in much lower registrations which will subject the new registry operators to sustainability issues which could allow the larger registry to absorb the smaller ones and become even larger thus defeating the initial intent of diversity and fairness.

It will cause the internet end users more confused and as to which gTLDs are community and represented gTLDs and which gTLD may be used to mimic and/or act like verified and secure gTLDs.

At least 84% of the community applicants have failed the CPE process and there is no way to find out what information was being considered and who made the determination. The applicants have no way to supplement, correct or provide additional information to the CPE panel to ensure accuracy and fairness and there is no appeal procedure as promised and guaranteed by Core Values 7 through 9.

8. Detail of Board Inaction

The BCG has seen numerous motions for reconsideration and have responded with various decision that did not consider the primary guidelines of the GNSO. In addition the Board has received countless letters asking for action to be taken to correct the similar string issue and no action has been taken. Finally the board is aware that the GNSO has committed to providing fair, transparent and non-discriminatory action, community priority, community applicant determination, String Similarity will not exist in the root, pre-published processes using objective and measureable criteria, dispute resolution and challenge processes.

When the GNSO, the group that ICANN has charged to research, define and set up policies and procedures for new gTLDs has to write letter to ICANN Board asking them to honor what was created and the Board refuses not only to react but also opted to not even respond to the issues, then the Board, who may not be aware of the far reaching impacts of the inaction, needs to become education, informed from non-biased parties and act quickly and with severity they deserve instead of ignoring the issues until another board or leader is in place or hope that they fade into obscurity.

CPE Issues with the .SHOP Application

While we feel that we should not have to be held to CPE panel decisions based on prior statements by ICANN in their GNSO Final Report on new gTLDs item 9, if ICANN allows the CPE panel to remains then ICANN must change the CPE Evaluation mechanisms to be based on easily clear cut objective and measureable criteria. Since these clear cut objective and measureable criteria are not in place prior to the application process, ICANN will have clearly failed on this process but can take steps to rectify this issue but the first step is admitting there is an issue.

Again, I wish to point out that no policies, procedure, mission, nor core values were changed for the Applicant Guidebook. Nothing replaced the GNSO Final Report – this the wording Final. This is the report that the AGB is based upon and what is contained in this report is binding and what was published to the world as what the new TLD process would base its principals and procedure upon. If procedures were to change than this report would have to have been modified but the GNSO did not change this report, they did not update it nor make it obsolete. In fact they wrote letters to ICANN's Board begging them to remember the conditions of this report since the GNSO was charged by ICANN to create the policies and procedures for the new gTLD program. Some of these letters urged ICANN to rectifying the name similarity issue.

Actions of the gTLD committee since that time also have not altered, changed or modified these guidelines. The new gTLD committee also has not replaced the GNSO nor should it be allowed to circumvent their highly researched and committed procedures.

As per ICANN policies it was stated that Community applicants would be "taken on trust" unless there was objections from a substantial portion of that community and that those substantial members had to be verified as to weed out for false objections – this the objection has to be identified and it has to be determined as to their standing and credibility in the community first and then the reason for objection to be considered second. Since no such formal objections existed for .shop, .music nor .gay then none of the corresponding CPE's should have included statements indicating that objections existed.

Additionally and simply put, **there is no need for our CPE based on item 9 in the GNSO Final Report**.

If it is found that a CPE is required, then a formal dispute and challenge process is required and needs to be established.

If the CPE panel is given consideration, it must be pointed out that many of the procedures, hiring and scoring mechanisms have developed after the pre-published application process began thus conflicting with Final Report Item #9, M3 & CV6-9 including the decision to keep the CPE panel and communication anonymous.

If the CPE panel is given consideration then we must object that clear cut objective and measureable criteria was not used. This is clearly evidenced by the BCG stating that they expected varying results simply because there were different panelists. This would not be expected and should not occur if objective and measureable criteria was established.

The CPE questions are not objective nor measureable – more importantly most communities that exist today including ICANN's community would not be able to prevail. This statement is supported by the

CPE Failures on strings such as .SHOP, .GAY and .MUSIC. In fact, ICANN's Community that has been active since the mid 90's would not get close to obtaining a passing score no matter what string ICANN should choose. Presently out of 24 CPE applicants – one did not elect to go through the process, three are still in process and one is pending which leaves 19 left of those 19 applicants only .ECO, .HOTEL and .OSAKA prevailed. 16 out of 19 failed the CPE – **How can the promise of trust to community applicants result in denying 84% of all applicants that applied?**

Finally if the CPE panel is given consideration then there must be a dispute resolution and challenge process which there is none as per GNSO Final Report Item 12, CV7-9.

Specific allegations of inappropriate conclusions

In our CPE Evaluation we scored a 5 out of 16 – however if you compare our responses to those of the .ECO CPE the exact same rational that was used for given points to .ECO was used for not giving points to .SHOP, .GAY and .MUSIC. Inconsistency is abound which explains the number of Motion for Reconsiderations received by the BCG on CPE evaluations.

The four basic criteria for the Community Priority Evaluation are as follows:

- **Community Establishment we scored 0 out of 5**
- **Nexus between the string and Community we scored 0 out of 4**
- **Registration Policies we scored 3 out of 4, and**
- **Community Endorsement we scored 2 out of 4**

Community Establishment
In short is there an established community that utilizes PCI for sale of good over the internet? We scored a zero even though we spent over a decade helping define, unite and providing education and assistance to such a community.

The CPE stated that it did not demonstrate sufficient delineation even though we provided a detailed way to actually count the number of eCommerce sites that are set up for PCI compliance and credit card acceptance which allows for a clear and certain count of the community who we claim to have represented. If we can count them, identify them and they support and agree with us in our endeavor then this community is certainly clear and a straight-forward. Second, these members all utilize and are aware of PCI compliance – they actually have to provide proof of such compliance so there is no question that the community member are aware of this fact and thus a cohesion of continuing to meet these obligations along with is a most certain awareness that they are members. The CPE actually states that based upon their research various entities in the proposed community do not show an awareness of being PCI compliant – If they asked someone whether or not they were PCI compliant and they responded that they did not know, then they certainly are not PCI compliant and not a member of our community. We hope you see the absurdity of these remarks as this is akin to asking someone if they have a drivers' license – if they don't know then almost certainly they are not a part of the driver's licensed community.

The CPE stated that we were not organized even though we provided physical proof including video, pictures, and proof of over 1000 supporters where we actually conducted in-person, face to face meetings with members of this community whereby we explained our concept for .shop – we made appearances at multiple internet conventions, developed support web sites, have formal boards are very organized. The only way a CPE panelist would state otherwise was if they were completely unware

of our efforts and accomplishments which apparently is the case and they made no effort to become educated. In addition the CPE states that there is no entity that is mainly dedicated to the community – well in fact both Commercial Connect, LLC and eCommerce World Retailers, Inc. are both dedicated to the community and the existence of both can easily be proved for a substantial period exceeding all ICANN's requirements for pre-existence and both have been instrumental world-wide in supporting eCommerce.

The CPE Panel claimed that we had no prior existence but we all know that we were an original applicant since 2000 and partially due to us not having an adequate community sponsor for the 2004 round we have worked with all know eCommerce trade Unions, etc. to help ensure that this community is well defined and understood. We have accomplished this over the past 11+ years and just because a certain panelist which we are not allowed the name us is unaware of our efforts is by no means indication that we have not existed for the past 15 years. We can easily provide tax returns to dispute this obvious misconception as well as a world published application for .SHOP in 2000.

The CPE panel concluded that the size of our community which has over $866 in revenues and represents over 80% of the world's economy was not considerable in size. The also felt that these entities had no knowledge that they were PCI Complaint Internet eCommerce operators.
The CPE panel also determined that eCommerce and PCI community has not existed since 2007 and that they are not aware of others in eCommerce which were PCI complaint.

Nexus
Trying to argue the fact that the word SHOP is connected to people buying items seems absurd but the .SHOP CPE says that there is no relation whatsoever. While the BCG may argue that this is a substantive issue, it is far more than this. What this does is prove how non-objective this question is. Everyone should agree whether or not shop a verb that means "to visit shops and stores for purchasing or examining goods" but we scored a zero on nexus.

This scoring does nothing to explain the amount of research spent on determining the best string for eCommerce. We spent years examining difference in languages, meanings utilizing various internet, language and eCommerce industry experts to determine the best string for the internet and there was a resounding conclusion that SHOP is the best universal word that had direct connotation to the actual act of eCommerce. Words such as store, buy, sell, sale, service simply did not translate well or have same meanings in multiple languages. Much research was perform by experts and it was determined that SHOP was word with the best NEXUS for eCommerce.

The use of word .SHOP to represent a community of shoppers who will be operating online "Shops" should be an acceptable use and correlation. We are simply astonished as the CPE giving us a 0 out of 4 for nexus relation between the TLD string .SHOP and the online Shopping community. This statement may surpass our String Similarity Dispute decision that found that .SHOP in Chinese did NOT have the same meaning as .SHOP in English. Was the CPE panelist and the ICDR Mediator the same person?

The CPE Panel stated that .SHOP does not match the name of the shoppers online nor is it a well-known term for Shoppers who have shops on the internet. If Shop is not a shorter form of Shoppers and the same as the action people perform as well as the actual site offered to provide goods and services, then a lot of significant supporters are in the same situation and that is just simply astounded by this finding.

The CPE panel did not ask for clarifying questions on items that received less than perfect even though ICANN committed to assist in resolving defects in our applications. The clarifying questions that I was asked for ignored my response and made no attempt to explain as to why.

Registration Policies
The CPE panel goes on to state that the name selection rules are not consistent with the articulated community – In other words they feel that the People offering SHOPs on the Internet are not consistent with strings meaning of SHOP.

A pertinent example is when the CPE panel concluded that the eCommerce (PCI) community simply did not exist. Then in another section they indicated that they had received an objection from a considerable portion of my community (which does not exist?). How can there be a member of a non-existent community? In addition, there was no substantial objection as defined by ICANN and the Final Report. How can the CPE state such an untruth and based their scoring on it? See Part IG P of the Final Report.

Relevant objection was not filed as required but CPE went against established guidelines by considering such a non-qualifying objection.

Community Endorsement
The CPE gives a 2 out of 4 for community endorsement. We provided third party verifiable proof of over 1000 separate in-person and face-to-face obtained support which is considerably more than any other applicant for a new gTLD. Not only is the count of supporters more than any other applicant but the representation of over 80% of the gross financial influence was also obtained. If this is not proof of community endorsement, please provide an application that passed the CPE and had better statistics.

CPE ignored our community support whereby a neutral third party documented and provided the documentation of over 1,000 supporters all representing their companies – no verifications were performed and our review ignores them all.

In the CPE it show that there were 7 comments, 17 attachments, 6 pieces of correspondence were all that was received and verified even they asked a clarifying question and evidence of the 1,000+ supporters which we did provide and they decided not to count these essential community members and supporters which we assume is out of shear laziness and refusal to confirm the vast number.

The CPE mentioned one opposition and reduced our score by 1 for this letter. No qualified and formal entity that represented a substantial portion of our community filed any formal objections therefore no objection should be consider as per the Final Report and thus the one point deducted is completely inappropriate. We have not been provided any such objection and are not aware of any objections since we filed our first application in 2000 – There has been plenty of time for objections to be presented and they simply do not exist.

A proper CPE panel must:

Understand the criteria which have to be objective and measureable and not open to interpretation, speculation or opinion.
Must have knowledge of the domain name industry and its evolution of community throughout the gTLD process as well as thoroughly understand the GNSO's Final Report and rationale for its Policies, Procedures and Guidelines
Understand ICANN's and the GNSO's stipulations on what a community is and how objection to that community will be handled
Ask for clarification and assist in success of the application as per GNSO and ICANN's policies and procedures

Procedural things the CPE did wrong

- Wrote letters of verification with expired dates of when to reply.

- Ignored over 1,000 community supporters and members even though we provided independent proof of their support.

- Stated in their denial that a substantial community objection had been received when no such objection was ever file or existed.

- Made several false statements in regard to who our community was, who belonged to our community and interviewed people not included in our community thinking that they were community members which clearly shows their lack of understanding and comprehension of the definition of our community.

9. What we are asking ICANN to do

a. Award the .shop application to CC based on their original application which is still active and should have precedence on any other newer application and is immune to the newest gTLD processes.

b. Award the .shop application to CC based on the 2000 and 2008 application – understanding that it has claimed community standing and should have been trusted as a community applicant that has a clearly delineated community that does exist.

c. Review and fix the issue with name similarity especially with any and all similar and confusing eCommerce strings which include

d. The board should place into a procedure to review the substantive findings of the CPE.

e. The board should have a challenge and/or review process for the CPE findings.

f. The board should set in place a formal objection and/or appeal mechanism for the CPE determinations.

g. The board should direct how a community applicant can proceed to delegation without passing CPE as stated in the AGB.

10. Please state the grounds under which you have the standing and right to assert this Request.

We are an applicant for a gTLD both in 2000 and under ICANN's new gTLD program. We have applied on the basis that .SHOP is a "community" application as defined in the program.

11. Are you bringing this Request on behalf of multiple persons or entities?

NO

Appendix

A. Summary of CPE Letter to ICANN and Panel 20150325
B. CPE Response Pics of Community Involvement
C. CPE Letter to ICANN and Panel – Addl Letters of Support
D. CPE Letter to ICANN and Panel 20150313
E. Supporters Provided to CPE Panel 20150325 redacted

RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-13

24 AUGUST 2015

The Requester, Commercial Connect, LLC ("Requester"), seeks reconsideration of the Community Priority Evaluation ("CPE") panel's report, and ICANN's acceptance of that report, finding that the Requester did not prevail in CPE for the .SHOP string ("CPE Report"). The Requester also challenges various procedures governing the New gTLD Program, as well as the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for its Application.

I. Brief Summary.

The Requester submitted a community-based application for the .SHOP gTLD ("Application"). The Requester's Application was placed into a contention set with eight other applications for .SHOP, two applications for .SHOPPING, and one application for .通販 (Japanese for "online shopping") (".SHOP/SHOPPING Contention Set"). Since the Requester's Application is community-based, the Requester was invited to, and did, participate in CPE. The Application did not prevail in CPE. As a result, the Application was placed back into the contention set.

The Requester claims that the CPE panel considering its Application ("CPE Panel"): (i) violated established policy or procedure in its consideration of the expressions of support for and opposition to the Requester's Application; and (ii) improperly applied the CPE criteria. The Requester also challenges various procedures governing the New gTLD Program including, among other things, the String Similarity Review process and the adjudication of various string

confusion objections, which ultimately resulted in the composition of the .SHOP/.SHOPPING Contention Set.

The Requester's claims are unsupported. First, all of the issues raised by the Requester are time-barred. Second, as to the Requester's challenge to the CPE Report, the Requester has not demonstrated that the CPE Panel acted in contravention of any established policy or procedure in rendering the CPE Report. The CPE Panel evaluated and applied the CPE criteria in accordance with all applicable policies and procedures, including but not limited to its consideration of the expressions of support for and opposition to the Requester's Application. The Requester presents only its substantive disagreement with the CPE Report, which is not a basis for reconsideration. Similarly, the Requester has not demonstrated a basis for reconsideration with respect to the other issues it raises regarding: (a) the procedures set forth in the Guidebook; (b) the outcome of the String Similarity Review; and (c) the outcome of its string confusion objections. The BGC therefore recommends that Request 15-13 be denied.

II. Facts.

A. Background Facts.

In 2000, the ICANN Board adopted a measured and responsible application process for the introduction of new gTLDs.[1] The Requester submitted an application for .SHOP during this "proof-of-concept" round, but the .SHOP string was not approved at that time.

In 2012,[2] as part of the New gTLD Program, the Requester submitted a community-based application for .SHOP. Section 1.5.1 of the Guidebook provides that because the Requester applied for .SHOP in the 2000 proof-of-concept round but was not awarded the string at that

[1] ICANN TLD Application Process: Information for Applicants, *available at* http://www.icann.org/en/tlds/tld-application-process htm

[2] The Requester states that it submitted its application in 2008. Request, § 9, Pg. 14. However, applications were not accepted in connection with the New gTLD Program until 2012. We assume this was a clerical error and that the Requester is referring to the .SHOP application it submitted in 2012.

time, it was eligible for a US$86,000 credit towards its New gTLD Program application fee.[3] On 15 June 2012, the Requester received a US$86,000 offset for its .SHOP Application. Per the Guidebook, acceptance of the US$86,000 was subject to "confirmation that the [Requester] was not awarded any TLD string pursuant to the 2000 proof-of-concept application round and that the [Requester] has no legal claims arising from the 2000 proof-of-concept process."[4]

As provided by the Guidebook, a String Similarity Review was conducted for all 1,930 new gTLD applications in order to determine whether any strings were so visually similar as to create a possibility of user confusion and to ensure that any such strings were placed into contention sets.[5] In February 2013, following String Similarity Review, the Requester's Application was placed into a contention set with eight other applications for .SHOP.

The Requester then proceeded to file 21 separate string confusion objections against applicants for strings that the Requester asserted "so nearly resemble[d] [.SHOP] that [they were] likely to deceive or cause confusion" to the "average, reasonable Internet user."[6] Among the applications against which the Requester filed objections were applications for .BUY, .ECOM, .SALE, .SHOPPING, .SHOPYOURWAY, and for strings representing words such as "web shop" in languages such as Chinese, Japanese, and Arabic.[7]

All but two of the Requester's objections were overruled. The Requester's string confusion objection to an application for .SHOPPING was sustained, as was its string confusion objection to an application for .通販 (Japanese for "online shopping").[8] The latter determination

[3] Guidebook, § 1.5.1.
[4] *Id*. at § 1.5.1.
[5] *Id*. at § 2.2.1.1.
[6] Guidebook, § 3.5.1.
[7] *See* http://newgtlds.icann.org/en/program-status/odr/determination.
[8] *See* Determination on ICDR Case No. 50 504 T 00267 13, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-1631-16988-en.pdf; Determination on ICDR Case No. 50 504 T 00261 13, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1318-15593-en.pdf

was perceived as inconsistent with another expert determination overruling the Requester's string confusion objection to an application for the .购物 gTLD (Chinese for "shop").[9]

Following an extensive process that included the evaluation of two reconsideration requests,[10] a report by ICANN's staff, and a public comment period, on 12 October 2014, the NGPC directed ICANN staff to establish a very limited review process, whereby the ICDR would appoint "a three-member panel to re-evaluate the materials presented, and … render a Final Expert Determination [in .SHOP/.通販 and one other string confusion proceeding]" ("NGPC Resolution").[11] On 18 August 2015, the three-member Final Review Panel issued its Final Expert Determination which states that "this Final Review Panel reverses the Expert Determination and finds that the Applicant has prevailed and the Objection is dismissed."[12].

Currently, the relevant contention set consists of nine applications for .SHOP (including Requester's Application), two applications for .SHOPPING, and one application for .通販 (Japanese for "online shopping").

The Requester elected to participate in CPE, and on 21 May 2105, the CPE Panel issued the CPE Report, determining that the Requester's Application did not prevail in CPE.

On 10 July 2015, the Requester filed Reconsideration Request 15-13 seeking

---

[9] *See* NGPC Resolutions 2014.11.07.NG01-02, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-11-07-en (noting the perceived inconsistency).

[10] On 4 September 2013, Amazon E.U. S.a.r.l ("Amazon"), the applicant for 通販 (Japanese for "online shopping"), sought reconsideration of the expert determination sustaining The Requester's objection to Amazon's application (a*vailable at* https://www.icann.org/en/system/files/files/request-amazon-04sep13-en.pdf). On 5 September 2013, The Requester sought reconsideration of the expert determination overruling its objection to the .购物 gTLD (Chinese for "shop")(a*vailable at* https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf). Both reconsideration requests were denied, but the BGC recommended (and the NGPC accepted the recommendation) that the ICANN staff prepare a report regarding how to address a small number of perceived inconsistent string confusion objection determinations. *See* NGPC Resolutions 2014.11.07.NG01-02, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-11-07-en.

[11] *See* Rationale for NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.

[12] http://newgtlds.icann.org/sites/default/files/drsp/21aug15/determination-2-1-1318-15593-en.pdf

reconsideration of the CPE Report, and challenging various procedures governing the New gTLD Program, as well as the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for its Application.

B. Relief Requested.

The Requester asks that ICANN:

1. Award .SHOP to the Requester because "it has claimed community standing and should have been trusted as a community applicant";[13]

2. Award .SHOP to the Requester "based on [the Requester's] original application [from 2000]," which the Requester asserts is "still active" and which "should have precedence over any other newer application" submitted as part of the New gTLD Program;[14]

3. "Review and fix issues with string similarity especially with any and all similar and confusing eCommerce strings;"[15]

4. "[S]et in place a formal objection and/or appeal mechanism for the CPE determinations;"[16] and

5. "Direct how a community applicant can proceed to delegation without passing CPE."[17]

III. The Relevant Standards for Evaluating Reconsideration Requests and Community Priority Evaluation.

A. Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[18] The Requester challenges both staff and Board action.

---

[13] Request, § 9, Pg. 14.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC[19] agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws. Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and in this case the NGPC agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.[20]

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the Economist Intelligence Unit ("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.[21]

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the CPE Panel violated any established policy or procedure.

B. Community Priority Evaluation.

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – a firm selected to perform CPE – has published supplementary guidelines ("CPE

(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

[19] New gTLD Program Committee.

[20] Bylaws, Art. IV, § 2.

[21] *See* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc, BGC Recommendation on Reconsideration Request 13-5.

Guidelines") that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.[22]

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.[23] CPE is performed by an independent panel appointed by the EIU.[24] A CPE panel's role is to determine whether the community-based applicant fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive a minimum of 14 points on the scoring of foregoing four criteria, each of which is worth a maximum of four points

IV. Analysis and Rationale.

The Requester challenges the "correctness" of the CPE Report, as well as various procedures governing the New gTLD Program, the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for its Application. As explained below, all of the issues raised by the Requester are time-barred. Further, insofar as the Requester is challenging the CPE Report, the Requester has not demonstrated any misapplication of any policy or procedure by the CPE Panel in rendering the CPE Report. The Requester instead only presents its substantive disagreement with the scoring and analysis in the CPE Report, which is not a basis for reconsideration. Similarly, the Requester has not demonstrated a basis for reconsideration with respect to the other issues it raises regarding the procedures set forth in the Guidebook or the processing of its Application.

A. Reconsideration Request 15-13 Is Time-Barred

[22] For CPE Guidelines see http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.
[23] Guidebook, § 4.2.
[24] *Id*. at § 4.2.2.

Reconsideration requests must be filed within 15 days of "the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action."[25] The Requester seeks reconsideration of the CPE Report finding that the Requester's Application did not qualify for community priority. The CPE Report was published on 21 May 2015. Thus, any reconsideration request challenging the CPE Report must have been filed by 5 June 2015. The Requester, however, did not file Request 15-13 until 10 July 2015, over a month after the filing deadline.

Request 15-13 also challenges certain procedures set forth in the Guidebook, including the fact that CPE exists at all, and the absence of a substantive appeals process for CPE determinations. However, the current Guidebook was adopted in 2012, years before the Requester filed Request 15-13. Finally, although not quite clear, it seems that the Requester is challenging the outcome of the String Similarity Review and string confusion objections that resulted in the .SHOP/.SHOPPING Contention Set. However, the .SHOP/.SHOPPING Contention Set was constituted in its present form in 2014.[26] Insofar as Request 15-13 challenges Guidebook procedures, the String Similarity Review, or the adjudication of the Requester's string confusion objections, those challenges are time-barred by years.

The Requester provides no explanation for its delay in filing this reconsideration request. Request 15-13 is untimely, and on that basis alone, the BGC recommends that Request 15-13 should be denied.

B. No Reconsideration is Warranted with Respect to the CPE Report.

[25] Bylaws, Art. IV, § 2.5(b).

[26] The Requester filed a timely reconsideration request seeking reconsideration of the expert determination in one of its string confusion objections. The NGPC denied that reconsideration request on 7 November 2014. *See* https://www.icann.org/resources/pages/13-10-2014-02-13-en.

The Requester challenges the determination of the CPE Panel that its Application did not qualify for community priority. However, the Requester has demonstrated no violation of any established policy or procedure by the CPE Panel.

1. The Requester's Claim that the CPE Panel Violated Applicable Policy or Procedure is Without Support.

The Requester raises several issues related to the CPE Panel's consideration of the expressions of support for and opposition to its Application. Specifically, the Requester claims that the CPE Panel failed to consider documented support for the Application, sent validation letters containing errors to the Requester's supporters, and erred when it found that the Application had received opposition from a relevant entity. None of the Requester's claims are supported.

First, the Requester claims that the CPE Panel did not consider "third party verifiable proof of over 1000 separate in-person and face-to-face obtained support."[27] However, the fourth CPE criterion, "Community Endorsement," calls for CPE panels to assess a community's "documented" support for and opposition to a community-based application.[28] In assessing that support and opposition, the CPE panel considers "application comments on the application" as well as "correspondence (letters of support or objection related to the application)."[29] To be considered, the written documentation of support or opposition must "contain a description of the process and rationale used in arriving at the expression of [support or opposition]."[30]

Here, the Requester provided the CPE Panel only with a spreadsheet containing the names and contact information of alleged supporters. The Requester never submitted written documentation of support that included "a description of the process and rationale used in

[27] Request, § 8, Pg. 13.
[28] Guidebook, § 4.2.3.
[29] CPE FAQs, Pg. 4, *available at* http://newgtlds.icann.org/en/applicants/cpe.
[30] CPE Guidelines, Pgs. 18, 20.

arriving at the expression of [support or opposition],"[31] even after receiving a clarifying question from the CPE Panel asking for such documentation.[32] Having failed to submit the required documentation, the Requester has not presented grounds for reconsideration with respect to this issue.[33]

Second, the Requester argues that the CPE Panel sent validation letters with "expired dates of when to reply" to the Requester's supporters.[34] In fact, only one validation email sent by the CPE Panel had a typographical error in the form of an incorrect "reply-by" date. The typographical error was discovered and corrected in subsequent validation emails to other supporters. Importantly, the recipient of the single verification email with the typographical error did respond and verified its letter of support for the Requester, which the CPE Panel considered. Because the CPE Panel verified and considered the supporter's letter, the typographical error (which was corrected) had no effect on the CPE scoring of the Application. As such, the Requester has not demonstrated that the CPE Panel violated any established policy or procedure in its validation and consideration of letters of support for the Application.

Third, the Requester disputes the CPE Panel's determination that there was "relevant opposition" to the Application from a "multinational company" that is "within the community explicitly addressed by the application," and that the opposition "relat[ed] to the [Requester's] right to regulate a namespace in which the opponent has a place."[35] The Requester argues that "[n]o qualified and formal entity that represented a substantial portion of our community filed

[31] *Id*.
[32] CPE FAQs at 4-5 (CPE panels may submit clarifying questions to applicants, asking them, among other things, to clarify issues relating to community support or opposition).
[33] CPE Guidelines, Pgs 17-18.
[34] *Id*., § 8, Pg. 14. CPE panels "will attempt to validate all letters" submitted in support of or in opposition to an application "to ensure that the individuals who have signed the documents are in fact the sender, have the authority to speak on behalf of their institution, and that the panel clearly understands the intentions of the letter." *See* CPE FAQs, *available at* newgtlds.icann.org/en/applicants/cpe/faqs-31oct13-en.pdf.
[35] CPE Report, Pgs. 8-9.

any formal objections."

Contrary to what the Requester asserts, a multinational corporation did submit an application comment opposing the Application.[36] That opposition was verified by the CPE Panel in accordance with established procedure. Insofar as the Requester is claiming that the corporation's opposition should not have been considered, its argument simply constitutes a substantive disagreement with the CPE Panel's determination that the corporation's objection comprised "relevant opposition," and does not demonstrate a violation of established policy or procedure.

The Requester has not stated a basis for reconsideration with respect to the CPE Panel's consideration of the expressions of support for and opposition to the Application.

2. The CPE Panel Applied the CPE Criteria in Accordance With Established Policies and Procedures.

The Requester objects to the CPE Panel's decision to award only five of the possible 16 points to the Application. As noted above, the reconsideration process does not call for the BGC to evaluate the CPE Panel's substantive conclusion, but only whether the CPE Panel (or ICANN staff) violated any established policy or procedure. As discussed below, insofar as the Requester claims that the number of points awarded by the CPE Panel for various criteria was "wrong," the Requester does not claim that the CPE Panel violated established policy or procedure, but instead challenges the substantive determinations of the CPE Panel. That is not a basis for reconsideration.[37]

[36] *See* https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/8303.

[37] In addition to its objections to the scoring of each CPE criterion, the Requester generally objects that the CPE Report was inconsistent with other CPE panel reports regarding entirely different applications. *See* Request, § 6, Pg. 5. However, the Requester provides no support for this argument, other than the conclusory statement that "[t]he CPE Panel established criteria early in the CPE determinations which later, in direct opposition to those standards (created with [the] .eco decision) scored other applicants such as .gay .music and .shop in the opposite manner." *Id*. Again, in the absence of a demonstrated violation of policy or procedure, the Requester's substantive disagreement with the CPE Report is not a basis for reconsideration.

a. The CPE Panel Applied the First CPE Criterion in Accordance With Established Policies and Procedures.

The Requester claims that the CPE Panel improperly awarded the Requester's Application zero out of four points on the first criterion, which evaluates "the community as explicitly identified and defined according to statements in the application" through the scoring of two elements—1-A, delineation (worth two points), and 1-B, extension (worth two points).[38]

i. CPE Element 1-A ("Delineation").

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the delineation element, an application must identify a "clearly delineated, organized, and pre-existing community." The Guidebook defines community as "implying more [] cohesion than a mere commonality of interest," and requiring "an awareness and recognition of a community among its members."[39] Section 4.2.3 also sets forth further guidelines for determining delineation. In awarding zero out of two points for element 1-A (delineation), the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines.[40]

The CPE Panel found that while the Application identified a "clear and straightforward membership," it did not "have awareness and recognition of a community among its members" because the "proposed community encompasses a very large and growing field of diverse and geographically dispersed online retailers."[41] The CPE Panel also found that the community defined in the Application had neither "at least one entity mainly dedicated to the community" nor "documented evidence of community activities," noting that the Requester itself "acknowledge[d] that the proposed community was not organized, and that [the Requester] has

[38] Guidebook, § 4.2.3; *see also* Request, § 8, Pgs. 11-12.
[39] Guidebook, § 4.2.3.
[40] CPE Report, Pg. 1-4.
[41] *Id*., Pg. 2.

sought to organize the proposed community members. . . ."[42] Finally, the CPE Panel found that the community was "construed to obtain a sought-after generic word as a gTLD string," which the CPE Panel viewed as supporting the conclusion that the relevant community had not been active prior to September 2007.[43]

The Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 1-A. Instead, the Requester simply objects to the CPE Panel's substantive conclusion, arguing that the community does have cohesion because it consists of online retailers who use Secured Socket Layer ("SSL") certificates.[44] However, the CPE Panel specifically noted that "[w]hile the application's reliance on SSL certificates delineates a subset of retailers, . . . [u]se of SSL [] is not sufficient to ensure that all entities using it are aware of one another as a community, and that the proposed community coheres as per the [Guidebook]."[45] While the Requester may disagree with the CPE Panel's conclusion, such disagreement is not a basis for reconsideration.

The Requester further argues that its own efforts to organize a community of online retailers dates back to 2000, and that those efforts demonstrate both that there is an entity mainly dedicated to the community and that the community existed prior to September 2007.[46] However, the CPE Panel found that the Requester's reliance on its own efforts to organize the community actually demonstrated that the community was not in fact pre-existing.[47] The Requester's arguments reflect only substantive disagreement with the CPE Panel's finding, and are not a proper basis for reconsideration.

[42] *Id*., Pg. 3.
[43] *Id*., Pgs. 3-4.
[44] Request, § 8, Pg. 11.
[45] CPE Report, Pg. 2.
[46] Request, § 8, Pg. 11-12.
[47] CPE Report, Pg. 3.

ii. CPE Element 1-B ("Extension").

The Requester also objects to the CPE Panel awarding its Application zero out of two points on element 1-B (extension). To receive a maximum score for the extension element, an application must identify a "community of considerable size and longevity."[48] In order for a community to be of considerable size or to demonstrate longevity, it must in fact be a community (*i.e.*, demonstrate "awareness and recognition of a community among its members").[49]

The Requester does not identify any policy or procedure that the CPE Panel violated in scoring element 1-B. In awarding zero out of two points for element 1-B (extension), the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines. In particular, the CPE Panel found that the defined community was of considerable size, but concluded that it did not meet the size requirement because it was not in fact a community (*i.e.*, did not demonstrate the requisite awareness and recognition of a community).[50] The Requester erroneously argues that the CPE Panel determined that the community as defined in the Application was not of considerable size.[51]

The CPE Panel also found that the relevant community as defined in the Application could not demonstrate longevity because the proposed community was "construed to obtain a sought-after generic word as a gTLD" and thus "d[id] not meet the [Guidebook's] standards for a community."[52] Here, the Requester points to its own efforts to organize the community, which purportedly commenced "11+" years ago, arguing that such efforts demonstrate longevity.[53]

---

[48] Guidebook § 4.2.3.
[49] *Id*.
[50] CPE Report, Pg. 4.
[51] Request, § 8, Pg. 12.
[52] *Id*.
[53] Request, § 8, Pg. 12.

However, this simply demonstrates the Requester's substantive dispute with the CPE Panel's conclusion that the Requester's proposed community could not demonstrate longevity because it was organized and "construed to obtain a sought-after generic word as a gTLD."[54] The Requester's substantive disagreements with the CPE Panel's findings are not a proper basis for reconsideration.

b. The CPE Panel Applied the Second CPE Criterion in Accordance With Established Policies and Procedures.

The Requester claims that the CPE Panel improperly awarded the Application zero out of four points on the second criterion, which evaluates "the relevance of the string to the specific community that it claims to represent" through the scoring of two elements—2-A, nexus (worth three points), and 2-B, uniqueness (worth one point).[55] To receive a maximum score for element 2-A, the applied-for string must "match[ ] the name of the community or [be] a well-known short-form or abbreviation of the community name."[56] To fulfill the requirements for element 2-B, a string must have "no other significant meaning beyond identifying the community described in the application."[57]

In awarding zero out of four points for the second criterion, the CPE Panel accurately described and applied the Guidebook scoring guidelines, and scored the mandatory questions listed in the CPE Guidelines.[58] The Application defines the community as "eCommerce operators that directly sell to the general public on the internet."[59] The CPE Panel reviewed that definition and found that, because the Application focused on the "e-commerce community," the .SHOP string: (1) "does not *match* the name of the community as defined in the application";

[54] *Id*., § 8, Pgs. 11-12; CPE Report, Pg. 4.
[55] Guidebook, § 4.2.3.
[56] *Id*.
[57] Guidebook, § 4.2.3.
[58] CPE Report, Pgs. 4-5.
[59] Requester's Application, § 20(d), *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/307.

and (2) "over-reaches substantially beyond the [Requester's] proposed community . . . because the string .SHOP identifies both online (*i.e.*, e-commerce) as well as brick-and-mortar entities that sell goods and services."[60]

The Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring the second criterion. Rather, the Requester argues that the scoring does not reflect the "amount of research spent on determining the best string for eCommerce" and that "[t]he use of the word .SHOP to represent a community of shoppers who will be operating online 'Shops' should be an acceptable use and correlation."[61] Again, the Requester's disagreement with the CPE Panel's finding is not a proper basis for reconsideration.

c. The CPE Panel Applied the Third CPE Criterion in Accordance With Established Policies and Procedures.

The Requester claims that the CPE Panel improperly awarded the Application three out of four points on the third criterion, which evaluates an applicant's registration policies through the scoring of four elements—3-A, eligibility (worth one point); 3-B, name selection (worth one point); 3-C, content and use (worth one point); and 3-D, enforcement (worth one point).[62]

The Requester challenges the CPE Panel's evaluation of criterion 3-B, name selection. To receive a maximum score for the name selection element, an applicant's policies must "include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD."[63] In awarding zero out of one point for element 3-B (name selection), the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines.[64]

[60] CPE Report, Pg. 5.
[61] Request, § 8, Pg. 12.
[62] *Id*.
[63] *Id*.
[64] CPE Report, Pg. 6.

The CPE Panel found that the Application "d[id] not directly refer to [the Application's] community-based purpose in discussion of name selection rules, nor [were] they implicitly based on the community-based purpose of the applied for TLD, which [was] to 'aid in [] development of a safer, cheaper, and more secure platform for eCommerce . . . .'"[65] The CPE Panel also noted that the Application's name selection rules in fact contained only technical requirements that were "the same as the minimum requirements for any second level domain in a gTLD."[66]

The Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 3-B. Rather, the Requester mischaracterizes the CPE Panel's conclusion, stating that the CPE Panel "fe[lt] that the [p]eople offering SHOPs on the Internet are not consistent with the strings meaning of SHOP."[67] As discussed, the CPE Panel's determination was based on its finding that the Application's name selection rules contained only technical requirements and were not based on the community-based purpose of the Application.[68] As such, the Requester has not stated a basis for reconsideration with respect to the CPE Panel's scoring of element 3-B.[69]

C. The Requester Is Not Entitled to Priority Based Upon Its Earlier Application for .SHOP.

The Requester submitted an application for .SHOP during ICANN's proof-of-concept round in 2000. The Requester was not awarded a TLD at that time, and now argues that because it applied for .SHOP in 2000, it should be entitled to priority over all applications in the

[65] *Id*.
[66] *Id*.
[67] Request, § 8, Pg. 10.
[68] CPE Report, Pg. 6.
[69] The Requester addresses the fourth CPE criterion, "Community Endorsement," only insofar as the Requester challenges the CPE Panel's consideration of the expressions of support for and opposition to the Requester's Application. As discussed above, The Requester does not state a basis for reconsideration with respect to that issue.

.SHOP/.SHOPPING Contention Set, which were all submitted as part of the New gTLD Program.[70]

The Requester points to no policy or procedure that would entitle it to priority over other applicants for .SHOP. To the contrary, on 15 June 2012, the Requester received a US$86,000 offset to its New gTLD Program application fee as a result of its previous application for .SHOP in 2000. As provided in the Guidebook, acceptance of that credit was subject to "confirmation that the [Requester] was not awarded any TLD string pursuant to the 2000 proof-of-concept application round and that the [Requester] has no legal claims arising from the 2000 proof-of-concept process."[71]

The Requester's argument is not a basis for reconsideration.

D. The Requester's Other Challenges to the Guidebook's CPE Procedures Do Not Warrant Reconsideration.

The Requester raises several other issues regarding the application review procedures set forth in the Guidebook, arguing, among other things, that: (a) CPE should not be required at all; (b) the Guidebook improperly fails to provide an appeals mechanism for CPE panel determinations; and (c) the Guidebook does not conform to the recommendations of ICANN's Generic Names Supporting Organization ("GNSO").[72] As discussed above, any challenge to the procedures set forth in the Guidebook are time-barred. Furthermore, in challenging the approval of the Guidebook, the Requester seeks reconsideration of Board action but does not demonstrate, as it must, that the Board either failed to consider material information or relied on false or inaccurate material information before approving the New gTLD Program and the Guidebook.[73]

[70] Request, § 9, Pg. 14.
[71] Guidebook, § 1.5.1.
[72] Request, § 3, Pgs. 2-3; *id*., § 8, Pgs. 10.
[73] Bylaws, Art. IV, § 2.2.

As detailed in the Board's Rationales for the Approval of the Launch of the New gTLD Program, the Guidebook procedures—including the absence of an appeals mechanism for CPE panel determinations and other determinations by third-party evaluators in the context of the New gTLD Program—were adopted by the ICANN Board only after years of rigorous policy development and implementation that included extensive review and analysis by ICANN, as well as input and comment from legal and arbitration experts, numerous ICANN constituents and Internet stakeholders, and community members from around the world.[74] The current version of the Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts.[75] If the Requester had concerns related to these issues, it should have pursued them at the time through the available accountability mechanisms, not years later, only after receiving the CPE Report with which it disagrees.[76]

The Requester also argues that CPE should not be required at all, because the GNSO's recommendation was that an application's assertion of community representation should be "taken on trust."[77] Again, the Requester fails to show how the existence of CPE is a basis for reconsideration. Furthermore, the Requester misreads the language of the GNSO's recommendation. Specifically, the GNSO's recommendation was that:

> Where an applicant lays any claim that the TLD is intended to support a particular community such as a *sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions:*
>
> *(i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application*; and

[74] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program ("ICANN Board Rationales") at Pgs. 66-67, *available at* .
[75] *See* Guidebook, Cl. Ex. RM-5, Preamble.
[76] Bylaws, Art. IV, § 2.5 (15-day limitation period for reconsideration requests); *see also Booking.com v. ICANN*, Final Declaration, ¶ 30 ("[T]he time has long since passed" for parties to seek review of the Guidebook procedures); *available at* https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf
[77] Request, § 6, Pgs. 7, 8-9.

(ii) a formal objection process is initiated.[78]

In accordance with this recommendation, the Guidebook provides that "[e]valuation of an applicant's designation as community-based will occur only in the event of a contention situation that results in a community priority evaluation."[79] The community-based applicant must elect to undergo CPE if it seeks priority over other competing applications for the same string.[80]

Reconsideration is not appropriate because the Requester has not demonstrated that the Board failed to consider material information or relied on false or inaccurate material information in approving the Guidebook, which provided for CPE and included no appeals mechanism for CPE results.

D. The Requester Has Not Stated a Basis for Reconsideration with Respect to the String Similarity Review and the Determinations on String Confusion Objections that Resulted in the .SHOP/.SHOPPING Contention Set.

The Requester asks that the Board "[r]eview and fix the issue with name similarity especially with any and all similar and confusing eCommerce strings."[81] The Requester appears to claim that applications for various strings other than .SHOP should be included in the Requester's contention set because, in the Requester's view, "issuing multiple random and similar gTLDs will only yield very small registrations [on each gTLD] which in turn would make sustainability unfeasible."[82] Although Request 15-13 is unclear, we understand the Requester to make two different challenges in this respect. First, the Requester appears to challenge the Board's adoption of the String Similarity Review and string confusion objections

[78] GNSO Final Report on the Introduction on New Generic Top Level Domains, Recommendation IG H *available at* http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07 htm.
[79] Guidebook § 1.2.3.2.
[80] *Id*.
[81] Request, § 9, Pg. 14.
[82] Request, § 6, Pg. 6. The Requester does not specify the other strings, but appears to be referring to strings against which it filed String Confusion Objections, such as SALE, .ECOM, .BUY, .SHOPYOURWAY, and for strings representing words such as "web shop" in languages such as Chinese, Japanese, and Arabic.

procedures. Second, the Requester appears to challenge the actions of third-party evaluators and the Board with respect to: (1) the String Similarity Review performed for the Requester's .SHOP Application; and (2) the adjudication of the Requester's string confusion objections. Neither challenge warrants reconsideration.

1. The Requester's Challenge to Procedures Governing String Similarity Review and String Confusion Objections Is Time-Barred and Does Not Warrant Reconsideration.

The Requester appears to challenge the String Similarity Review and string confusion objection procedures set forth in the Guidebook, arguing that the procedures will result in the "issuing [of] multiple random and similar gTLDs."[83] However, not only is any challenge to the Guidebook procedures long since time-barred, but the Requester has not demonstrated a basis for reconsideration with respect to those procedures.

The Guidebook provides two methods for ensuring that confusingly similar strings are placed in the same contention set. First, during Initial Evaluation, a String Similarity Review was conducted, during which a third-party expert evaluator—the String Similarity Review Panel—identified "visual string similarities that would create a probability of user confusion."[84] New gTLD applications for strings determined to be so visually similar as to create a possibility of user confusion were placed into contention sets.[85]

Next, even if an application was not identified as being visually similar during the String Similarity Review, an existing TLD operator or another new gTLD applicant could file a string confusion objection. Unlike String Similarity Review, string confusion objections were "not limited to visual similarity. Rather, confusion based on any type of similarity (including visual,

[83] *Id*.
[84] Guidebook, § 2.2.1.1 (emphasis added).
[85] *Id*.

aural, or similarity of meaning) [could] be claimed by an objector."[86] The Guidebook provided for string confusion objections to be upheld only if the objected-to string "so nearly resemble[d] [the objector's string] that [it was] likely to deceive or cause confusion" to the "average, reasonable Internet user."[87] If a string confusion objection is sustained, then the objected-to application is placed in a contention set with the objector's applied-for string.[88]

Again, these Guidebook procedures were put in place years ago, after an extensive process of public comment and input. Insofar as the Requester is challenging those processes, Request 15-13 is long since time-barred. Furthermore, the Requester's assertions in this regard challenge Board action, and the Requester has not identified any material information the Board failed to consider, or any false or inaccurate material information that the Board relied upon, in adopting the procedures governing String Similarity Review or string confusion objections.

2. The Requester's Challenges to the String Similarity Review and to the Outcome of the Requester's String Confusion Objections Are Time-Barred and Do Not Warrant Reconsideration.

Insofar as the Requester is objecting to the String Similarity Review performed for the Requester's .SHOP Application, no reconsideration is warranted. That String Similarity Review concluded in February 2013 and resulted in the Requester's Application being placed into a contention set with eight other applications for .SHOP.[89] The Requester does not identify any policy or process violation in the String Similarity Review Panel's determination that no other existing or applied-for gTLDs had a confusing visual similarity to .SHOP. The Requester argues that the panel "received incorrect instructions," but provides no explanation as to what those incorrect instructions may have been, and does not identify any established procedure the panel

[86] *Id*.
[87] Guidebook, § 3.5.1.
[88] *Id*., § 3.2.2.1.
[89] *See* http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-26feb13-en.pdf.

violated in conducting the String Similarity Review.[90] And again, any challenge to a process that was completed over two years ago is long since time-barred.

The Requester also filed 21 separate string confusion objections against applicants for strings the Requester asserted "so nearly resemble[d] [.SHOP] that [they were] likely to deceive or cause confusion" to the "average, reasonable Internet user."[91] Insofar as the Requester is objecting to the outcomes of those objections, the Requester also has not stated a basis for reconsideration.

Among the applications against which the Requester filed objections were applications for .BUY, .ECOM, .SALE, .SHOPPING, .SHOPYOURWAY, and for strings representing words such as "web shop" in languages such as Chinese, Japanese, and Arabic.[92] All but two of the Requester's objections were overruled. The Requester's objection to an application for .SHOPPING was sustained, as was its objection to .通販 (Japanese for "online shopping").[93] The latter determination was perceived as inconsistent with another expert determination overruling the Requester's string confusion objection to .购物 (Chinese for "shop").

Following an extensive process that included the evaluation of two reconsideration requests,[94] a report by ICANN's staff, and a public comment period, on 12 October 2014, the NGPC approved Resolutions 2014.10.12.NG02 and 2014.10.12.NG03, which directed ICANN

---

[90] Request, § 6, Pg. 5. The Requester also argues that it was "impossible to object" because the time to respond was shortened. *Id*. The results of the String Similarity Review were released on 26 February 2013. *See* https://www.icann.org/news/announcement-2013-02-26-en. This was well before the deadline to file string confusion objections, on 13 March 2013. *See* https://newgtlds.icann.org/en/program-status/odr. The Requester ultimately filed 21 such objections.

[91] Guidebook, § 3.5.1.

[92] *See* http://newgtlds.icann.org/en/program-status/odr/determination.

[93] *See* Determination on ICDR Case No. 50 504 T 00267 13, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-1631-16988-en.pdf; Determination on ICDR Case No. 50 504 T 00261 13, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1318-15593-en.pdf

[94] Reconsideration Request 13-9, *available at* https://www.icann.org/en/system/files/files/request-amazon-04sep13-en.pdf; Reconsideration Request 13-10, *available at* https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf.

staff to establish a very limited review process, whereby the ICDR would appoint "a three-member panel to re-evaluate the materials presented, and … render a Final Expert Determination [in .SHOP/.通販 (Japanese for "online shopping") and one other string confusion proceeding]" ("NGPC Resolution").[95] That review is currently ongoing.

The Requester has not identified any violation of established policy or procedure by the third-party experts who ruled on the Requester's myriad string confusion objections. Nor has the Requester identified any material information that the NGPC failed to consider, or any false or inaccurate material information that the NGPC relied upon, in determining to have a three-member panel re-evaluate the Requester's objection to .通販 (Japanese for "online shopping"). And, once again, any challenge to the outcomes of the Requester's string confusion objections or to the NGPC Resolutions are plainly time-barred.

The Requester therefore has not demonstrated any basis for reconsideration with respect to either: (1) the procedures for String Similarity Review and string confusion objections; or (2) the outcome of those processes, which resulted in the Requester's Application currently being in contention with nine applications for .SHOP (including Requester's own), two applications for .SHOPPING, and the application for .通販 (Japanese for "online shopping").

V. Recommendation.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore recommends that Request 15-13 be denied.

In terms of the timing of the BGC's recommendation, it notes that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation

[95] *See* Rationale for NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.

with respect to a reconsideration request within thirty days, unless impractical.[96] To satisfy the thirty-day deadline, the BGC would have to have acted by 10 August 2015.[97] However, due to the timing of the BGC's meetings in July and August, the first practical opportunity for the BGC to consider Request 15-13 was 24 August 2015.

[96] *Id*., Art. IV, § 2.16.
[97] Thirty days from the date the Requester submitted its Request would have been 9 August 2015, a Sunday.

Pages 44/57 – 57/57 Removed. Privileged & Confidential.