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USA

22 October 2014

By email: didp@icann.org

Dear Madam,
Dear Sir,

.ECO Community Priority Evaluation for Application ID 1-912-59314
Request under ICANN's Documentary Information Disclosure Policy

This request is submitted under ICANN's Documentary Information Disclosure Policy on by Little Birch LLC, one of the applicants for the .ECO gTLD (hereinafter referred to as "Requester") in relation to ICANN's Community Priority Evaluation panel's ("CPE Panel") determination that Big Room Inc.'s application for the .ECO gTLD (Application ID: 1-912-59314; hereinafter referred to as the "Application") prevailed in Community Priority Evaluation according to the Community Priority Evaluation report available at https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf (hereinafter: the "CPE Report").

Context

Reference is made to the CPE Report that has been released by ICANN and published on the ICANN website as referred to above, and ICANN's decision to change the Contention Resolution Status of the Application to "In Contracting" and the Contention Resolution Result to "Resolved" (hereinafter: the "Determination").

According to the CPE Report: *"[t]he Community Priority Evalation panel has determined that the application met the requirements specified in the Applicant Guidebook"*, hereby confirming that the application for the .ECO gTLD that has been submitted by Big Room Inc. *"prevailed in Community Priority Evaluation"*.

Considering the fact that, according to the processes and procedures set out in ICANN's Applicant Guidebook, this Determination would result in ICANN (i) awarding the .ECO gTLD to Big Room Inc., and – hence – (ii) not allowing the Requester to proceed with its application for this string, this decision materially impacts the application submitted by the latter.

According to ICANN, *"ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."*[1]

[1] See https://www.icann.org/resources/pages/didp-2012-02-25-en.

Requester therefore invokes ICANN's accountability mechanisms in order to understand on which information the CPE Panel have relied in developing the CPE Report and ICANN in making the Determination.

Request

In view of transparency of ICANN's decision-making process, the Requester would like to obtain the following information from ICANN under the Documentary Information Disclosure Policy:

1) the agreement(s) between ICANN and the organizations and individuals involved in the Community Priority Evaluation, in particular the representations and warranties given and quality standards to be applied by such organizations and individuals;

2) policies, guidelines, directives, instructions or guidance given by ICANN relating to the Community Priority Evaluation process;

3) internal reports, notes, meeting minutes drawn up by or on behalf of ICANN, the Community Priority Panels, and other individuals or organizations involved in the Community Priority Evaluation in relation to the Application;

4) input provided by the Applicant or organizations, governmental authorities, businesses and individuals having supported the Applicant's application for the .ECO gTLD, including the Applicant's responses to Clarifying Questions (if any), or other communications that have not been made public but have been reviewed and/or considered by the CPE Panel and ICANN in this respect;

5) detailed information in relation to (i) the information reviewed, (ii) criteria and standards used, (iii) arguments exchanged, (iv) information disregarded or considered irrelevant, and (v) scores given by the Community Priority Evaluation panel in view of the criteria set out in the Applicant Guidebook, and more in particular:

I. In relation to the criterion "Community Establishment"

According to the CPE Report, a ".ECO Community" exists, which has been defined in the Application is as follows:

"Members of the Community are delineated from Internet users generally by community-recognized memberships, accreditations, registrations, and certifications that demonstrate active commitment, practice and reporting.

Community members include:
Relevant not-for-profit environmental organizations (ie, accredited by relevant United Nations (UN) bodies; International Union for Conservation of Nature (IUCN) member; proof of not-for-profit legal entity status with documented environmental mission).
Businesses (ie, members of environmental organizations; UN Global Compact participants; hold internationally-recognized environmental certifications; report to a global sustainability standard).
Government agencies with environmental missions (ie, UN bodies, national/sub-national government agencies with environmental responsibilities).

Individuals (ie, members of environmental organizations; academics; certified environmental professionals)."

Requester notes that the above is by all means not a definition of a community but a vague overview what its membership is considered by Big Room Inc. to consist of.

Requester therefore requests ICANN to provide further details relating to:

(i) the actual definition of the community that has been assessed by the CPE Panel, if any;

(ii) the (independent) review carried out by the CPE Panel in accepting the existence of the community, and which information has been relied on in this respect by the CPE Panel;

(iii) the criteria and standards that have been used in assuming the existence of an "ECO" or ".ECO" community;

(iv) the additional factors that have been taken into account by the CPE Panel in determining that the "community for ECO", apparently consisting of organizations, businesses, individuals, and government agencies, (i) are aware that they are part of a community, (ii) that they are recognized as a member of a community, and (iii) that this so-called community implies more "of cohesion than a mere commonality of interest", and (iv) which have been the standards and criteria that have been used to make a distinction between "cohesion" and "commonality of interest".

II. In relation to the criteria "Nexus" and "Uniqueness":

According to the Determination:

"The Community Priority Evaluation panel determined that the application met the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook. The string "identifies" the name of the community, without over-reaching substantially beyond the community, but does not "match" the name of the community."

and

"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."

First of all, Requester would like to obtain further information on the criteria and standards that have been used by the CPE Panel in determining that "ECO" "identifies" the name of the community: which independent research has been carried out in order to come to such a conclusion, and more in particular which information has been relied on and which information has been discarded by the CPE Panel.

Public information reveals that the string "ECO" does not "closely describe" the community or the community members, and that it certainly over-reaches substantially beyond the community referred to in the application.

For instance, according to Wikipedia,[2] the term "eco" may refer to:

- *eco-, a prefix mostly relating to ecological or environmental terms (emphasis added)*
- *.eco, (dot-eco), a proposed top-level domain for the Internet*
- *Eco (currency), a proposed currency*
- *Eco (video game), a computer simulation game*
- *Umberto Eco (born 1932), Italian philosopher, semiotician, novelist*
- *Eco, a character, played by Jacqueline Duncan, on the children's show The Shak*
- *The natural substance of energy and power in the Jak and Daxter games*

Requester notes that no reference is being made to any "eco community", nor does the string apparently seems to identify "the name of the core community members" (in addition to concepts, products and services) as stated in the determination.

Furthermore, according to the same source, the abbreviation ECO has a wide variety of uses:

- *Enterprise Core Objects, software development framework useful for domain-driven design*
- *Economic Cooperation Organization, an international organization involving seven Asian and four Eurasian countries*
- *Electronic Countermeasures Officer, an officer in the reimagined Battlestar Galactica series*
- *Emil Chronicle Online, a 2005 Japanese MMO computer game*
- *Encyclopaedia of Chess Openings, a scheme to classify chess openings*
- *Engineering Change Order, used for changes in documents such as processes and work instructions*
- *English Chamber Orchestra, a chamber orchestra based in London*
- *The Environmental Commissioner of Ontario*
- *Environment and Conservation Organisations of Aotearoa New Zealand*
- *Epichlorohydrin, a synthetic rubber with the ISO code ECO*
- *Equity carve-out, a sort of corporate restructuring*
- *Esporte Clube Osasco, a Brazilian football (soccer) club*
- *Eternally Collapsing Objects, an alternate theory of black hole. See Magnetospheric eternally collapsing object*
- *European Communications Office, the permanent secretariat of the Electronic Communications Committee, a part of European Conference of Postal and Telecommunications Administrations*
- *ECO (denomination), a Presbyterian denomination (full name ECO: A Covenant Order of Evangelical Presbyterians)*
- *Noticias ECO, a now defunct 24-hour Spanish-language cable news network, owned and operated by Televisa*
- *Elementaire Commando Opleiding (elementary commando course) of the Korps Commandotroepen (KCT)*

Furthermore, the prefix "eco-" is, next to "ecology" or the "environment" (in the ecological sense) also used in the context of terms relating to "economy".[3]

Therefore, the Requester would like to obtain further information from ICANN regarding:

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[2] http://en.wikipedia.org/wiki/Eco.
[3] http://en.wiktionary.org/wiki/eco-

(i) the information considered by the CPE Panel and ICANN in the CPE Report and the Determination in assessing the uniqueness of the term, prefix or abbreviation "ECO";

(ii) the independent research performed by the CPE Panel and ICANN in this respect;

(iii) more in particular, the reasons for discarding the many other meanings and uses of the term "ECO" outside of the environmental and ecological fields, especially those referred to above.

III. In relation to the criterion "Community Endorsement":

The Community Priority Evaluation panel determined that the Application *"partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as there was documented support from at least one group with relevance."* – Determination, Page 7.

Requesters would like to obtain further information concerning:

- which letters of endorsement and/or support have been considered by the CPE Panel in making its Determination;

- which criteria and/or standards have been used by the CPE Panel in order to determine which group is "of relevance" in relation to the organizations, companies and individuals that have provided letters of endorsement and/or support in relation to the Application;

IV. In relation to the criterion "Opposition":

Requesters would like to obtain further information as to the reasons why and the criteria against which the public comments, submitted by many third parties to ICANN in relation to the Application, which all contained strong oppostion against ICANN awarding the .ECO gTLD to the Applicant have obviously been considered "of no relevance" and that each of these have been considered as a "group of negligible size".

Standards for Disclosure

Requesters are of the opinion that none of the information requested by them meet any of the defined conditions for non-disclosure as set out in ICANN's Documentary Information Disclosure Policy:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.

  Considering the nature and contents of Requesters' requests, this standard is not met.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal

documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

Considering the nature and contents of Requesters' requests, this standard is not met. Since these requests are made in view of assessing Requesters' respective positions and (legal) actions in relation to ICANN potentially awarding the .ECO gTLD to the REQUESTER, and considering the impact such award may have upon Requesters, they believe that it is essential for ICANN to provide supplemental information and motivations for its determination to give the Application a passing score in the context of Community Priority Evalation.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

  Considering the nature and contents of Requesters' requests, this standard is not met. Since these requests are made in view of assessing Requesters' respective positions and (legal) actions in relation to ICANN potentially awarding the .ECO gTLD to the REQUESTER, and considering the impact such award may have upon Requesters, they believe that it is essential for ICANN to provide supplemental information and motivations for its determination to give the Application a passing score in the context of Community Priority Evalation.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

  Requesters believe that this condition does not apply in relation to this request.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

  Requesters believe that this condition does not apply in relation to this request.

- Confidential business information and/or internal policies and procedures.

  Requesters believe that this condition does not apply in relation to this request.

- Information that, if disclosed, would or would be likely to endanger the life, health, or safety of any individual or materially prejudice the administration of justice.

  Requesters believe that this condition does not apply in relation to this request.

- Information subject to the attorney– client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Requesters believe that this condition does not apply in relation to this request.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

  Requesters believe that this condition does not apply in relation to this request. The Requesters' requests relate to the information, final criteria, standards, arguments and considerations used in view of drafting a determination that lacks clarity and is insufficiently motivated.

- Information that relates in any way to the security and stability of the Internet, including the operation of the L Root or any changes, modifications, or additions to the root zone.

  Requesters believe that this condition does not apply in relation to this request.

- Trade secrets and commercial and financial information not publicly disclosed by ICANN.

  Requesters believe that this condition does not apply in relation to this request.

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

  As stated above, considering the impact of ICANN awarding the .ECO gTLD may have upon Requesters, they believe that it is essential for ICANN to provide supplemental information and motivations for its determination to give the Application a passing score in the context of Community Priority Evalation.

ICANN's transparency obligations, created by ICANN's Bylaws and Articles of Incorporation require the publication of information related to the process, facts and analysis used by individual members of the Community Priority Evaluation panel in preparation of the Determination.

Bylaw Article III, Section 1 provides as follows:

> *"ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to use fairness."*

Furthermore, Requesters refer to ICANN's core mission and values, set out in their by-laws, and in particular, they intend to review the information provided and to be provided by ICANN following this request on the basis of the following values of ICANN:

> *7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
>
> *8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
>
> *And*

> *10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*

Furthermore, Article 4 of ICANN's Articles of Incorporation provides:

> *"The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable open competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."*

Considering the potentially irreparable harm that will be done if ICANN would not take into account the position taken by the Requesters as legitimate competitors for the .ECO gTLD, we respectfully request ICANN to disclose the additional information, criteria, and standards set out above, which have formed the basis of the Determination.

Respectfully submitted,

Reg Levy
VP Compliance + Policy
Minds + Machines