

ICANN
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USA

26 September 2014

By email: didp@icann.org

Dear Madam,
Dear Sir,

**.RADIO Community Priority Evaluation for Application ID 1-1083-39123
Request under ICANN's Documentary Information Disclosure Policy**

This request is submitted under ICANN's Documentary Information Disclosure Policy on behalf of Afilias Limited, BRS Media Inc., and Tin Dale, LLC, applicants for the .RADIO gTLD (hereinafter referred to as "Requesters")¹ in relation to ICANN's Community Priority Evaluation panel's determination that the European Broadcasting Union's application for the .RADIO gTLD (application ID 1-1083-39123; hereinafter referred to as the "Application") has prevailed in Community Priority Evaluation (hereinafter: the "Determination").

Context

Reference is made to the Community Evaluation Report that has been released by ICANN and published on the ICANN website under URL
<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

According to this Report: "[t]he Community Priority Evaluation panel determined that the application met the requirements specified in the Applicant Guidebook", confirming that the application for the .RADIO gTLD that has been submitted by the European Broadcasting Union (hereinafter referred to as "EBU") has "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 .RADIO gTLD to the EBU, and – hence – (ii) not allowing the Requesters to proceed with their respective applications, this decision materially impacts the applications submitted by the latter parties.

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."²

¹ Respectively Application IDs 1-868-75631; 1-994-75477; and 1-1593-8224.

² See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Request

In view of transparency of ICANN's decision-making process, the Requesters 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) 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 "Delineation":

- a. According to the Determination, the community defined in the Application is as follows:

The Radio industry is composed of a huge number of very diverse radio broadcasters: public and private; international and local; commercial or community-oriented; general purpose, or sector-specific; talk or music; big and small. All licensed radio broadcasters are part of the .radio community, and so are the associations, federations and unions they have created (such as the EBU, applicant for the .radio TLD with the support of its sister Unions; see below for more details on Radio industry representativeness). Also included are the radio professionals, those making radio the fundamental communications tool that it is.

However, the Radio industry keeps evolving and today, many stations are not only broadcasting in the traditional sense, but also webcasting and streaming their audio content via the Internet. Some are not broadcasters in the traditional sense: Internet radios are also part of the Radio community, and as such will be acknowledged by .radio TLD, as will podcasters. In all cases certain minimum standards on streaming or updating schedules will apply.

The .radio community also comprises the often overlooked amateur radio, which uses radio frequencies for communications to small circles of the public. Licensed radio amateurs and their clubs will also be part of the .radio community.

Finally, the community includes a variety of companies providing specific services or products to the Radio industry.

- b. The community definition contained in the Application refers to the definition of the “radio industry” as included in the North American Industrial Classification System (NAICS). This definition reads as follows:

“Establishments primarily engaged in broadcasting aural programs by radio to the public. Included in this industry are commercial, religious, educational, and other radio stations. Also included here are establishments primarily engaged in radio broadcasting and which produce radio program materials.”³

Key elements in this definition include:

- Criterion 1: members of the radio industry are “establishments” and “radio stations”;
 - Criterion 2: they are “primarily engaged in radio broadcasting”; and
 - Criterion 3: they “produce radio program materials”.
- c. Requesters would like to obtain further information on the reasons for acknowledging that certain “members” of the “radio community” listed by the Applicant, such as “radio professionals”, “licensed radio amateurs” and “podcasters” meet Criterion 1 set out above;
- d. Requesters would like to obtain further information on the reasons for acknowledging that certain “individuals that are in the radio industry” to which the Determination refers, even expressly referencing the NAICS definition in the footnote immediately thereafter, meet Criterion 1 set out above, as an individual cannot be considered an “establishment” nor a “radio station”;
- e. Requesters would like to obtain further information on the reasons for acknowledging that certain “members” of the “radio community” listed by the Applicant, such as “podcasters” meet Criterion 2 set out above;
- f. It is not clear to Requesters how the concept of “a variety of companies” rhymes with the concept of a “clear and straightforward membership that is well-defined”. Therefore, Requesters would like to obtain further information on the criteria used by and the determinations made by ICANN and the Community Priority Evaluation panel in this respect.

Furthermore, Requesters would like to obtain further information on the reasons for acknowledging that certain “a variety of companies providing specific services or products to the Radio industry” meet Criteria 1, 2 or 3 set out above, considering the fact that the wording “variety of companies” and “specific services or products” are obviously much broader than the criteria set forth in the NAICS definition.

This is more in particular the case when these companies are rendering “specific” services or products, without expressly mentioning what these are, or what the criteria are for these services or products to be “specific”. Therefore, Requesters would like to obtain further information on the

³ Reference is made to footnote 1 on Page 2 of the Determination.

criteria used by and the determinations made by ICANN and the Community Priority Evaluation panel in view of these criteria;

- g. Requesters would like to obtain further information on the criteria used by and the determinations made by ICANN and the Community Priority Evaluation panel for acknowledging that only companies “providing specific services or products to the Radio industry”, etc. can be considered members of a community that “shows a clear and straightforward membership, and is therefore well-defined”.

Requesters are unaware of any specific membership criteria that would apply to “radio professionals”, “licensed radio amateurs”, “podcasters”, and “a wide variety of companies providing specific services or products to the Radio industry”, apart from the fact that these individuals or organisations have some affinity with the medium “radio”. For instance, under the Community Evaluation Panel’s assessment, every employee of a radio company or station can register a .radio domain name, even if such employee’s actual professional activities are unrelated to the radio medium as such.

- h. Insofar and to the extent these products and services are specific to the “radio industry”, it is not clear to the Requesters how, on the one hand, the reference made in the Application that the so-called “radio community” includes a “wide variety of members”, including “radio-related providers that can be identified through trademarks”, and “radio industry partners and providers” whereas, according to the NAICS definition, the membership to the radio industry is much more narrow considering the three criteria set out above.

Based on this, Requesters would like to obtain further information on the criteria used by and the determinations made by ICANN and the Community Priority Evaluation panel in view of these criteria.

- i. It is commonly known that various companies are offering “Internet radio software” to Internet users, enabling them to operate an Internet radio and stream live audio instantly over the Internet. Considering the fact that – according to the Application – Internet radios are also “part of the Radio community”, it is obvious that including any person or entity who sets up a “plug and play” Internet radio system in a few minutes cannot be considered meeting the requirements of a clear and straightforward membership that is well defined.

Given this, Requesters would like to obtain further information on the criteria used by and the determinations made by ICANN and the Community Priority Evaluation panel in view of this criterion, as well as in view of Criteria 1 (“establishments and radio stations”) and 2 (“broadcasting”).

In the Application, the EBU states that in order to qualify, “Internet radios need to meet certain minimum standards” without being specific on what these standards are and how the EBU is going to verify whether these standards are met.

- j. In the Determination, ICANN and the Community Priority Evaluation panel acknowledge – and in the opinion of the Requesters rightfully so – that the

community invoked by the EBU in the Application does not meet the requirements of “Organization”. According to the Determination:

“Based on the information provided in the application materials and the Panel’s research, there is no such entity that organizes the community defined in the application. Therefore, as there is no entity that is mainly dedicated to the community as defined in the .RADIO application, as the Panel has determined, there cannot be documented evidence of community activities”.⁴

In light of this Determination, there is a clear contradiction with the Determination provided under the Delineation criterion, where ICANN and the Community Priority Evaluation panel have found that the “membership in the (industry) community is sufficiently structured as the requirements listed in the community definition above show.

Based on this, Requesters would like to obtain further information on the criteria and arguments used and provided for accepting that the community is on the one hand *insufficiently organized*, but on the other hand is found to be *“sufficiently structured”*.

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 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.

[...]

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application. The string as defined in the application demonstrates uniqueness, as the string does not have any other meaning beyond identifying the community described in the application.”

A simple search on Wikipedia shows that the word “radio” extends far beyond the narrow concept as described in the application, and in particular in the description provided in the NAICS’ “radio industry” definition, as the term “radio” also covers additional uses of the “radiation of electromagnetic signals through the atmosphere or free space”, such as:

- Telephony;
- Video;
- Navigation (used in, *e.g.*, satellite navigation systems, such as GPS);
- Radar;
- Heating (used in, *e.g.*, microwaves and induction furnaces); and
- Radio control.⁵

⁴ Determination, Page 3

⁵ See <http://en.wikipedia.org/wiki/Radio> and [http://en.wikipedia.org/wiki/Radio_\(disambiguation\)](http://en.wikipedia.org/wiki/Radio_(disambiguation)).

Furthermore, Requesters point out to the fact that manufacturers of radio transmitters or receivers – both critical elements and tools in order to be able to send and receive broadcasted radio programs – have to be added to this list, and do not form part of the definition of the NAICS definition since they do not meet Criteria 2 and 3 ...

Considering the above, the Requesters would like to obtain further insights in the information reviewed and arguments developed by the Community Priority Evaluation panel in its determination that:

- a) the applied-for string *identifies* the name of the community as defined in the application, or *closely describes* such community, considering the above elements;
- b) why the other uses and meanings of the word “radio” have been disregarded by the Community Priority Evaluation panel, especially since the uses and meanings listed above are unrelated to any of the activities carried out by the EBU and the organizations supporting the Application;
- c) why the other uses and meanings of the word “radio” have been disregarded, by determining that the meaning of the word “radio” is unique (which, on the basis of the information that can be easily retrieved on a commonly known website such as Wikipedia, is obviously not the case).

III. Registration Policies – Eligibility; Name Selection; Content and Use; Enforcement

The Community Priority Evaluation panel has determined that “[...] *the application demonstrates adherence to this requirement by restricting eligibility to the community categories mentioned in Delineation, and additionally requiring the the registered domain name be “accepted as legitimate, and beneficial to the cause and value of the radio industry; and commensurate with the role and importance of the registered domain name; and in good faith at the time of registration and thereafter.”*”

Considering the fact that Requesters have requested further clarifications and information on the information and criteria used by the Community Priority Evaluation panel in § I. above, it is unclear which standards and criteria are going to be used, implemented and enforced by the EBU in view of ensuring that only members of the “radio community” or “radio industry” can register domain names.

Especially since Requesters have established that, on the basis of the criteria set out in the Application, anyone with some affinity with the concept “radio” are considered by the EBU and the Community Evaluation Panel as members of the “radio community”, Requesters would like to obtain the information and arguments used by this panel in determining that the criteria for eligibility are satisfied, even when disregarding parties who are active in other, albeit adjacent industries, such as the video, radar, navigation, and heating industry, as well as manufacturers of radio transmitters and receivers.

Furthermore, since the standard propagated by the EBU in relation to name selection is that “*the domain name must be commensurate with the role of the registered domain, and with the role and importance of the domain name based on the meaning an average user would reasonably assume in the context of the domain name*”, Requesters would like to obtain the information, arguments, and the application thereof in concrete use cases they have developed on the basis of the information contained in the Application in order to determine that the “*registration policies for name selection for registrants must be consistent with the*

articulated, community-based purpose of the applied-for gTLD", especially since Requesters do not understand what the EBU means by:

- a) "the domain name must be commensurate with the role of the registered domain";
- b) "the domain name must be commensurate with [...] the role and importance of the domain name";
- c) the criteria the "meaning" of the domain name, "average user", and such average user's "reasonable assumption",

and the standards and criteria used by ICANN and the Community Priority Evaluation panel in establishing that – on the basis of these requirements – names can be excluded from registration because they have no connection with the so-called "radio community", and how these vague requirements can possibly be enforced against the registrant.

The same question arises in relation to the standards and criteria applied by the EBU and evaluated positively by ICANN and the Community Priority Evaluation panel in terms of the "Contents and Use" criterion.

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

The Community Priority Evaluation panel determined that the EBU "*was not the recognized community institution(s)/member organization(s)*", which is a view that is supported by the Requesters.

However, the Community Priority Evaluation panel has determined that the EBU "[...] *possesses documented support from institutions / organizations representing a majority of the community addressed.*"

Requesters therefore would like to obtain further information concerning the information on which such determination was based, especially in determining that the letters of support were submitted by institutions / organizations representing a *majority* of the community addressed. (emphasis added)

Furthermore, Requesters would like to obtain further information about the institutions / organizations who – in the Community Priority Evaluation panel's view also form part of the "radio community", but who have not supported the Application.

V. 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 or on behalf of the Requesters to ICANN in relation to the Application, which all contained strong opposition against ICANN awarding the .RADIO gTLD to the Applicant have obviously been considered "of no relevance" or that each of the Requesters is to be considered as a "group of negligible size".

The outcome of the Community Priority Evaluation is particularly surprising, considering the fact that one of the Requesters, BRS Media Inc., is the registry for the .FM TLD, which is serving many domain name registrants relating to radio.

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 .RADIO gTLD to the EBU, 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 Evaluation.

- 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 .RADIO gTLD to the EBU, 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 Evaluation.

- 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 .RADIO 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 Evaluation.

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

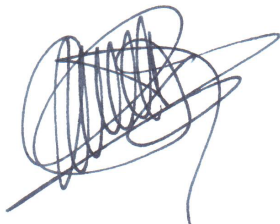
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.

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 .RADIO 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,



Bart Lieben
Attorney-at-Law