

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**ICDR Case Number 01-16-0000-2315**

**Commercial Connect, LLC**

Contact Information Redacted

**(Claimant)**

- v -

**Internet Corporation for Assigned Names and Numbers**

12025 Waterfront Drive, Suite 300  
Los Angeles, California, 90094-2536  
USA

**(Respondent)**

**REQUEST FOR EMERGENCY ARBITRATOR  
AND INTERIM MEASURES OF PROTECTION IN VIEW OF  
INDEPENDENT REVIEW PROCEEDINGS**

## **I. INTRODUCTION**

1. Pursuant to ICDR Rules 21 and 37, Complainant hereby requests the appointment of an Emergency Arbitrator to decide Complainant's request for interim measures of protection preventing the Internet Corporation for Assigned Names and Numbers ("ICANN") from completing the process for resolving the contention set for the .SHOP gTLD through an ICANN administered auction process, the award of the Registry Agreement to the prevailing party in such auction, and the delegation of the .SHOP gTLD to such party pending the outcome of an ICANN-created accountability procedure known as an Independent Review Process ("IRP"), which Claimant initiated on November 17, 2015.

## **II. PARTIES**

### **A. Claimant**

2. Claimant in these proceedings is Commercial Connect, LLC, incorporated in Louisville, the Commonwealth of Kentucky, USA.
3. Claimant is an applicant for the .SHOP gTLD, having submitted a so-called community-based application for this new gTLD in the context of ICANN's New gTLD Program. This application is known to ICANN under application ID 1-1830-1672.
4. Claimant's preferred method of communication in these Proceedings is both via email and, if and when hardcopies need to be exchanged, by regular mail on the above address.

### **B. Respondent**

5. The Respondent is the Internet Corporation for Assigned Names and Numbers. ICANN's contact details are:

Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
Tel: +1 310 301 5800  
Fax: +1 310 823 8649

### III. BACKGROUND OF THE INTERESTED PARTIES

#### A. Claimant

6. Claimant has submitted an application for the .SHOP gTLD in in the context of ICANN's New gTLD Program, which has been made available on ICANN's website at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/307?t:ac=307>.

1

7. This Request is submitted pursuant to Article IV, Section 3 of the Bylaws for the Internet Corporation for Assigned Names and Numbers ("ICANN"),<sup>2</sup> the International Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Rules")<sup>3</sup> and the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process (the "Supplementary Procedures").<sup>4</sup> By way of this Request, Claimant seeks relief from the harm it has suffered as a result of the actions, inaction and decisions of the ICANN Board of Directors, and more in particular the Recommendation of ICANN's Board Governance Committee ("BGC") dated August 24, 2015<sup>5</sup> and the Determination by the New gTLD Program Committee ("NGPC") regarding Claimant's Reconsideration Request 15-13<sup>6</sup> in violation of ICANN's Articles of Incorporation,<sup>7</sup> Bylaws,<sup>8</sup> New gTLD Applicant Guidebook ("AGB"),<sup>9</sup> ICANN's Top-Level Domain Application Terms and Conditions,<sup>10</sup> and principles of international law.

8. Following publication of all applied-for new gTLD strings in the fall of 2012, it appears that various entities have applied for the .SHOP gTLD, including Claimant.

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<sup>1</sup> See **Annex 1**.

<sup>2</sup> See **Annex 2** (<https://www.icann.org/resources/pages/governance/bylaws-en>).

<sup>3</sup> See **Annex 3**.

<sup>4</sup> See **Annex 4**.

<sup>5</sup> See **Annex 5** (<https://www.icann.org/en/system/files/files/determination-15-13-commercial-connect-24aug15-en.pdf>).

<sup>6</sup> See **Annex 6** (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-09-28-en#2.a>).

<sup>7</sup> See **Annex 7** (<https://www.icann.org/resources/pages/governance/articles-en>).

<sup>8</sup> See **Annex 2**.

<sup>9</sup> See **Annex 8** (<https://newgtlds.icann.org/en/applicants/agh/guidebook-full-04jun12-en.pdf>).

<sup>10</sup> See **Annex 9** (<https://newgtlds.icann.org/en/applicants/agh/terms>).

9. In November of 2014, Claimant was invited by ICANN to and did participate in community priority evaluation (“CPE”), which is one of the ways offered by ICANN to community-based applicants like Claimant to resolve the situation whereby various parties have applied for the same or confusingly similar extension.
10. On May 21, 2015, Claimant was informed of the fact that it did not prevail in CPE. Reference is made to the determination of said date by the Economist Intelligence Unit, which is the organization that has been appointed by ICANN to perform CPE. This determination has been published on the ICANN website at <https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>.<sup>11</sup> (hereinafter: the “EIU Determination”).
11. Upon information and belief, this EIU Determination was subsequently accepted by ICANN, apparently without ICANN further reviewing the contents of this EIU Determination, the information on which it was based and/or the process used by the EIU in this respect.
12. Claimant subsequently filed, in accordance with ICANN’s accountability mechanisms a Request for Reconsideration (the “Reconsideration Request”).
13. As indicated in its Reconsideration Request, Claimant is of the opinion that:
  - a. the EIU and ICANN have not followed the rules and criteria that have been laid down in the Applicant Guidebook, by relying on incorrect or even false and misleading information;
  - b. the EIU and ICANN have, by developing additional guidelines in connection with the CPE process, not followed established policies, considering the fact that these guidelines have been developed
    - i. not taking into account ICANN’s policy-making processes; and
    - ii. more than two years after the application round for new gTLDs were closed, and without providing community-based applicants like Claimant with the opportunity to modify the contents of their applications accordingly.
14. According to Claimant, ICANN committed numerous breaches of its Articles of Incorporation, its Bylaws, the AGB, the Top-Level Domain Application Terms

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<sup>11</sup> See **Annex 10**.

and Conditions, as well as principles of international and local law in its handling and treatment of the Community Priority Evaluation of the Application, their First Request for Information under ICANN's Documentary Information Disclosure Policy, their First Reconsideration Request, and the Second EIU Determination.

15. Under its Articles of Incorporation, ICANN is required to "operate for the benefit of the community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law."<sup>12</sup>

16. Furthermore, ICANN's Bylaws require it to act in an open, transparent and non-discriminatory manner, remaining accountable to the Internet community and parties that are affected by ICANN's actions, and consistent with procedures designed to ensure fairness.

17. Furthermore, the ICANN Board failed to ensure that adequate safeguards were put in place in order to implement policies (such as the AGB) accurately, transparently and in an unbiased manner, and that established processes have been followed by the EIU in performing the first and the second CPE.

18. Specifically, Claimant seeks review of (i) ICANN's decision not to accept the findings contained in the EIU Determination; and resulting therefrom (ii) ICANN's decision not to award community-based status to Claimant's Application, which should have ultimately lead to resolving the .SHOP contention set in favor of Claimant.

## **B. ICANN**

19. The Internet Corporation for Assigned Names and Numbers, founded in 1998, has as its mission to ensure a stable and unified global Internet. One of its key responsibilities is introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system (DNS).

## **IV. PROCEDURAL ASPECTS**

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<sup>12</sup> ICANN Articles of Incorporation, Section 4.

20. In the first place, Claimant requests the appointment of an Emergency Arbitrator in order to (a) hear its request for emergency relief to preserve its right for a meaningful Independent Review (see §21 below); and (b) suspend the contention resolution process for the .SHOP gTLD; and (c) obtain an order enjoining ICANN from executing the .SHOP Registry Agreement while the Independent Review Proceedings are ongoing.

21. In relation to the proceedings on the merits, Claimant that the IRP be considered by a three-member panel, composed of one arbitrator selected by each party and a presiding arbitrator selected by the parties either by mutual agreement or, in the event the parties are unable to reach an agreement, selected by the parties from a list of five potential presiding arbitrators chosen by the two party-appointed arbitrators.

## **V. SUMMARY OF RELEVANT FACTS**

### **A. ICANN's New gTLD Program**

22. For over a decade, ICANN has been developing its so-called New gTLD Program in order to increase competition in domain name registrations, and increase consumer choice.

23. In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet.

24. The policy development process included detailed and lengthy consultations with the many constituencies of ICANN's global Internet community, including governments, civil society, business and intellectual property stakeholders, and technologists.

25. In 2008, the ICANN Board adopted 19 specific policy principles, recommendations and implementation guidelines developed by ICANN's Generic

Names Supporting Organization (GNSO) for implementing new gTLDs, with certain allocation criteria and contractual conditions.<sup>13</sup>

## **B. Development and Finalization of the Applicant Guidebook**

26. After approval of the GNSO's policy principles, recommendations and implementation guidelines, ICANN undertook an open, inclusive, and transparent implementation process to address stakeholder concerns, such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work included public consultations, review, and input on multiple draft versions of the Applicant Guidebook, as provided for in ICANN's operating principles.

27. In June 2011, ICANN's Board of Directors approved the Guidebook and authorized the launch of the New gTLD Program. The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains.

28. The application window opened on January 12, 2012, and ICANN received 1,930 applications for new gTLDs.

29. On 17 December 2012, ICANN held a prioritization draw to determine the order in which applications would be processed during Initial Evaluation and subsequent phases of the program. These applications were processed by ICANN staff and evaluated by expert, independent third-party evaluators according to priority numbers.

30. ICANN published the final version of the Applicant Guidebook on June 4, 2012, which is almost two months after the closing of the application round for new gTLDs (which was officially set for April 12, 2012).<sup>14</sup>

## **C. About Community Priority Evaluation**

31. Community Priority Evaluation ("CPE") is a method to resolve string contention, described in full detail in section 4.2 of the Applicant Guidebook

<sup>13</sup> See <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>14</sup> See <https://newgtlds.icann.org/en/applicants/agh>.



(AGB). According to the AGB, Community Priority Evaluation will only occur if a so-called “community-based application” is both in contention and elects to pursue CPE.

32. In order to qualify as a community-based application, the applicant must (i) have answered specific questions in the application form put at the disposal by ICANN during the application round, and (ii) have indicated to ICANN that the application should be subject to CPE. Additional fees of up to USD 22,000 are due for participating in CPE.

33. According to the AGB, a community-based application must receive a score of at least 14 out of 16 points in order to be confirmed by ICANN as being community-based. The direct effect of such acknowledgement is that such application prevails over any standard application for the same or confusingly similar gTLD application.

34. The evaluation itself, which includes the scoring of the application as explained above, is an independent analysis conducted by a panel selected by ICANN.

**D. The EIU Was Selected As The Sole Community Priority Evaluator For Community-Based Applications**

35. On July 31, 2009, ICANN published on its website a “Call for Expressions of Interest (EOIs) for a New gTLD Community Priority Evaluation Panel – formerly Comparative Evaluation Panel”, inviting providers to submit their proposals on how to “conduct the comparative evaluation of applications in contention”.<sup>15</sup>

36. The selection criteria for independent evaluators have been published included, amongst other criteria, the following:

*Criterion 4: “Considering the comparative evaluation criteria defined in Module 4 of the Applicant Guidebook and described in Section 3 of this document, the provider must propose a panel that is capable of:*

- a. exercising consistent and somewhat subjective judgment in making its evaluations, (the Guidebook criteria seeks to make the judgment as objective as possible)*

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<sup>15</sup> See <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>.



- b. *reaching conclusions that are compelling and defensible, and documenting the way in which it has done so in each case.*"

Criterion 7: *"The evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination."*<sup>16</sup>

37. Furthermore, in its response to the requirements set out in the EOI, the applicant had to provide *"A statement of the candidate's plan for ensuring fairness, nondiscrimination and transparency."*<sup>17</sup>

38. Later on, ICANN awarded the contract for performing Community Priority Evaluations to the Economist Intelligence Unit ("EIU"). The EIU was selected for this role because it offers premier business intelligence services, providing political, economic, and public policy analysis to businesses, governments, and organizations across the globe.<sup>18</sup>

39. On August 16, 2013, the EIU published a set of draft Guidelines that panelists will use to score Community-based applicants.<sup>19</sup>

#### **E. ICANN / The EIU Did Not Perform Due Diligence In Evaluating Claimant's Application**

40. On the basis of the information contained in the EIU Determination, the Community Priority Evaluation Panel demonstrates that it has taken into account certain information that is either in the public domain or has been communicated to the EIU in the context of the Community Priority Evaluation process. The AGB indeed authorizes CEP panels to *"perform independent research, if deemed necessary to reach informed scoring decisions"*.<sup>20</sup>

41. Upon information and belief, based upon the contents of the EIU Determination, it is clear that the information relied upon by the EIU were false, incomplete or materially incorrect. Claimant therefore believes that, if the EIU would have taken into account accurate and up-to-date information, it would

<sup>16</sup> <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>, page 5; **ibid.**

<sup>17</sup> <https://archive.icann.org/en/topics/new-gtlds/eoi-commun-priority-31jul09-en.pdf>, page 6, Requirement 5; **ibid.**

<sup>18</sup> See <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>19</sup> See <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>.

<sup>20</sup> AGB, §4.2.3.

have come to a different conclusion, as stated in the Reconsideration Request and the submissions made by Claimant in this context.

**F. The EIU Was Not Authorized To Follow The CPE Guidelines**

42. In its Determination, the BGC refers to the fact that the CPE Panel has published *"supplementary guidelines ("CPE Guidelines") that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored"*. (BGC Determination, page 6). In the Determination, the BGC refers on various occasions that the CPE Panel has *"applied the Guidebook scoring guidelines"* apparently as opposed to the *"standards governing CPE"* that are *"set forth in Section 4.2 of the Guidebook"* (BGC Determination, pages 6, 10, 12, 14, 15 and 18) (emphasis added).

43. Claimant is of the opinion that the CPE Panel did not have the authority under ICANN Policy and in particular under the Applicant Guidebook to publish such additional "CPE Guidelines". Furthermore, the rules and processes for developing "ICANN Policy" have not been followed in defining these "CPE Guidelines".

44. For these two reasons alone, the CPE Guidelines cannot be considered "ICANN Policy", and should therefore have been disregarded by the EIU in developing the CPE Report and by ICANN in making the Determinations.

45. In Claimant's view, the only reference point to be used by the CPE Panel is the Applicant Guidebook.

46. In this respect, Claimant also points out to the fact that these CPE Guidelines have been published about one year and a half after the closing of the application window in April / May of 2012.<sup>21</sup> Claimant hereby refers to Recommendation 9 contained in the GNSO's Principles, Recommendations & Implementation Guidelines, according to which ICANN had to implement "[...] a clear and pre-published application process using objective and measurable

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<sup>21</sup> Reference is made to <http://newgtlds.icann.org/en/applicants/cpe> - CPE Resources.

criteria” for new gTLDs.<sup>22</sup> According to Resolution 2008.06.26.02 of the ICANN Board, dated June 26, 2008, “[...] *the Board [adopted] the GNSO policy recommendations for the introduction of new gTLDs*

*<<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>>.”<sup>23</sup>*

47. In conclusion: by expressly referring to the fact that the CPE Panel has utilized its own CPE Guidelines, which do not form part of the Applicant Guidebook, nor are to be considered ICANN Policy, the CPE Panel has not applied ICANN’s policies and procedures in accordance with its Bylaws. Since the BGC has expressly confirmed in the Determination that the CPE Panel has applied “*the (Applicant) Guidebook scoring guidelines and the CPE Guidelines*”, the BGC has in fact acknowledged that guidelines other than what has to be considered ICANN Policy have been followed ...

48. Given the obscurity of the evaluation and scoring process, and in the absence of further insights in which information has been used and considered by the EIU in the context of CPE, Claimant is unable to determine or demonstrate that the scoring provided by the CPE Panel would have been different if these CPE Guidelines would not have been applied. In order to do this, additional factual information and documentation would be required, which ICANN refused to disclose within the context of Claimant’s initial Reconsideration Request.

49. In any case, Claimant has submitted a new Reconsideration Request on January 26, 2016, which has been duly received by ICANN.<sup>24</sup>

## **VI. STANDING, SUMMARY OF BREACHES BY ICANN OF ITS BY-LAWS, THE TERMS AND CONDITIONS, AND APPLICABLE LAW**

50. Claimant has standing to initiate these Proceedings in accordance with Section 6 of ICANN’s Top-Level Domain Application Terms and Conditions, which state:

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<sup>22</sup> <http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf> and <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

<sup>23</sup> See ICANN Board Resolution 2008.06.26.02, available at [https://www.icann.org/resources/board-material/resolutions-2008-06-26-en#\\_Toc76113171](https://www.icann.org/resources/board-material/resolutions-2008-06-26-en#_Toc76113171), which expressly refers to the GNSO’s Principles, Recommendations and Implementation Guidelines.

<sup>24</sup> **Annex 11.**

*"[...] APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. [...]"*<sup>25</sup>

51. The breaches committed by ICANN in accepting the Second EIU Determination are manifold.
52. It is therefore clear that the Second EIU Determination, ICANN's acceptance thereof materially affects Claimant's Application and causes irreparable harm, considering the fact that they have invested more than USD 185,000 in application fees to be paid to ICANN, USD 22,000 in CPE fees, as well as significant consulting and attorney fees in the context of developing, submitting and managing each of their respective applications.
53. Given the fact that ICANN decided, on the basis of the EIU Determination, that Claimant's Application for the .SHOP gTLD did not prevail in CPE, this will result in ICANN putting Claimant's Application in contention with various other applicants for the .SHOP gTLD, which will likely result in additional costs for Claimant in view of entering into a Registry Agreement with ICANN for this new gTLD.

## **VII. CONCLUSIONS AND RELIEF REQUESTED**

54. For all of the reasons set out above, Claimant respectfully requests the appointment of an Emergency Arbitrator in accordance with Article 37 of the ICDR Rules, and that said Arbitrator provide interim measures of protection by way of an award pursuant to Article 21 of the ICDR Rules as follows:
- a. an interim award compelling ICANN to stay any resolution of the contention set for the .SHOP gTLD until (a) the BGC has provided a response to the Reconsideration Request submitted by Claimant on January 26, 2016 and (b) the IRP has concluded and the Board has made its decision based upon the IRP Panel's declaration;
  - b. an interim award compelling ICANN to stay the execution of a Registry Agreement for the .SHOP gTLD pending the Independent Review;

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<sup>25</sup> <https://newgtlds.icann.org/en/applicants/agb/terms>.

- c. an interim award compelling ICANN to accept the Notice of Independent Review that has been submitted to ICANN on November 17, 2015 as well as Claimant's invitation to commence the Cooperative Engagement Process following the NGPC Determination;
- d. an interim award compelling ICANN to set aside the CPE Report and ICANN's subsequent Determination until the IRP proceedings on the merits have been completed;

55. In addition, following the determination by the Emergency Arbitrator, Claimant requests the appointment of a Panel by the ICDR to:

- (1) determine that, in light of the above facts and circumstances, which may be further elaborated and supplemented in the context of this Independent Review Proceedings, the ICANN Board, and more in particular the BGC and the NGPC, have breached ICANN's Articles of Association, its Bylaws, the criteria and procedures set forth in the AGB, ICANN's Top-Level Domain Application Terms and Conditions, and principles of international law in performing the CPE for Claimant's Application;
- (2) determine that the CPE Guidelines have been developed outside of the policy context provided for by the GNSO in 2007, which has been adopted by the ICANN Board in 2008, and should hence be disregarded in the context of Community Priority Evaluation;
- (3) determine that the EIU erred in reviewing and scoring Claimant's Application;
- (4) determine that the review and scoring of Claimant's Application was done on the basis of false or inaccurate material information as is proven by the submissions made by the Claimant to ICANN and in the context of these Independent Review Proceedings, and that they have not performed due diligence by independently verifying the information available to them;
- (5) determine that, by not scrutinizing the CPE process followed by the EIU in the context of the Second EIU Determination, and more in particular by not verifying that indeed different evaluators participated to the CPE,

the ICANN Staff and the ICANN Board have taken an action or inaction that was contrary to established process established by the BGC in its Determination;

- (6) determine that, by reviewing the contents of the Second EIU, Determination, the information relied upon by the EIU, their work papers and additional documentation developed by the EIU, the ICANN Board has taken an action or inaction by relying on false or inaccurate material information;
- (7) temporarily restore the "Application Status" of Claimant's application to "In CPE" until Claimant's Application has been re-evaluated against the Community Priority criteria set out in the Applicant Guidebook;
- (8) in the meantime, also revise ICANN's decision whereby Claimant's Application for the .SHOP gTLD has been put "In Contention" with other applications for the .SHOP gTLD, submitted by third parties;
- (9) provide Claimant with a timeframe of at least thirty (30) days to review the information received from ICANN and provide for additional submissions in the context of the IRP proceedings on the merits, following the determination by the Emergency Arbitrator;
- (10) determine that Claimant's Application meets the Community Priority Evaluation Criteria set forth in the AGB;
- (11) if the Panel would determine that it would not be qualified to perform such a Community Priority Evaluation, appoint (or instruct ICANN to appoint) a third party other than the Economist Intelligence Unit to perform such Community Priority Evaluation, taking only into account the criteria and standards set out in the AGB;
- (12) instruct ICANN to refund to Claimant all fees paid in order for the EIU to perform CPE.

#### **VIII. RESERVATION OF RIGHTS**

56. Claimant reserves all of its rights to seek additional emergency relief or interim measures of protection, to submit to the ICDR a complete submission on the merits in the context of these Independent Review proceedings, and to

supplement or amend its arguments, claims and requested relief during these and the Independent Review proceedings, including but not limited to its rights to further elaborate upon, substantiate and supplement the factual and legal positions and arguments set out herein within the context of the ICDR Rules, bearing in mind that Claimant has not been offered the opportunity to initiate and conduct the Cooperative Engagement Process that has been initiated on at least two occasions with ICANN.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jeffrey Smith', is written over a horizontal line. The signature is stylized and cursive.

*Jeffrey Smith*  
*President*  
*Commercial Connect, LLC*

*January 26, 2016*



