

# JONES DAY

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May 15, 2017

## VIA E-MAIL

Arif H. Ali, Esq.  
Dechert LLP  
1900 K Street, NW  
Washington, DC 20006-1110

Re: Application of dotgay LLC

Dear Arif:

I write to provide you with a status update on Reconsideration Request 16-3 (Request 16-3) filed by dotgay LLC (dotgay) in response to the questions that you have raised to ICANN including in your correspondence to the ICANN Board and the President and CEO of ICANN.<sup>1</sup>

Request 16-3 was filed on 17 February 2016, seeking reconsideration of the Community Priority Evaluation (CPE) of dotgay's application for the .gay string. On 15 May 2016, dotgay made a telephonic presentation to the Board Governance Committee (BGC) regarding Request 16-3. On 26 June 2016, the BGC, having considered all relevant evidence, recommended that Request 16-3 be denied on the basis that the Requestor failed to identify any misapplication of policy or procedure by the CPE provider that materially or adversely affected the Requestor and failed to identify any action that the Board has taken without consideration of material information or on reliance upon false information.<sup>2</sup> The BGC's Recommendation on Request 16-3 was scheduled for consideration by the ICANN Board on 15 September 2016. Two days before the Board meeting, on 13 September 2016, dotgay submitted a 60 page independent

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<sup>1</sup> See letter from Arif Ali to Göran Marby, 25 Aug. 2016, available at <https://www.icann.org/en/system/files/correspondence/ali-to-marby-25aug16-en.pdf>; letter from Arif Ali to ICANN Board, 13 Sep. 2016, available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>; letter from Arif Ali to ICANN Board, 17 Oct. 2016, available at <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; letter from Arif Ali to ICANN Board, 15 Nov. 2016, available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>; letter from Arif Ali to ICANN Board and Göran Marby, 30 Jan. 2017, available at <https://www.icann.org/en/system/files/correspondence/ali-to-marby-bgc-30jan17-en.pdf>; and letter from Arif Ali to ICANN Board and Göran Marby, 12 Mar. 2017, available at <https://www.icann.org/en/system/files/correspondence/ali-to-marby-icann-board-12mar17-en.pdf>.

<sup>2</sup> See BGC Recommendation on Request 16-3, available at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

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expert report for the Board to consider as part of its evaluation of Request 16-3.<sup>3</sup> As a result, the Board deferred its consideration of Request 16-3 to provide sufficient time for review of the report.<sup>4</sup> The Board noted the reasons for continuing its consideration of Request 16-3 in the published Minutes of the 15 September 2016 Board meeting.<sup>5</sup> Thereafter, dotgay submitted additional materials for the Board's consideration.<sup>6</sup> The materials have been provided to the Board for consideration and have been published on the Reconsideration page under Request 16-3.<sup>7</sup>

The Board has recently discussed certain concerns that some applicants have raised with the CPE process, including issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. The Board has directed the President and CEO to undertake a review of various aspects of the CPE process.<sup>8</sup> The details of this review are discussed in the 26 April 2017 letter<sup>9</sup> from Chris Disspain, Chair of the BGC, to you and Mr. Jamie Baxter, among others. As Mr. Disspain explained in his letter, the CPE review is currently underway and will be completed as soon as practicable. The Board's consideration of Request 16-3 is currently on hold pending completion of the review. Once the CPE review is complete, the Board will resume its consideration of Request 16-3, and will take into consideration all relevant materials. A copy of Mr. Disspain's letter has been published on the ICANN correspondence page<sup>10</sup> and on the Reconsideration page under Request 16-3.<sup>11</sup>

Your letter of 30 January 2017 references the timing requirements for the Board's consideration of Reconsideration Requests prescribed by the Bylaws and posits that the Board's

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<sup>3</sup> See letter from Arif Ali to ICANN Board of Directors, 13 Sep. 2016, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

<sup>4</sup> <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.f>.

<sup>5</sup> *See id.*

<sup>6</sup> See letter from Arif Ali to ICANN Board of Directors, 17 Oct. 2016, *available at* <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>; and letter from Arif Ali to ICANN Board of Directors, 15 Nov. 2016, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>.

<sup>7</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

<sup>8</sup> See <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>9</sup> See letter from Chris Disspain to All Concerned, 26 Apr. 2017, *available at* <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

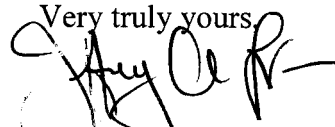
<sup>10</sup> *See id.*

<sup>11</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

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consideration of Request 16-3 has been delayed past the prescribed time. The Bylaws in effect at that time that Request 16-3 was filed provides that “[t]he Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN’s website.”<sup>12</sup> The circumstances that have delayed the Board’s consideration of Request 16-3, which are described above, have been identified and posted on ICANN’s website<sup>13</sup> and on the Reconsideration page under Request 16-3.<sup>14</sup> As stated in Mr. Disspain’s 26 April letter, the Board will resume its consideration as soon as feasible once the CPE review is complete.

I hope you find this update helpful.

Very truly yours,  
  
Jeffrey A. LeVee

cc: John O. Jeffrey  
General Counsel and Secretary  
ICANN

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<sup>12</sup> ICANN Bylaws, Art. IV, Section 2.17, effective 11 Feb. 2016, *available at* <https://www.icann.org/resources/pages/bylaws-2016-02-16-en#IV>.

<sup>13</sup> See Minutes, 15 Sep. 2016, *available at* <https://www.icann.org/resources/board-material/minutes-2016-09-15-en#2.f>; letter from Chris Disspain to All Concerned, 26 Apr. 2017, *available at* <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; and <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

<sup>14</sup> See letter from Chris Disspain to All Concerned, 26 Apr. 2017, *available at* <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.