

## Reconsideration Request Form

Version of 11 April 2013

### 1. Requester Information

Name: Dot Registry, LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

Name: National Association of Secretaries of State

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

### 2. Request for Reconsideration of (Check one only):

Board action/inaction

Staff action/inaction

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

Dot Registry, LLC ("Dot Registry") is seeking reconsideration of the Economic Intelligence Unit ("EIU") Community Priority Evaluation panel's (the "Panel") determination that Dot Registry's application, no. 1-880-35979 for .INC (the ".INC Community Application") did not meet the requirements for Community Priority specified in the Applicant Guidebook ("AGB") (the "Panel Determination") and subsequent placement of the Application into active contention by the New gTLD Programming Committee ("NGPC").

### 4. Date of action/inaction:

The Community Priority Evaluation Report (the "Report") lists the date of the Panel Determination as June 11, 2014. Dot Registry believes that as a result of the Panel Determination, the Application was placed into active contention by the NGPC shortly thereafter.

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

Dot Registry became aware of the Determination on June 11, 2014 when Dot Registry received an email indicating the Community Priority Evaluation ("CPE") status for the .INC Community Application had been updated and to view its CSC portal for more information.

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

The Panel Determination, based on its violation and misapplication of the policies and processes set out in the AGB, CPE Guidelines and ICANN Bylaws, and the subsequent placement of the .INC Community Application into active contention by the NGPC, will materially affect Dot Registry because Dot Registry will now have to resolve contention of the Application with seven other applicants. This will cause significant material harm to Dot Registry. As a result of the Panel Determination, which is inconsistent with both AGB and ICANN policy, Dot Registry will incur significant additional expenses to participate in the contention auction and ultimately may and not be able to operate the .INC TLD.

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

The improper denial of Community Priority status to the .INC Community Application will likely result in delegation of the .INC TLD to one of the non-community applicants, which as US government officials and Secretaries of State have stated, do not have enforceable safeguards in place. If the .INC TLD proceeds to auction and the string is awarded to a generic, non-community application, ICANN is not only ignoring the direct communication provided by US and state government officials, which calls for transparent, enforceable registration policies,<sup>1</sup> but it is then possible that anyone could register an .INC domain, even if they did not have an active corporation, which could result in significant harm to registered corporations within the US, the consumers that patronize them and the US government officials then tasked with combatting the damages. The majority of US Secretaries of States are charged with the administrative oversight associated with business registration and reporting compliance in the US. Thus, state's would be financially taxed by the additional time and staff needed to investigate registrants of .INC domain names that do not have an active INC. The use of the designation .INC implies that the company has the right to conduct business within the US. This designation if used haphazardly could create false consumer confidence, business identify theft and a legacy of damage that ultimately affects Registrants, end users and Registry operators. States are not adequately resourced to protect legitimate businesses from fraudulent operators. Furthermore, the use of an .INC domain name by a company or entity that does not have an active corporation would violate state laws that specifically prohibit portraying a business as a corporation if it is not properly registered with the state<sup>2</sup> and/or deceptive trade practices' laws.

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<sup>1</sup>See Annex 1.

<sup>2</sup>See, e.g., <http://www.leg.state.nv.us/NRS/NRS-078.html#NRS078Sec047>.

Therefore, many Secretaries of State support a process which seeks to deter fraudulent business activities and provides some basic checks and balances in the use of domain extensions.

## **8. Detail of Board or Staff Action—Required Information**

The Panel Determination, and the NGPC's subsequent placing of the .INC Community Application into active contention in reliance on the Panel Determination, is inconsistent with established policies and procedures in the AGB and ICANN Bylaws. The inconsistencies with established policies and procedures include: (1) the Panel's failure to properly validate all letters of support and opposition; (2) the Panel's repeated reliance on "research" without disclosure of the source or substance of such research; (3) the Panel's "double counting"; (4) the Panel's apparent evaluation of the .INC Community Application in connection with several other applications submitted by Dot Registry; and (5) the Panel's failure to properly apply the CPE criteria in the AGB in making the Panel Determination.

### **A. The Panel's Failure to Validate All Letters of Opposition**

CPE Panels are required to validate all letters of support and opposition.<sup>3</sup> However, in evaluating the .INC Community Application for Community Priority, the Panel here did not meet this obligation because the Panel did not validate all of the letters that were purportedly submitted in opposition to the Application, particularly those submitted by a group of non-negligible size. This is important because the .INC Application only received 1 out of 2 points in the Opposition criteria, based on a purported opposition from a group of non-negligible size. Dot Registry is only aware of two letters submitted by a group of non-negligible size that could have been construed as in opposition to the application: a letter from the Secretary of State of Delaware, on March 5, 2014, stating his opinion that certain business identifier extensions should not be delegated<sup>6</sup> and a letter from the European Commission on March 4, 2014 expressing concern about Dot Registry's operation of .INC due to usage of the term "INC" outside of the US.<sup>7</sup> On March 20, 2014, the Secretary of State of Delaware submitted another letter clarifying that the State of Delaware was not opposed to the .INC Community Application, which was posted on the ICANN new gTLD website on March 20, 2014.<sup>8</sup> Similarly, the European Commission submitted a letter rescinding its earlier opposition to the application, which was posted to the ICANN website on

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<sup>3</sup>See Community Priority Evaluation FAQ's, <http://newgtlds.icann.org/en/applicants/cpe/faqs-31oct13-en.pdf>.

<sup>6</sup><https://www.icann.org/en/system/files/correspondence/bullock-to-dryden-radell-05mar13-en.pdf>.

<sup>7</sup><https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12359>.

<sup>8</sup><http://newgtlds.icann.org/en/program-status/correspondence/bullock-to-crocker-20mar14-en.pdf>.

March 25, 2014.<sup>9</sup> Notably, in addition to the letter being posted on the ICANN New gTLD website, the European Commission specifically asked that ICANN forward a copy of this communication to the Economist Intelligence Unit "for the avoidance of any potential confusion with the pending Community Priority Evaluation processes underway for Dot Registry." The follow up letters submitted by both the Delaware Secretary of State and the European Commission clearly show that these groups of non-negligible size do not oppose the .INC Community Application. Furthermore, the European Commission confirmed to Dot Registry that it was never contacted by EIU in connection with validation of the purported opposition, and it is Dot Registry's understanding that the Panel never attempted to contact the Delaware Secretary of State to validate any purported opposition to the .INC Community Application. If the Panel had done so, it would likely have learned that the European Commission's initial concerns were based on deceptive information provided to it by a competitor of Dot Registry, which led the European Commission to believe that the term "INC", as defined in the .INC Community Application, was used in Europe in connection with similar business structures, when, in fact, it is not.

In addition to the Panel's failure to validate all letters of support and opposition constituting a violation of established CPE process, its refusal to identify the group of non-negligible size, which purportedly opposed the .INC Community Application, is inconsistent with the ICANN policy and Bylaws requirement to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>10</sup> In its Determination, the Panel stated that the relevant letter of opposition from an organization of non-negligible size "was on the grounds that limiting registration to US registered corporations only would unfairly exclude non-US businesses." What organization, other than the European Commission, who as discussed above, rescinded any opposition it might have had to the .INC Community Application, could the Panel be referring to? The Panel's refusal to disclose the identity of this organization of non-negligible size, which is purportedly in opposition to the .INC Community Application, is neither transparent nor fair. It is difficult to imagine what purpose the Panel could have for choosing not to identify this organization, since presumably any letter of opposition submitted by it would have been posted publicly anyway, and the Panel's failure to identify the organization calls into question whether such opposition actually exists. The BGC addressed this issue recently in its Determination of Reconsideration Request 14-1 regarding the Community Objection filed by the Independent Objector against the application for .MED. The BGC's language in that decision is instructive:

"The Requester has provided the BGC with uncontroverted information demonstrating that the

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<sup>9</sup><https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/12412>.

<sup>10</sup>ICANN Bylaws, Article III, Section 1.

public comments on which the Objection was based were not, in fact, in opposition to the Requester's application. Accordingly, the BGC concludes that ICANN not consider the Expert Determination at issue."<sup>11</sup>

Similarly, since there is no evidence of public comments of relevance in opposition to the .INC Community Application, the BGC should determine that the Panel Determination should not be considered.

## **B. The Panel's "Research"**

In its Determination, the Panel repeatedly relies on its "research." For example, the Panel states that its decision not to award any points to the .INC Community Application for 1-A Delineation is based on "[r]esearch [that] showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities structure as an INC" and also that "[b]ased on the Panel's research, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook."<sup>12</sup> Similarly, the Panel states that its decision not to award any points for 1-B Extension is based on its determination that the .INC Community Application did not meet the criteria for Size or Longevity because "[b]ased on the Panel's research, there is no evidence of INCs from different sectors acting as a community as defined by the Applicant Guidebook."<sup>13</sup> Thus, the Panel's "research" was a key factor in its decision not to award at least four (but possibly more) points to the .INC Community Application. However, despite the significance of this "research", the Panel never cites any sources or gives any information about its substance or the methods or scope of the "research."

Dot Registry does not take issue with the Panel conducting independent research during its evaluation of the .INC Community Application, which is permitted by the AGB.<sup>15</sup> However, as discussed above, ICANN's Bylaws obligate it (and by extension Staff and expert panels working on behalf of ICANN) to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.<sup>16</sup> To the extent that the Panel's "research" is a key factor in its decision not to award at least four (but possibly more) points to the .INC Community Application, it is not consistent with ICANN's obligation to operate in a transparent manner or with procedures designed to ensure fairness; to not include even a single citation or any information on the substance or method of the "research." The principles of transparency and fairness require that the Panel should have disclosed to Dot

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<sup>11</sup><https://www.icann.org/en/system/files/files/determination-medistry-21jun14-en.pdf>.

<sup>12</sup><http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>.

<sup>13</sup>*Id.*

<sup>15</sup>See Section 4.2.3.

<sup>16</sup>ICANN Bylaws, Article III, Section 1.

Registry (and the rest of the community) what "research" showed that firms are typically organized around specific industries, locales and other criteria not related to the entities structure as an INC and that there is no evidence of corporations from different sectors acting as a community as defined by the Applicant Guidebook.

### **C. The Panel's "Double Counting"**

The AGB sets forth an established policy against "double counting" in the CPE criteria, such that "any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria."<sup>17</sup> However AGB contains numerous instances of double counting as does the Determination. For example, one of the requirements for Delineation is that "there must be awareness and recognition of a community (as defined by the applicant) among its members." However, "awareness and recognition of a community (as defined by the applicant) among its members" is also a requirement for Size and for Longevity. Accordingly, if a CPE panel makes a determination that there is not sufficient awareness and recognition of a community (as defined by the applicant) among its members to award any points to an application for Delineation,<sup>18</sup> then this negative aspect found in assessing an application for this one criteria will also affect the assessment of Size and Longevity and result in no points being awarded for Extension; as well as it did here when the Panel determined in these sections that "[t]here is no evidence that these INCs would associate themselves with being part of the community as defined by the applicant."

The requirement for Uniqueness is an even more blatant violation of the principle of no double counting. The AGB states that in order to be eligible for a score of one for Uniqueness, the application must score a two or three for Nexus.<sup>19</sup> Accordingly, a negative aspect found in assessing Nexus will affect the assessment of Uniqueness, as it did in the Panel Determination as set forth below.

### **D. The Panel's Failure to Evaluate the .INC Community Application Independent of other Applications**

It is a well-established ICANN policy within the new gTLD program that every application will be treated individually.<sup>20</sup> Evaluating multiple applications together with regard to community priority violates this policy as well as ICANN's mandate to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. Individual treatment aside, to the extent that the Panel is taking into account other applications when

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<sup>17</sup>AGB Section 4.2.3.

<sup>18</sup><http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>.

<sup>19</sup>AGB Section 4.2.3.

<sup>20</sup>See, e.g., <http://newgtlds.icann.org/en/applicants/customer-service/faqs/faqs-en>, Section 2.10.

making its determination, fairness and transparency dictate that it should disclose this fact. The EIU's actions in evaluating applications for community priority are inconsistent with ICANN's well-established policy of treating gTLD applications individually and the ICANN policy and mandate to operate in a fair and transparent manner. It is clear that the EIU panels for Dot Registry's .INC Community Application, .INC Community Application and .LLP Community Application (and likely the .GMBH Panel as well) were working in concert. First, the EIU panels gave the .INC, .LLP, and .INC Community Applications the exact same score, five out of sixteen.<sup>21</sup> Furthermore, all three Community Priority Evaluation Reports have virtually identical language and reasoning, with just some of the factual details swapped out, including heavy reliance on the yet as unidentified "research," to come to the same conclusions.<sup>22</sup> The failure of the Panel to evaluate the .INC Community Application on its own merit and reliance in information and analysis of other applications may have resulted in the .INC Community Application being penalized unjustly.

### **E. The Panel's Failure to Properly Apply the CPE Criteria**

The process and criteria for evaluating Community Priority applications is set forth in Section 4 of the AGB. ICANN has also published the Community Priority Evaluation (CPE) Guidelines prepared by the EIU (CPE Guidelines),<sup>23</sup> the purpose of which, according to the ICANN website, is "to ensure quality, consistency and transparency in the evaluation process."<sup>24</sup> However, the "[CPE Guidelines] do not modify the framework or standards laid out in the AGB."<sup>25</sup> Accordingly, the policies and processes in the AGB control, as will be explained in more detail below, the scoring in and ultimate outcome of the Panel Determination is inconsistent with the CPE process set forth in the AGB.

#### **1. Criterion #1: Community Establishment**

The Panel determined that the community, as identified in the .INC Community Application, did not meet the criterion for Delineation or Extension, and awarded the .INC Application 0 out of 4 points for Community Establishment. This determination is not consistent with the AGB and CPE Guidelines.

##### **a. Delineation**

The Panel determined that the community, as identified in the .INC Community Application, did not meet the criterion for Delineation because the community did

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<sup>21</sup><https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>;  
<http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>;  
<http://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>.

<sup>22</sup>See Annex 2, redlines of the .LLP and .INC Determination against the .INC Determination.

<sup>23</sup><http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>.

<sup>24</sup><http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

<sup>25</sup>*Id.*

not demonstrate sufficient delineation, organization and pre- existence and awarded the .INC Community Application 0 out of 2 points.

**i. Delineation**

According to the Panel Determination, two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition and there must be awareness and recognition of a community (as defined by the applicant) among its members.<sup>26</sup> The Panel acknowledged that the community definition in the .INC Community Application shows a clear and straightforward membership. However, the Panel determined that the community, as defined in the application, does not have awareness and recognition of a community among its members, because:

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

As discussed above, the Panel bases this determination on mysterious "research" to which it does not provide any citations or insight as to how the research was conducted. That aside, while firms may organize around specific industries, locales and other criteria not related to the entities structure as a corporation, this does not preclude firms from also organizing around the entities' structure as an corporation. In fact, while there may be a wide variation of the types of companies that elect to become corporations, there are still commonalities and binding requirements for any corporation registered in the US. Specifically, every registered corporations in the US would describe themselves as a registered corporation within the US, the exact definition of our community. Additionally each member of the INC community chose this particular legal entity type to operate as, with the understanding and expectation of the tax and legal benefits and liability protections that the entity type provides. Accordingly, all members of the INC community have a shared and common interest to the extent that there is a change to the legal or tax treatment of corporations, which would affect all members of the INC community. Furthermore, there is ample evidence that INCs would associate themselves as being part of the INC community because, at a minimum: (1) they chose to become a corporation and join the community; (2) they identify themselves as part of the community by including the word "INC" in their official name; and (3) they must identify

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<sup>26</sup><http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>.

themselves as part of the community when filing tax returns and filing out other legal documents.

## **ii. Organization**

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities. The Panel indicated that the community, as defined in the application, does not have at least one entity mainly dedicated to the community because:

Although responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state, these government agencies are fulfilling a function, rather than representing the community. In addition, the offices of the Secretaries of State of US states are not mainly dedicated to the community as they have other roles/functions beyond processing corporate registrations.<sup>28</sup>

First, inclusion of the term "mainly" implies that the entity administering the community may have additional roles/functions beyond administering the community. In addition to administering filings and record keeping of corporations, many Secretaries of State are dedicated to providing information about corporations through their websites, pamphlets and other programs and support to existing members of the INC community, as well as those considering joining the INC community.

There is also ample evidence of community activities, which was seemingly ignored by the Panel. These activities include things that all members of the INC community must do such as file articles of incorporation, file an annual report and claim their status as an corporation on their state and federal tax returns—activities which identify them as members of the INC community; which they otherwise would not do if they were not part of the INC community.

## **iii. Pre-existence**

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007. The Panel determined that the community defined in the .INC Community Application does not meet the requirements for pre-existence. However, rather than providing evidence or explanation for this determination, the Panel instead merely cites a sentence from the AGB<sup>29</sup> and

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<sup>28</sup><http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>.

<sup>29</sup>"[Community Priority Evaluation Criteria] of the Applicant Guidebook the CPE process is conceived to identify qualified community-based applications, while preventing both "false positives" (awarding undue priority to an application that refers to a "community" construed merely to get a sought-after generic word as a

then makes the conclusory determination that the .INC Community Application refers to a "community" construed to obtain a sought-after corporate identifier as a gTLD string; which is based on the Panel's previous conclusion that corporations would typically not associate themselves with being part of the community as defined by the applicant—a conclusion that Dot Registry has shown is questionable at best. In fact, as the panel must be aware, corporations have existed in all 50 states long before September 2007.<sup>30</sup> Furthermore, 100% of the states have acknowledged that the community exists through the National Association of Secretaries of State.<sup>31</sup>

#### **b. Extension**

The Panel determined that the community, as identified in the application, did not meet the criterion for Extension because the .INC Community Application did not demonstrate considerable size or longevity for the community identified in the .INC Community Application, which is inconsistent with the AGB.

#### **i. Size**

According to the Panel, two conditions must be met to fulfill the requirements for size: (1) the community must be of considerable size and (2) must display an awareness and recognition of a community among its members.<sup>32</sup> However, the second requirement for size cited by the Panel—that the community must display an awareness and recognition of a community among its members—does not exist in the AGB definition of size. Rather, the AGB states that:

"Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers—a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples—all these can be regarded as of "considerable size."<sup>33</sup>

Similarly, the CPE Guidelines, which were prepared by EIU, do not list the requirement that the community must display an awareness and recognition of a community among its members as part of the criteria of size. The Panel's application of this additional requirement to the criteria of Size, is thus not only

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gTLD string) and "false negatives" (not awarding priority to a qualified community application)."

<sup>30</sup>[2005 CCH Federal Taxation Comprehensive Topics, CCH Incorporated, 2004, Chicago, IL; Section 14,015.](#)

<sup>31</sup>See Annex 3.

<sup>32</sup><http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>.

<sup>33</sup>AGB, Pgs. 4-11.

inconsistent with the established process in the AGB, but also violates the established policy of not "double counting" as discussed above; since the Panel erroneously determined that the members of the INC community do not have an awareness of their community.

As the Panel acknowledged, there are over eight million registered corporations in the US. Accordingly, when the AGB definition of "Size" is properly applied, it is clear that the community identified in the .INC Community Application meets this criteria and should have been awarded points.

## **ii. Longevity**

According to the Panel, two conditions must be met to fulfill the requirements for size: (1) the community must demonstrate longevity; and (2) must display an awareness and recognition of a community among its members.<sup>34</sup> However, the second requirement for longevity cited by the Panel—that the community must display an awareness and recognition of a community among its members—does not exist in the AGB definition of size. Rather, the AGB states that:

"Longevity" means that the pursuits of a community are of a lasting, non-transient nature.<sup>35</sup>

Similarly, the CPE Guidelines, which were prepared by EIU, do not list the requirement that the community must display an awareness and recognition of a community among its members as part of the criteria of longevity. The Panel's application of this additional requirement to the criteria of longevity, is thus not only inconsistent with the established process in the AGB, but also violates the established policy of not "double counting" as discussed above, since the Panel erroneously determined that the members of the INC community do not have an awareness of their community.

corporations are corporate structures that are intended to be perpetual until either the entity is wound down or the statutory requirements are not met. In other words, they are the direct opposite of transient. Accordingly, when the AGB definition of "longevity" is properly applied, it is clear that the community identified in the .INC Community Application meets this criteria and should have been awarded points.

## **2. Criterion #2: Nexus Between Proposed String and Community**

The Panel determined that the .INC Community Application did not meet the criterion for Nexus of Uniqueness and awarded no points. However, the Panel's determination with regards to Nexus was based on incorrect factual information and the Panel's determination with regard to Uniqueness was based on its erroneous determination of Nexus.

### **a. Nexus**

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<sup>34</sup><http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>.

<sup>35</sup>AGB, Pgs. 4-11.

The Panel determined that the .INC Community Application did not meet the criterion for Nexus because while the string identifies the community, it overreaches substantially beyond the community.<sup>36</sup>

According to the Panel, "to receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus, the applied-for string must identify the community. "Identify" means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community."

As an initial matter, it should be noted that according to the AGB, to receive the maximum score of three, "the essential aspect is that the applied for string is commonly known by others as the identification/name of the community." However, regardless of whether the AGB standard or the inconsistent Panel standard is applied, it is clear that the .INC Community Application should still receive the maximum number of points for Nexus. In fact, the Panel acknowledged that "the string identifies the name of the community."<sup>37</sup> However, unfortunately for Dot Registry, the Panel also erroneously determined that the string substantially overreaches because "INC" is also used in Canada, Australia, and the Philippines. While there may be some use of "INC" in several countries outside the US, , it is not used outside the US in connection with the .INC community described in the .INC Community Application. Notably, no relevant organization in Canada, Australia, or the Philippines submitted any opposition to the .INC Community Application. Furthermore, the AGB does not require applicants to define "any connotations the string may have beyond the community" and does not provide any direction in relation to scoring question 20A negatively if the designation is used outside of the community regardless of scale. Accordingly, it is clear that the .INC Community Application should receive full points for Nexus.

#### **b. Uniqueness**

The Panel determined that the application does not meet the criterion for Uniqueness because the string does not score a two or a three on Nexus. However, as discussed above, the only reason that the .INC Community Application did not score a two or three on Nexus was due to the Panel's erroneous determination. Furthermore, the Panel's basing of its decision with regard to Uniqueness (and the AGB's direction to do so) on the results of another criteria violates the established policy against double counting.**Criterion #3: Registration Policies**

The Panel correctly awarded the .INC Community Application points for Eligibility, Name Selection, and Content and Use, but determined that the .INC Community Application did not meet the criterion for Enforcement because it

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<sup>36</sup><http://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>.

<sup>37</sup>*Id.*

provided specific enforcement measures but did not include appropriate appeal mechanisms. However, the .INC Community Application does in fact contain an appropriate appeals mechanism.

According to the .INC Community Application, the enforcement mechanism is as follows:

DOT Registry or its designated agent will annually verify each registrant's community status in order to determine whether or not the entity is still an "Active" member of the community. Verification will occur in a process similar to the original registration process for each registrant, in which each registrant's "Active" Status and registration information will be validated through the proper state authority. In this regard, the following items would be considered violations of DOT Registry's Registration Guidelines, and may result in dissolution of a registrant's awarded ".INC" domain:

- (a) If a registrant previously awarded the ".INC" domain ceases to be registered with the State.
- (b) If a registrant previously awarded a ".INC" domain is dissolved and/or forfeits the domain for any reason.
- (c) If a registrant previously awarded the ".INC" domain is administratively dissolved by the State.

The .INC Community Application also contains an appeals mechanism, which is that:

Any registrant found to be "Inactive," or which falls into scenarios (a) through (c) above, will be issued a probationary warning by DOT Registry, allowing for the registrant to restore its active status or resolve its dissolution with its applicable Secretary of State's office. If the registrant is unable to restore itself to "Active" status within the defined probationary period, their previously assigned ".INC" will be forfeited.

The AGB states that "[t]he restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application."<sup>38</sup> While the above-referenced appeal process may not be a traditional appeals process, it is appropriate to, and aligned with, the community-based purpose of the .INC Community Application. Here, the .INC Community Application is restricted to those with active corporations. Because Dot Registry will verify the status of the corporation,

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<sup>38</sup>AGB, Pgs. 4-16.

which is the basis for a second level domain registration in .INC, it will be a simple matter to verify whether the corporation is "active" or not. To the extent that the corporation is not in "active" status, the registrant is issued a probationary warning. This warning allows the registrant to appeal Dot Registry's inactivity determination by resolving the issue with the relevant Secretary of State and restoring the domain name to active status. Notably, .edu utilizes a similar appeals mechanism.<sup>39</sup> Accordingly, the .INC Community Application should have received points for Enforcement.

### **3. Criterion #4: Community Endorsement**

The Panel incorrectly determined that the .INC Community Application only partially met the criterion for Support and Opposition, which is inconsistent with the CPE process as set forth in the AGB.

#### **a. Support**

The Panel awarded the .INC Community Application only 1 out of 2 points for Support because it determined that while Dot Registry possesses documented support from at least one group with relevance, Dot Registry was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community or documented support from a majority of the recognized community institution(s)/member organization(s).

The Panel acknowledged that the .INC Community Application included letters of support from a number of Secretaries of State of US states which constituted groups with relevance, but that the Secretaries of State are not the recognized community institution(s)/member organization(s), as these government agencies are fulfilling a function, rather than representing the community. As discussed above, in addition to administering filings and record keeping of corporations, many Secretaries of State are dedicated to providing information about INCs through their websites, pamphlets and other programs and support to existing members of the INC community (including Dot Registry, which as an INC is a member of the community); as well as those considering joining the INC community, the Secretaries of State *are* the recognized community institutions. As also discussed above, numerous letters of support and endorsement were submitted by members of the INC community, including one from the National Association of Secretaries of State in which it described the agreement of 100% of the states for community operation of .INC. However, these letters appear not to have been considered by the Panel, and in any case were not validated by the Panel in connection with the .LCC Community Application. Accordingly, the .INC Community Application should have been awarded full points for Support.

#### **b. Opposition**

The Panel determined that the .INC Community Application partially met the criterion for Opposition because it received relevant opposition from one group of

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<sup>39</sup>[http://net.educause.edu/edudomain/show\\_faq.asp?code=EDUPOLICY#faq425](http://net.educause.edu/edudomain/show_faq.asp?code=EDUPOLICY#faq425).

non-negligible size. As discussed above, the only groups of non-negligible size that could even arguably be viewed as having submitted opposition are the Secretary of State of Delaware or the European Commission. However, the Secretary of State of Delaware clarified that it did not oppose the .INC Community Application and the European Commission rescinded any comments in opposition to the .INC Community Application. Furthermore, any opposition by the European Commission, even if it existed, which clearly it does not, is not relevant because the INC designation is not used in Europe. Additionally, as also discussed above, to the extent any opposition by the Secretary of State of Delaware or European Commission existed, which it does not, the Panel failed to validate any such letters in connection with the .INC Community Application. Accordingly, the .INC Community Application should have been awarded full points for Opposition.

## **9. What are you asking ICANN to do now?**

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

Dot Registry is asking that ICANN reverse the decision of the Panel and grant Dot Registry's .INC TLD application Community Priority status. There is precedence for this when, as here, there is substantial and relevant evidence indicating that the Objection was inconsistent with ICANN procedures.<sup>40</sup> Just recently, the BCG concluded that ICANN not consider the Expert Determination in the Community Objection filed against .MED because the Requester provided the BGC with uncontroverted information demonstrating that the public comments on which the Objection was based were not, in fact, in opposition to the Requester's application, as is the case here. In the alternative, ICANN should disregard the results of the first Panel determination and assemble a new CPE Panel to reevaluate the Community Priority election by Dot Registry for its .INC TLD application in compliance with the policies and processes in the AGB, CPE Guidelines and ICANN Bylaws. To the extent that ICANN assembles a new Panel to re-evaluate the .INC Community Application for Community Priority, the Panel should not be affiliated with EIU, or at a minimum, should not consist of the same EIU panelists or anyone who participated in the initial CPE.

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

*(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial)*

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<sup>40</sup><https://www.icann.org/en/system/files/files/determination-medistry-21jun14-en.pdf>.

*that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)*

Dot Registry has standing and the right to assert this request for Reconsideration because the Panel's Determination, and the NGPC's subsequent placement of Dot Registry's .INC application into active contention, was based on the Panel's failure to follow the established policies and procedures for Community Priority Evaluation in the AGB and ICANN's Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party service providers, such as the EIU, where it can be stated that the Panel failed to follow the established policies or processes in reaching its determination, or that staff failed to follow its policies or processes in accepting that determination.<sup>41</sup> In addition, the NGPC's placement of the .INC Community Application into active contention based on the Panel Determination constitutes Staff or Board Action. Furthermore, Staff became involved with the Panel Determination when it responded to complaints that the Panel did not engage in uniform or consistent manner when questioning Secretaries of State as part of the validation process for letters of support, resulting in an apology from EIU to the Secretaries of State.<sup>42</sup>

This failure to follow established policies and procedures by the Panel and the NGPC will result in material harm to, and will have an adverse impact on, Dot Registry, registered businesses in the US and consumers, as a result of the Determination and placement of Dot Registry's .INC Application into active contention; at best, Dot Registry will have to expend significant additional funds to win the contention auction for .INC, and, at worst, Dot Registry will lose the contention auction and not be able to operate the .INC TLD and the string will be operated generically without necessary consumer protections in place.

This harm to Dot Registry, Secretaries of State, potential registrants and the public generally, can be reversed by setting aside the decision of the Panel and granting Dot Registry's .INC TLD application Community Priority status, or in the alternative, by assembling a new CPE Panel to reevaluate the Community

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<sup>41</sup> See <https://www.icann.org/en/system/files/files/determination-tennis-au-29apr14-en.pdf>, DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC) RECONSIDERATION REQUEST 14-12 and <http://www.icann.org/en/groups/board/governance/reconsideration/recommendationbooking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

<sup>42</sup> See Annex 4.

Priority election by Dot Registry for its .INC TLD application, in compliance with the established policies and processes in the AGB and CPE Guidelines.

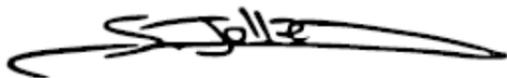
**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

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

The causal connection between the circumstances of the Reconsideration Request and the harm caused by the awarding of the string to a non-community applicant are the same for Dot Registry and the National Association of Secretaries of State (NASS), on whose behalf this Request is also being made. Whereas the immediate harm to Dot Registry is material and financial, the harm to the Secretaries of State is related to their ability to prevent business fraud and consumer confusion. As discussed above, the improper denial of Community Priority to the .INC Community Application will likely result in delegation of the .INC TLD to one of the non-community applicants, which do not have enforceable safeguards in place, and could allow anyone to register a .INC domain name regardless of their actual business registration status and entity type. This could facilitate fraudulent business registration, business identity theft and other harmful online activity, as well as cause significant consumer confusion and protection issues. Over the last two and a half years, NASS and many of its individual members have expressed their clear concerns via numerous letters to ICANN, the GAC and the FTC calling for the issuance of these strings in a community format, in order to provide appropriate protections for both the community and consumers with the necessary recourse required to hold the Registry Operators accountable if these strings are not operated in a responsible manner. As most of the Secretaries of State in the US have the ultimate responsibility for INC registration and validation, this is of significant concern to them, and to NASS as well, which is acting on behalf of their interest. The issuance of these strings to a non-community applicant without enforceable protection mechanisms directly disregards the opinions expressed by the US Secretaries of State in regards to this matter and shows a blatant disregard by ICANN to operate accountably, as required by the ICANN bylaws.



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Signature

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\_June 26, 2014\_\_\_\_\_

Date