

## **Reconsideration Request Form**

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### **1. Requester Information**

**1. Name:** Despegar Online SRL,

**Address:** Contact Information Redacted

Contact Information Redacted

**Email:** Contact Information Redacted

**AND**

**2. Name:** DotHotel Inc.,

**Address:** Contact Information Redacted

Contact Information Redacted

**Email:** Contact Information Redacted

**AND**

**3 Name: dot Hotel Limited,**

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**AND**

**4. Name: Fegistry, LLC,**

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**AND**

**5. Name: Spring McCook, LLC,**

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**AND**

**6. Name: Top Level Domain Holdings Limited,**

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

(Requester, herein)

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

**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.**

Requester was notified by public posting at <http://newgtlds.icann.org/en/applicants/cpe#invitations> on or about 12 June 2014 that the application for the new gTLD .hotel (1-1032-95136) by HOTEL Top-Level-Domain s.a.r.l had prevailed in an award of community priority after Community Priority Evaluation. Requester seeks to have that decision by the Community Priority Evaluation panel reconsidered.

**4. Date of action/inaction:**

The date of the CPE panel is 11 June 2014; the date of its public posting is approximately 12 June 2014.

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

Requester became aware of the action on or about 13 June 2014

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

Requester is a group of applicants in a contention set with other applicants for .hotel. If the decision to award community priority to application 1-1032-95136 stands, it will require Requesters' standard (non-community) applications to be abandoned or withdrawn. The Applicant Guidebook ("AGB") states at page 4-9:

*"It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be."*

"Qualified" in this context means that the application has been awarded community priority status. The elimination of Requester's applications will cause Requester to lose its current investment of

time, money and other resources in its applications, notwithstanding the availability of a small application fee refund. More significantly, it deprives Requester of the opportunity to run the .Hotel TLD, which represent loss of a financial and business opportunity to Requestor.

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

The purpose behind the community application is expressly to fend off legitimate competition from business operators in competition with the standard hotel booking model. Community applicants are required to file evidence of support from their so-called community. This applicant has filed support from commercial trade associations dependent on maintaining the current commercial model.

The Applicant's principal supporter is the IH&RA (International Hotel and Restaurant Association).

The IH &RA said, in its supporting letter:

*We fully support dotHOTEL's Eligibility Criteria as defined in ISO 18513 to establish a verified and secure domain name space exclusively for the hotel industry. Thus, .hotel domain names will help to increase direct bookings by which profit margins of hotels rise and to reduce dependency from OTAs.*

The Hotrec association (a trade association supporting both the restaurant and hotel trades in Europe) said this:

*"... hotels all over Europe are concerned to lose more and more control over their rates, distribution channels and the hotel product itself to the so-called Online Travel Agencies or OTAs. With dotHOTEL's Eligibility Criteria for a verified and secure domain name space exclusively for the hotel industry as defined in ISO 18513, .hotel domain names will help to increase direct bookings by which profit margins of hotels rise and to reduce dependency from OTAs."*

The Global Hotel Alliance said:

*"....hotels all over the union are concerned to lose more and more control over their rates, distribution channels and the hotel product itself to the so called Other Travel Agencies or OTAs. With dotHotel's eligibility criteria for a verified and secure domain name space exclusively for the hotel industry as defined in ISO 18513 .hotel domain names will help to increase direct bookings by which profit margins of hotels rise and to reduce dependency on OTAs."*

The application is plainly a purely commercial move by heavily invested commercial entities to increase their profits, and to head off competition from developing threats to their market, presented by the growth of the OTA business model.

Other parties affected by the decision therefor include all of the world's OTAs, and all of the

world's customers of hotel products that will be deprived of competitive business opportunities in relation to hotel bookings.

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

### **Introduction**

Requester submits that the Community Priority Evaluation Panel (“Panel”) failed to properly perform its functions as set out in the AGB.

Before describing the failures of the Panel, Requester makes two procedural comments.

First, there is no doubt that ICANN’s Reconsideration process applies to the decisions of external providers such as the Panel. As noted by the Board Governance Committee (“BGC”) in the recent tennis decision:

*“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 established policies or processes in reaching its determination, or that staff failed to follow its policies or processes in accepting that determination.”<sup>1</sup>*

Second, the Requester appreciates that on Reconsideration by the BGC, the Requester bears the burden of proving that the Panel has failed to follow some policy or process that it should have done, and is not a challenge to the accuracy or validity of any of the Panel’s conclusions. The Requester apprehends the BGC position that disagreeing with the conclusion of the Panel is not sufficient grounds for reconsideration. As the BGC noted in the tennis Decision on reconsideration:

*“In challenging the Panel’s Report, the Requester does not identify any process or policy or standard that the Panel misapplied in scoring element 2-A. Instead, the Requester simply objects to the Panel’s substantive conclusion, arguing that “[t]he community as defined [in the Application] specifically includes the global tennis community.” (Request at 4.) Such substantive disagreement with the Panel’s findings is not a proper basis for reconsideration.”<sup>2</sup>*

In this case, however, there are 3 instances where the Panel has not followed the AGB policy and processes for conducting CPE.

Further, the Panel, and ICANN staff have breached more general ICANN policies and procedures in the conduct of this CPE.

### **Breaches of the AGB rules on Community Priority Evaluation.**

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<sup>1</sup> See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

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<https://www.icann.org/en/system/files/files/determination-tennis-au-29apr14-en.pdf>

## 1. Failure to identify a “Community”.

The AGB sets out at para 4.2.3 the rules for community priority. In doing so, the drafting practice has been to set out a rule, in this criteria for awarding points, then to provide definitions of the terms used in the criteria, and then guidelines on how to apply the definitions and interpret the criteria. The Economist Intelligence Unit (EIU) published further “guidelines” in August 2013, to which we will refer.

The AGB set out 4 criteria, worth a score of 4 points each. These criteria were divided into subparts carrying various scores. An applicant was required to score 14 points out of the possible 16 to prevail in this evaluation

Criterion 1 is entitled “Community establishment”, and is divided into 2 components A -“Delineation” and B - Extension”. The criteria for these are set out at page 4-10, and then the definition section follows. The very first definition that is required to be understood and applied to the criterion is whether or not there is a community involved in the application. That definition comes first, and logically is a pre-requisite to the later steps of seeing how well delineated that community is, or how old it is, etc. The first question that has to be asked is “Is there a community that meets the definition of “community” under these rules”? If there is not, then the rest of the analysis is unnecessary, as the applicant should fail at the first hurdle.

The Panel did not attempt this analysis, in breach of the requirements of the policy and process for CPE.

The definition of community begins by noting that it means more than its Latin origins in “*communitas*” meaning fellowship, but observing that it still implies “more of cohesion than a mere commonality of interest”. Not testing whether there was a community at all under this definition is critical, as it is readily apparent from the evidence and the application text that a “mere commonality of interest” is precisely what links the applicant and its supporters, without any of the “cohesion” that a true community under this definition must have. This is not a disagreement about a finding by the Panel on this topic; the Panel did not consider this definition, nor apply the test for “community” required.

The definitions of “community” go on to refer to 3 further conditions that must be satisfied for a finding that a community existed.

They are:

- (2) an awareness and recognition of a community among its members;
- (3) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and
- (4) extended tenure or longevity—non-transience—into the future.

The Panel did refer to these definitions, but failed to consider the first and vital question of whether there was first a cohesive community, bound together by more than a mere commonality of interest. Had it considered the matter, it would have appreciated that the applicants definition, rather than showing cohesion, depended instead on coercion; every hotelier is deemed a member of this community, even though they have never heard of it, and would not chose to join it if asked, but are nevertheless deemed to be a member of it. Compulsory membership, and deemed memberships seem to be the opposite of the kind of community that is worth of the protection and reward of the

CPE process. However, as the Panel has simply omitted to consider cohesiveness, the matter can be reconsidered.

Failure to consider self-awareness and recognition of the community

The Panel report begins with the Panel being confused or mistaken about the criteria for the first criterion – Delineation. It says:

*“Delineation*

*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.”*

In fact, the requirements of delineation are (in summary) that it must (1) be clearly delineated, (2) be organized, and (3) be pre-existing before 2007. The Panel got one out of the three requirements correct.

It will be observed that the Panel has imported the test for determining whether there is a “community” – self-awareness that the group is a community - into the test for “delineation”. With respect, that is an error of process that further invalidates the findings.

Even if it were not, and self awareness and recognition are considered with Delineation, the actual response given under that enquiry about “self awareness and recognition” shows that the Panel does not understand the test that is to be applied. The response given by the Panel: *“This is because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”* is a response directed only at the delineation issue, which is how the Panel posed the question, not as part of the “self-awareness” and “beyond mere commonality of interest” tests that goes into the definition of community. The Panel has not considered, and has therefore not concluded that the community has the requisite self-awareness and self-recognition to be a community for the purposes of CPE.

We observe, for the record, that the above quote is an almost meaningless statement even in the context of discussing delineation. The phrase is substantially repeated in relation to community longevity, where it is equally meaningless.

What is required is a showing by evidence that members of the alleged community regard themselves as members of a defined community, which is recognised as such by the members, and by people outside the community. Simply operating a hotel anywhere in the world might make one a member of the same trade, having a similar common interest. One cannot declare that even hoteliers who have never heard of the associations supporting this applicant, operating in different countries from where these associations operate, are nevertheless members of a community with them, simply because they are in the same trade, and because there is an ISO definition of what a hotel is.

This is a very important issue for the AGB itself, which noted in its Guidelines:

*All (referring to possible types of communities) are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both Delineation and Extension*

We invite the BGC to find that this is a failure to consider the issue of self-awareness and recognition, which does not arise from “association with the hotel industry” or “provision of hotel services” at all. That is, there has not been a consideration of the issue of self-awareness and recognition, if the response is on an entirely separate and distinct matter.

It is important to note that the Panel finds that the alleged community is clearly delineated, because there is an ISO definition of “hotel”, and because every hotel is a member of the alleged community. The Panel says: *‘The string “Hotel” is an internationally agreed word that has a clear definition of its meaning: According to DIN EN ISO 18513:2003, “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.”*<sup>3</sup>

The Panel then proceeds through the proper requirements of Delineation, which it names accurately – organisation and existence before 2007.

#### Failure to apply test for Uniqueness

The next major consideration is that of Nexus- the link between the string and the purported Community. This is broken down in 2 parts: Nexus, worth 3 points and Uniqueness worth one point. To get 3 points under Nexus an applicant has to show that the string is either

- (a) an exact match of the community name, or
- (b) is a well know short form of the community name, or
- (c) is an abbreviation of the community name.

An applicant who cannot score 3 points under those options, can score 2 points if it can show that the string “identifies” the community – but in a way that does not equate with the 3 conditions above. “Identify” is defined in the AGB as meaning *“...that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community”*.

The AGB Guidelines say on this: *“With respect to “Nexus,” for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.”*

Uniqueness is defined in the AGB as where the *“String has no other significant meaning beyond*

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<sup>3</sup> There is some confusion in the Application itself, which defines hotels by reference to the ISO definition then appears to hold that the “establishments” themselves are members of the Community. For present purposes we proceed on the basis that while a hotel may be a defined establishment, the alleged community is made up of the people and enterprises that run the hotels, and also the associations that such people form among themselves.



*identifying the community described in the application.”*

The Panel reports that the Applicant scored 2 points on Nexus, as the string “identifies” the community. It explained itself thus: *“The string nexus (sic) closely describes the community, without overreaching substantially beyond the community. The string identifies the name of the core community members (i.e. hotels and associations representing hotels).”*

We observe that there is no evidence put forward for this claim, which remains an unsupported assertion by the Applicant, and that no web searches are reported, as recommended by the EIU to explore the issue. In particular, no evidence is given of how non-members of the community regard the string, and whether or not they associate the string “hotel” with the community of hoteliers seeking the TLD. It is manifestly obvious that it is also wrong in fact; the word “hotel” describes a place for obtaining lodging, not the hoteliers (Marriott, Sheraton, Crowne Plaza) and not their trade associations (IH&RA, HotRec, GHA).

The Panel then considered “Uniqueness”.

It held: *“The Community Priority Evaluation panel determined that the application met the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the string has no other significant meaning beyond identifying the community described in the application.”*

We remind the BGC that the Panel has itself already cited, and relied upon a definition of the string that has a meaning significantly different than the one just quoted. In determining that there was a delineated community, the Panel relied on the ISO definition of “hotel” – namely: *‘The string “Hotel” is an internationally agreed word that has a clear definition of its meaning: According to DIN EN ISO 18513:2003, “A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available.”’*

Patently, the word “hotel” has another “significant meaning” apart from identifying a community – it means a place where a customer can purchase lodgings.

The Panel has not followed ICANN policy or process in arriving at the conclusion that the string has “no other significant meaning beyond identifying the community” because it has itself cited a significant other meaning, and relied on that other meaning (that the word means “an establishment with services and additional facilities where accommodation and in most cases meals are available”) in order to measure and find Delineation.

This is not a disagreement about a conclusion – this is a demonstration of a failure of process by the Panel. It cannot use the significant meaning of “hotel” under an ISO definition for one purpose (a finding under delineation), then deny that meaning and say there is “no other significant meaning” for the purposes of finding Uniqueness.

The point is an obvious one. There is no demonstrated “community”, merely a business association of traders from the developed world with a common business interest. They wish to defeat the kind of competition and innovation that the ICANN program was intended to stimulate. The word

“hotel” means to most of the world what the ISO definition says it means- a place for lodging and meals. To assert that it means to most people the association of business enterprises that run the hotels is unsubstantiated and absurd.

#### Breaches of other ICANN Principles

Under Article 7 of the Affirmation of Commitments *“ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.”*

Under Article 1, Mission and Core Values of the ICANN Bylaws (11 Apr. 2013) at Clause 2.8 ICANN commits to the core value of *“Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.”*

Under Article III, Section 1 of the Bylaws ICANN commits: *“ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”*

Under Article IV, Clause 2.20, the purpose of Reconsideration is to: *“...to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.”*

Requestor submits that various aspects of the CPE process breach, or risk breaching, these fundamental provisions. All of the members of the Requestor group (and there are others) are competing applicants for the .hotel TLD. CPE is a process by which all were “materially affected” but in which a number of elements of basic fairness seem to be lacking. Although CPE is not set up as an *inter partes* contest, there are a number of features which are prejudicial to standard applicants, including:

(a) Insufficient material was made available to them as to who the Panelist was, and their qualifications. Several instances of possible conflict of interest involving Dispute Resolution Providers have arisen during the course of the new gTLD rollout to date. The way to ensure there is no criticism of the process, and to prevent actual conflicts is to ensure full notification of all details is provided to affected parties.

(b) There is no publication of the materials to be examined by the Panel. It is possible for the Panel to request further information during CPE, but it is not clear whether any, and if so what, material was sought and what was provided. Communications made between the Applicant and the CPE panel during the evaluation process should be made public. In relation to any such material, standard applicants should have some way of providing counter balancing material for the panel’s consideration.

(c) Insufficient analysis and reasons were given on how the Panelist reached their decision in the CPE report: (<http://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>). By way of example, a crucial issue in CPE is the whether or not there is a self-aware, well recognized

“hotel community” entitled to the special privileges that the AGB provides.

Far from providing the “*thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.*” On this crucial issue the Panel says only this:

*“This is because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services.”*

This is relatively nonsensical in the context of an allegedly global community. No evidence for the existence of this community was provided at all. Given the importance of this finding, and the impact on the affected parties, a thorough rationale should be provided, with the sources of data and information relied upon spelled out.

While the BGC takes the apparent view that the quality of decision-making is not available for reconsideration, the parties are denied “...*meaningful access to a review process that ensures fairness while limiting frivolous claims.*” Simply noting that the Panel has asked the question that the AGB requires, without regard to whether the answer has any relevance to the question posed is not reconsideration, and is not a fair assessment of whether ICANN policies and processes have been applied *neutrally and objectively, with integrity and fairness.*

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

Requester requests that the current finding that the Applicant has prevailed in CPE should be set aside. The Application should be remitted to the Panel for re-examination, with the Panel directed to have regard to the matters raised in the reconsideration request, and any further direction from the BGC. [JN: Should we ask for the necessary information here or do a separate info request?]

**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.**

Requestor is a group of applicants in ICANN new gTLD program. Each of the members of the group is affected by the finding in CPE of which Reconsideration is sought

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

X 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?**

Yes

**Explain.**

The parties are members of the same contention set, all being applicants for a .hotel TLD

**Do you have any documents you want to provide to ICANN?**

No

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

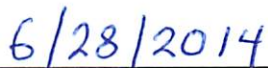
Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

  
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Signature

  
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Date