

# JONES DAY

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April 15, 2015

## VIA EMAIL

Mr. Scott Donahey  
Mr. Mark Kantor  
Hon. Charles N. Brower

Re: *Dot Registry v. ICANN*; ICDR Case No. 01-14-0001-5004

Dear Mr. Chairman and Members of the Panel:

The Panel's Amended Procedural Order No. 2 requires ICANN to produce certain documents related to the Community Priority Evaluation ("CPE") of Dot Registry's applications for .LLC, .LLP, and .INC., including: (1) ICANN's contract with the Economist Intelligence Unit ("EIU") for the performance of CPEs; and (2) documents relating to ICANN's consideration of the work performed by the EIU with respect to Dot Registry's applications.

With the EIU's consent, ICANN has already produced to Dot Registry ICANN's contract with the EIU (including amendments and Statements of Work), and ICANN has made those documents available on ICANN's website. (*See* <http://newgtlds.icann.org/en/applicants/cpe>.) And while the EIU also has agreed that documents responsive to the second category may be produced to Dot Registry, the EIU has asked that these documents—which include emails between ICANN and the EIU regarding the CPEs for Dot Registry's applications, draft CPE reports, and an EIU presentation to ICANN—be produced to Dot Registry only with assurances of confidentiality and protection.

This Panel, of course, has the authority to require such assurances. Article 37 of the International Centre for Dispute Resolution ("ICDR") Arbitration Rules provides that the Panel "may take measures for protecting trade secrets and confidential information" disclosed in the course of this independent review proceeding. ICANN requests that the Panel exercise this authority in this instance.

Independent Review proceedings such as this one are not court proceedings and not subject to the same presumption of openness that one finds in U.S. and other courts. Even so, ICANN generally posts all material documents filed in connection with Independent Review proceedings on its website.

Members of the Panel  
 April 15, 2015  
 Page 2

Here, however the harm that would be suffered by an independent third-party—the EIU—outweighs any argued public “right” to access these confidential documents. *See* Arbitration Rules of the World Intellectual Property Organization, Article 54(c) (tribunal shall determine whether confidential materials are “of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality”).

As detailed in the accompanying declaration of EIU Contact Information Redacted EIU Contact Information Redacted the EIU expected (with good reason) that its communications with ICANN would be maintained as confidential. (EIU Contact Information Redacted ¶¶ 3-4; *see also* 26 July 2011 New gTLD Program Consulting Agreement, Para 5) (contemplating that the parties will exchange “proprietary, secret, or confidential” information and requiring that that information be maintained in confidence)). The public disclosure of these confidential communications would cause concrete harm to the EIU.

Specifically, EIU Contact Information Redacted explains that “ensuring that the analysis set forth in the [CPE] results is clear, concise and consistent with the Guidebook . . . has, at times, necessitated wide-ranging discussions” with ICANN, and the public disclosure of those discussions would have a chilling effect on further communications between the EIU and ICANN, compromising the ability of the EIU to perform future CPEs. (EIU Contact Information Redacted ¶ 5.) In addition, the EIU is concerned that the selective, out-of-context dissemination of these communications could injure its reputation and encourage the filing of frivolous lawsuits (even though the Application Guidebook prevents New gTLD applicants from filing lawsuits against ICANN or its vendors, including the EIU, with respect to the evaluation of their applications). (*Id.* ¶¶ 6-7)

In order to prevent this harm to the EIU and to the CPE deliberative process, ICANN respectfully requests that the Panel order that ICANN’s communications with the EIU—including emails, draft reports, and presentations—be subject to confidentiality conditions requiring that:

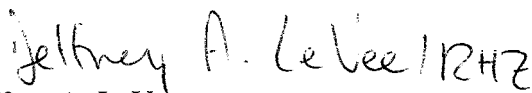
- (1) Documents exchanged by the parties may not be used for any purpose other than participating in the IRP;
- (2) Documents exchanged by the parties may not be publicly posted or disclosed in any manner, unless the EIU chooses to do so; and
- (3) Reference to such documents or information from such documents in the parties’ written submissions must be redacted prior to public posting.

Members of the Panel  
April 15, 2015  
Page 3

Notably, counsel to Dot Registry agreed voluntarily to these same confidentiality conditions in another pending IRP, *DotConnect Africa v. ICANN*, and there is no intellectual basis for any distinction here. There, as here, ICANN produced its confidential communications with a third-party evaluator of new gTLD applications, and the Claimant agreed not to use those documents for any purpose other than the IRP. As a result, the parties have posted on ICANN's website redacted versions of their memorials.

If Dot Registry objects to the application of confidentiality conditions even in light of the EIU's position and the declaration of <sup>EIU Contact Information</sup> Redacted and in the event the Panel finds that such conditions are not appropriate in this matter, ICANN would request that, at the very minimum, the Panel permit ICANN to redact the names of individual EIU employees and evaluators. As <sup>EIU Contact Information</sup> Redacted attests in his declaration, on a number of occasions during the CPE period, new gTLD Applicants and other third parties have improperly contacted EIU personnel regarding evaluations. (<sup>EIU Contact Information</sup> Redacted ¶ 9.) The names of these personnel were not to be disclosed during the course of the new gTLD process. Given the fact that certain members of the community feel aggrieved by the new gTLD process, it would be highly inappropriate to place the EIU's personnel at risk of harassment or other personal harm by publicly disclosing their identities.

Very truly yours,

  
Jeffrey A. LeVee

cc: Counsel for Dot Registry

Enclosure