DETERMINATION

OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-15

12 DECEMBER 2013

On 25 October 2013, Commercial Connect, LLC ("Commercial Connect")
submitted a reconsideration request ("Request"). The Request seeks reconsideration of
the 10 October 2013 staff decision not to invite Commercial Connect's application
for .SHOP to participate in the Community Priority Evaluation ("CPE") process at this
time. Specifically, the Request asks the Board to reverse the 10 October 2013 decision
and to invite Commercial Connect to begin CPE.

I.   Relevant Bylaws.

Article IV, Section 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
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> (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
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> (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.

Dismissal of a request for reconsideration concerning a staff action or inaction is
appropriate if the Board Governance Committee ("BGC") concludes, and the Board or

the New gTLD Program Committee ("NGPC") agrees to the extent that the BGC deems

that further consideration b the Board or NGPC is necessary, that the requesting party

does not have standing because the party failed to satisfy the criteria set forth in the

Bylaws. These standing requirements are intended to protect the reconsideration process

from abuse and to ensure that it is not used as a mechanism simply to challenge an action

with which someone disagrees. The reconsideration process is for situations where the

staff acted in contravention of established ICANN policies (when the Request is based on

a staff action or inaction).

The Request was received on 25 October 2013, which makes it timely under the

Bylaws. Bylaws, Art. IV, § 2.5.

II.   Background.

A.   The New gTLD Community Priority Evaluation Procedure.

The New gTLD Program includes a method for resolving string contention called

Community Priority Evaluation or CPE. The eligibility requirements and evaluation

procedures for CPE are set forth in Section 4.2 of the Applicant Guidebook

("Guidebook") (http://newgtlds.icann.org/en/applicants/agb/string-contention-

procedures-04jun12-en.pdf) and the CPE Guidelines

(http://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf.) CPE will occur

only occur if a community-based application in contention elects this option. (Guidebook,

Section 4.2.)

To begin CPE, there are eligibility requirements for both the application and the

contention set. First, an application must satisfy the following criteria:

- be a self-designated Community Application per section 1.2.3 of the
  Guidebook;

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- be in a string contention set;

- not have a pending change request; and

- not be in the 30-day application comment window for an approved changed request.

Second, an applicant may only begin CPE if all members of the contention set (including the community applicant(s)) meet the following eligibility criteria:

- Have completed evaluation;

- Have no pending objections;

- Have no unresolved GAC Advice; and

- Not be classified in the "High Risk" category of the Name Collisions Risk Management Proposal.

(Guidebook, Section 4.2.)

CPE is an independent analysis that will be performed by a Community Priority Evaluation Panel ("CPE Panel") appointed by ICANN. (Guidebook, Section 4.2.2.) The CPE Panel will review and score the one or more community-based applications in a contention set, having elected CPE, against the four following criteria:

- Community Establishment;

- Nexus between Proposed String and Community;

- Registration Policies; and

- Community Endorsement.

(Guidebook, Section 4.2.3.) The CPE Panel's role is to determine whether any of the community-based applications fulfills the community priority criteria. Standard (non-community-based) applicants within the contention set, if any, will not participate in CPE. (Guidebook, Section 4.2.2; CPE Guidelines.)

B.   Commercial Connect's Application for .SHOP.

Commercial Connect is a self-designated community applicant for the .SHOP string. Commercial Connect's application was placed into a contention set with several other applications for the .SHOP string. (*See* http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-26feb13-en.pdf.)

On or about 10 October 2013, ICANN notified Commercial Connect that it would not be invited for CPE at this time. (Request, Pg. 1.) Commercial Connect was advised that it was not eligible for CPE at this time because of the following:

- One or more applications in the contention set have an unresolved objection.

- One or more applications in the contention set has unresolved GAC advice.

(Request, Pg. 2.)

III.   Analysis of Commercial Connect's Request for Reconsideration – The Staff Decision Not To Invite Commercial Connect To CPE At This Time Does Not Demonstrate A Policy or Process Violation.

Commercial Connect seeks reconsideration of the 10 October 2013 staff decision not to invite Commercial Connect's .SHOP application to participate in CPE at this time. Specifically, Commercial Connect requests that "ICANN invite Commercial Connect" to CPE and "not needlessly delay its application further." (Request, Section 9.)

In the Request, Commercial Connect contends that it satisfies all of the eligibility requirements to begin CPE and should have been invited to CPE at this time. (Request, Pg. 4.) To support this assertion, Commercial Connect claims that it has no objections against its application for .SHOP, and although Commercial Connect has objected to other applications, those applications are not in the same contention set as Commercial Connect's .SHOP string. (Request, Pg. 2.) Commercial Connect also claims that the

eligibility requirements for being invited into CPE are not found in the Guidebook and were only recently published; asserting that the last four requirements – requiring that all members of the contention set "pass" – "is random and only causes harm to all applicants in the set." (Request, Pg. 2.) Commercial Connect's conclusions are not supported.

Contrary to Commercial Connect's claim, the Guidebook does make clear that all applications within a contention set must complete all previous stages of the process before any of the applications may proceed to CPE. (See Guidebook, Section 4.2 "Community priority evaluation can begin once all applications in the contention set have completed all previous stages of the process.") Thus, even if Commercial Connect has satisfied the eligibility criteria, so long as there is one application in the contention set that, among other things, has pending objections or has not resolved all GAC Advice, Commercial Connect will not be permitted to proceed to CPE.

As ICANN staff recently explained to Commercial Connect during a 1 November 2013 teleconference,[1] to ensure that there is certainty around the strings in the contention set, all applicants in the contention set are required to have completed all previous stages in the evaluation process before the CPE process can be invoked. One reason all members of a contention set must be identified before CPE begins is so that all applicants or other interested parties have a full understanding of the set before determining whether to submit letters of support or opposition for consideration by the CPE Panel.

Commercial Connect's Request does not clarify precisely what "requirements for being invited into Community Priority Evaluation . . . were recently published."

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[1] Commercial Connect states in the Request that it tried unsuccessfully to schedule a conference call with staff to discuss the 10 October 2013 notification. Commercial Connect and staff, however, spoke telephonically on 1 November 2013. At that time, Commercial Connect was provided with an explanation of the CPE process and the eligibility requirements as well as how the CPE Guidelines were developed as an accompanying document to the Applicant Guidebook.

(Request, Pg. 2.) If the "requirements" are those found in the CPE Guidelines, this is intended to be "an accompanying document" to the Guidebook and the guidelines "are meant to provide additional clarity around the process and scoring principles outlined in the [Guidebook]." (CPE Guidelines, Pg. 2.) "[The CPE Guidelines do] not modify the [Guidebook] framework, nor does it change the intent or standards laid out in the [Guidebook]." (CPE Guidelines, Pg. 2.) The CPE Guidelines were published after extensive input from the Internet community, and are "intended to increase transparency, fairness and predictability around the assessment process." (CPE Guidelines, Pg. 2.) Any claim by Commercial Connect that the publication of the CPE Guidelines altered the eligibility standards for CPE is incorrect and must be rejected. Further, if the "requirements" which Commercial Connect is suggesting "were just recently published" are those set out on the CPE page of ICANN's New gTLD Program microsite, Commercial Connect is also incorrect. The material found on this webpage is simply meant to help applicants understand CPE. Indeed, this webpage makes clear that the CPE process is "described in section 4.2 of the Applicant Guidebook." (http://newgtlds.icann.org/en/applicants/cpe.)

Based on the above, Commercial Connect has not sufficiently stated a request for reconsideration. The reconsideration process is for the consideration of policy- or process-related complaints. As there is no indication that ICANN violated any policy or process by not yet inviting Commercial Connect to CPE, this Request should not proceed. It should also be noted that Commercial Connect was specifically notified that it was not eligible for CPE at this time. (Request, Pg. 1.) Thus, Commercial Connect

may be eligible for CPE at a later date once the other applications in the contention set have completed all other stages of the evaluation process.

IV.   Recommendation and Conclusion.

Based on the foregoing, the BGC concludes that Commercial Connect has not stated proper grounds for reconsideration and therefore denies Commercial Connect's Request for Reconsideration.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 13-15 shall be final and does not require Board consideration. Article IV, Section 2, Paragraph 15 of the Bylaws provides that the BGC is delegated with authority by the Board to make a final determination and recommendation for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final and establishes precedential value. (Bylaws, Art. IV, § 2.15.) The BGC has the discretion, but is not required, to recommend the matter to the Board for consideration and action, as the BGC deems necessary. (*See id.*) As discussed above, Request 13-15 seeks reconsideration of action or inaction taken by staff. After consideration of this particular Reconsideration Request, the BGC concludes that its determination on this matter is sufficient and that no further consideration by the Board is warranted.