

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-4
14 JUNE 2018**

The Requestor, dotgay LLC, seeks reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (collectively, the Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.¹ Specifically, the Requestor claims that, “ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness,” and is inconsistent with ICANN organization’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence.²

I. Brief Summary.

The Requestor submitted a community-based application for .GAY generic top-level domain (gTLD) (Application or dotgay Application), which was placed in a contention set with three other .GAY applications.³ The Requestor participated in CPE, but did not prevail (First CPE). The Requestor then challenged the First CPE results in Reconsideration Request 14-44 (Request 14-44), which the Board Governance Committee (BGC) granted and directed a re-evaluation of the Requestor’s Application. The re-evaluation of the Application (Second CPE) was not successful.⁴ The Requestor then challenged the results of the Second CPE in

¹ Request 18-4, § 3, at Pg. 1.

² Request 18-4, § 6, at Pg. 4-5.

³ <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁴ BGC Determination on Request 14-44, <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

Reconsideration Request 15-21, which the BGC denied.⁵ Thereafter, the Requestor filed Reconsideration Request 16-3, challenging the BGC's denial of Request 15-21. Request 16-3 is pending evaluation by the BAMC.⁶

While Request 16-3 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.⁷ The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.⁸ The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.⁹

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).¹⁰

On 15 March 2018, the Board passed the Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the

⁵ BGC Determination on Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

⁶ See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

⁷ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

⁸ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁹ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

¹⁰ See <https://www.icann.org/news/announcement-2017-12-13-en>.

remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.¹¹

On 13 April 2018, the Requestor submitted Request 18-4, challenging the Resolutions.¹² The Requestor claims that, “ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness,” and is inconsistent with ICANN org’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence.¹³

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-4 to the Ombudsman for consideration, and the Ombudsman recused himself.¹⁴

The BAMC has considered Request 18-4 and all relevant materials and recommends that the Board deny Request 18-4 because the Board considered all material information when it adopted the Resolutions, which are consistent with ICANN’s Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in the Resolutions, the Board has considered the CPE Process Review Reports.¹⁵ The CPE Process Review Reports identify the materials considered by FTI.¹⁶ Additionally, as noted in the rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions.¹⁷

¹¹ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹² Request 18-4, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-request-redacted-13apr18-en.pdf>.

¹³ Request 18-4, § 6, at Pg. 4-5.

¹⁴ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-2, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-ombudsman-action-17apr18-en.pdf>.

¹⁵ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁶ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁷ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

II. Facts.

A. The CPE Provider's Evaluations of the Requestor's .GAY Application.

The Requestor submitted a community-based application for .GAY, which was placed in a contention set with other .GAY applications. On 23 April 2014, the Requestor's Application was invited and the Requestor accepted to participate in CPE.¹⁸

On 6 October 2014, the CPE panel issued a "First CPE Report," concluding that the Application did not qualify for community priority.¹⁹ The Requestor filed Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report.²⁰ The BGC granted reconsideration on Request 14-44 on the grounds that the CPE Provider had inadvertently failed to verify some letters of support for the Application.²¹ Subsequently, the CPE Provider conducted a "Second CPE" of the Application.²² The Application did not prevail in the Second CPE.²³

On 22 October 2015, the Requestor sought reconsideration of the Second CPE Report (Request 15-21),²⁴ and filed a DIDP Request seeking the disclosure of documents relating to the Second CPE (2015 DIDP Request).²⁵ Following ICANN org's response to the 2015 DIDP Request,²⁶ the Requestor revised Request 15-21 to include a challenge the response to the 2015

¹⁸ CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>. *See also* <https://newgtlds.icann.org/en/applicants/cpe#status>.

¹⁹ *See* CPE Report at 1.

²⁰ BGC Determination on Request 15-21, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

²¹ *Id.* at Pg. 2.

²² *Id.* at Pg. 1.

²³ *Id.* at Pg. 2.

²⁴ *Id.*

²⁵ DIDP Request No. 20151022-1, at Pg. 2-5, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-request-redacted-22oct15-en.pdf>.

²⁶ Response to DIDP Request No. 20151022-1, <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>,

DIDP Request in addition to the Second CPE Report.²⁷

On 1 February 2016, the BGC denied Request 15-21.²⁸ On 17 February 2016, the Requestor filed a third reconsideration request (Request 16-3), seeking reconsideration of the BGC's determination on Request 15-21 concerning the Second CPE Report; the Requestor did not challenge the BGC's determination concerning the response to the 2015 DIDP Request.²⁹ On 26 June 2016, the BGC recommended that the Board deny Request 16-3.³⁰

B. The CPE Process Review.

While Request 16-3 was still pending, ICANN's Board, as part of the Board's oversight of the New gTLD Program, directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program (Scope 1).³¹

Subsequently, the BGC determined that, in addition to Scope 1, the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).³² Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined

²⁷ Amended Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

²⁸ BGC Determination on Request 15-21, at Pg. 1

²⁹ Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

³⁰ BGC Recommendation on Request 16-3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

³¹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

³² *Id.*

that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-3, would be on hold until the CPE Process Review was completed.³³

On 13 December 2017, ICANN organization published FTI's reports issued in connection with the CPE Process Review.³⁴

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.³⁵

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."³⁶

For Scope 3, "FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider's working papers to the extent that such material was not otherwise cited in the final CPE report."³⁷ FTI observed that all eight of the relevant CPE reports (which are the ones at issue in the Reconsideration Requests placed on hold) referenced research. Two of the eight relevant CPE reports included citations for each reference to research. Of the remaining six relevant CPE reports, while the reports themselves did not include citations to each reference to research, in five of the six instances, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports. In the Requestor's case (for which two CPE reports were

³³ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

³⁴ See <https://www.icann.org/news/announcement-2017-12-13-en>.

³⁵ Scope 1 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

³⁶ Scope 2 Report, at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

³⁷ Scope 3 Report, at Pg. 3-4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

completed, as discussed above) FTI did not find citations to each reference to research in the working papers underlying the Second CPE Report. However, FTI did find that the citation supporting the research referenced in the Second CPE Report may have been recorded in the working papers associated with the First CPE.³⁸

On 15 March 2018, as detailed above, the Board adopted the Resolutions.³⁹ The Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),⁴⁰ and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).⁴¹ The Roadmap provides, in relevant part, that

Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions . . . , materials presented in the oral presentations . . . , any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.⁴²

The Board noted that the requestors with pending reconsideration requests

each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be

³⁸ Scope 3 Report, at Pg. 4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

³⁹ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>. One Board member, Avri Doria, abstained from voting on the 2018 Resolutions due to concerns “about the rigor of the study and some of its conclusions.” San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>. However, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting. Id.

⁴⁰ Available at <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

⁴¹ 2018 Resolutions. See also Roadmap, available at <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

⁴² Roadmap, at Pg. 2.

addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.⁴³

C. The Requestor’s Response to the CPE Process Review.

On 15 and 20 January 2018, the Requestor submitted letters to the Board, claiming that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough.⁴⁴ In the 15 January 2018 letter, the Requestor asked the Board to take no action with respect to the conclusions reached by FTI until the parties have had an opportunity to respond to the CPE Process Review Reports and to be heard as it relates to their pending reconsideration requests.⁴⁵

On 19 March 2018, consistent with the Roadmap, the BAMC invited the Requestor to “submit additional information relating to Request 16-3, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the Requestor to “make a telephonic oral presentation to the BAMC in support of” Request 16-3. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-3 and that is not already covered by the written materials.”⁴⁶

On 23 March 2018, the Requestor “reject[ed] BAMC’s invitation to make a telephonic presentation limited to 30 minutes” and “reject[ed] ICANN’s attempt to impose an artificial two weeks deadline” for supplemental briefing.⁴⁷ The Requestor reconfirmed its position on 5 April

⁴³ *Id.*

⁴⁴ <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>;

<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

⁴⁵ <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

⁴⁶ Attachment 1, 19 March 2018 Email From ICANN to the Requestor.

⁴⁷ 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5

<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

2018.⁴⁸

D. Request 18-4.

On 13 April 2018, the Requestor submitted Request 18-4, which challenges the Resolutions.⁴⁹

E. Relief Requested

The Requestor asks the Board to “reconsider and, subsequently, reject its decision to adopt the Resolutions.”⁵⁰

III. Issue Presented.

The issue is whether the Board’s adoption of the Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).

IV. The Relevant Standards for Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide 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:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.⁵¹

⁴⁸ Attachment 2, 5 April 2018 Email From the Requestor to ICANN.

⁴⁹ Request 18-4, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-request-redacted-13apr18-en.pdf>.

⁵⁰ *Id.*, § 9, at Pg. 15.

⁵¹ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁵² Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.⁵³ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁵⁴

On 19 May 2018, the BAMC determined that Request 18-4 is sufficiently stated and sent Request 18-4 to the Ombudsman for review and consideration.⁵⁵ The Ombudsman thereafter recused himself from this matter.⁵⁶ Accordingly, the BAMC has reviewed Request 18-4 and issues this Recommendation.

V. Analysis and Rationale.

A. The Resolutions Are Consistent With ICANN's Mission, Commitments, Core Values and Established ICANN Policy(ies).

The Requestor's claims focus on the transparency, fairness, efficiency, methodology, and scope of the CPE Process Reviews. But, the Requestor provides no evidence demonstrating how the Resolutions violate ICANN's commitment to fairness, or that the Board's action is inconsistent with ICANN's commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with

⁵² ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

⁵³ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

⁵⁴ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁵⁵ Ombudsman Action Regarding Request 18-4, Pg. 2, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-ombudsman-action-21may18-en.pdf>.

⁵⁶ Ombudsman Action Regarding Request 18-4, Pg. 1.

efficiency and excellence. Rather, it appears that the Requestor simply does not agree with findings of the CPE Process Review Reports and the Board’s acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. The Requestor’s Challenges to FTI’s Methodology Do Not Warrant Reconsideration.

The Requestor claims that FTI’s methodology was flawed because: (1) the CPE Provider did not produce documents in the course of the investigation; (2) FTI did not interview any former employees of the CPE Provider; and (3) FTI did not accept materials from, or interview, CPE applicants in the course of its investigation.⁵⁷

As a preliminary matter, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.⁵⁸ The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and relied on FTI to develop an appropriate methodology.⁵⁹ The Requestor has not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

Moreover, with respect to the first concern, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes, and spreadsheets for all CPE Reports.⁶⁰ FTI also received and reviewed emails (and attachments) produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the

⁵⁷ Request 18-4, § 8, at Pg. 12-13. *See also, e.g.*, 23 March 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf> (FTI did not interview applicants); 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf> (FTI did not interview or accept materials from applicants, and “received almost no input from the CPE Provider”)

⁵⁸ *See, e.g.*, Scope 2 Report at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁵⁹ *See* CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

⁶⁰ *See* Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

CPE process and evaluations.⁶¹ Accordingly, it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider.

As noted in the CPE Process Review Reports, FTI requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider’s personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”⁶² No policy or procedure exists that would require ICANN org to cancel the entire CPE Process Review because the CPE Provider did not produce its internal emails. This argument does not support reconsideration.

Similarly, with respect to the second concern, FTI interviewed the “only two remaining [CPE Provider] personnel,” who were both “part of the core team for all 26 evaluations” in the CPE Process Review.⁶³ Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.⁶⁴ Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has not identified a policy or procedure requiring FTI to do more because none exists. Reconsideration is not warranted on this ground.

⁶¹ See Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁶² See Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>. See also EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

⁶³ *Id.* at Pg. 9.

⁶⁴ Scope 1 Report, at Pg. 14, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

With respect to the argument that FTI did not interview CPE applicants or accept materials from the applicants in the course of the review, the Requestor has not identified a policy or procedure requiring FTI to do so. While the Requestor may disagree with FTI's methodology, such disagreement is not sufficient grounds for reconsideration.

Indeed, FTI acknowledged that certain applicants had requested that they be interviewed, but explained that "such interviews are not necessary or appropriate" to the investigation.⁶⁵ FTI noted that neither the Applicant Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Applicant Guidebook and the CPE Guidelines, the CPE Provider did not interview the applicants. Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.⁶⁶ Despite that conclusion, FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP) proceedings.⁶⁷

2. FTI was Not Required to Agree with the Findings of Prior Third-Party Reports.

The Requestor argues that the Board should not have accepted the findings of the CPE Process Review Reports because those findings are inconsistent with conclusions that third parties have reached concerning the CPE process.⁶⁸ The Requestor asserts that certain third parties, such as the former Ombudsman,⁶⁹ the Council of Europe (in its 4 November 2016 Report

⁶⁵ *Id.* at Pg. 8.

⁶⁶ *Id.*

⁶⁷ *Id.* at Pg. 8.

⁶⁸ Request 18-4, § 8, at Pg. 13.

⁶⁹ Request 18-4, § 8, at Pg. 11, quoting Ex. 28, Chris LaHatte, "Dot Gay Report" (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>. See also 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 9-10, quoting CoE Report, at Pg. 69-70 (in turn quoting Ombudsman's dotgay report).

on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (CoE Report),⁷⁰ and the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC (Dot Registry IRP)⁷¹ all identified concerns with the CPE process that the Requestor believes are inconsistent with and not addressed in the CPE Process Review Reports. According to the Requestor, these reports—all of which were issued *before* FTI completed the CPE Process Review Reports—should be taken to mean that any conclusion *other than* that the CPE Provider’s process was inconsistent with the Applicant Guidebook and that ICANN org exerted undue influence over the CPE Provider must be incorrect.⁷² The Requestor believes that the Board’s decision to undertake the CPE Process Review “acknowledged that problems with the CPE process existed.”⁷³

This argument is both contrary to the facts and completely inconsistent with proper investigative methodology. First, the Association of Certified Fraud Examiners (ACFE), the anti-fraud organization that has codified the international investigative methodology that FTI followed, required that FTI form an investigative plan, collect all potentially relevant evidence and information, then analyze the relevant evidence and arrive at their conclusion based on that evidence⁷⁴—not based on the opinions or investigations of prior investigators or commentators. Consistent with this methodology, FTI “carefully considered the claims raised in Reconsideration Requests and [IRP] proceedings related to CPE,” specifically allegations that

⁷⁰ Request 18-4, § 8, at Pg. 10. *See also* 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 9-10, quoting CoE Report, at Pg. 69-70.

⁷¹ Request 18-4, § 8, at Pg. 13; 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 8-9.

⁷² Request 18-4, § 8, at Pg. 13; 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 8-10. The Requestor also points to reports that the Requestor and other CPE applicants submitted in support of their CPE applications. For the same reasons that the independent reports identified in text are not determinative of the outcome of the CPE Process Review, the CPE applicants’ expert reports are likewise not determinative. *See* Request 18-4, § 8, at Pg. 10, 13.

⁷³ Request 18-4, § 8, at Pg. 11.

⁷⁴ *See* Scope 1 Report at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

the CPE criteria “were applied inconsistently across the various CPEs as reflected in the CPE reports.”⁷⁵ Second, as noted in the CPE Process Review Reports, FTI considered all available evidence, including but not limited to, relevant IRP documents (including the Dot Registry IRP Final Declaration), relevant Reconsideration Requests (including the documents submitted in support of such Requests such as the First Eskridge and COE Reports), and the report from the Ombudsman’s Own Motion Investigation on the CPE process.⁷⁶

Based upon the *evidence* available, FTI concluded that the CPE Provider applied the CPE criteria in a consistent manner, and differences in scoring outcomes “were not the result of inconsistent application of the criteria,” but rather of different underlying circumstances.⁷⁷

FTI was not directed to conduct an investigation that supported (or contradicted) the Dot Registry IRP, or that supported (or contradicted) the Ombudsman’s Report, the CoE Report, applicant submissions (including expert opinions), or any other commentary on the CPE process.⁷⁸ Similarly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review. Rather, the review was “intended to have a positive impact on the community” and “provide greater transparency into the CPE evaluation process.”⁷⁹ This decision was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the process had flaws or could otherwise be improved. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to

⁷⁵ Scope 3 Report, at Pg. 3.

⁷⁶ Scope 1 report, at Pgs. 3-6.

⁷⁷ *Id.*

⁷⁸ See Transcript of ICANN Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar, 18 January 2017, comments of M. Carvell and C. Chalaby, at Pg. 12, 20-21, *available at* https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

⁷⁹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

conducting the review in the first place. The Requestor’s arguments do not support reconsideration.

Finally, the Board’s discussion of the CPE Process Review Reports does not support reconsideration. That one Board member, Avri Doria, abstained from voting on the Resolutions due to concerns “about the rigor of the study and some of its conclusions,”⁸⁰ does not render the Board vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting.⁸¹

3. Professor Eskridge’s Criticisms of the CPE Process Review Do Not Support Reconsideration.

The “Second Expert Opinion of Professor William N. Eskridge, Jr.” (Second Eskridge Opinion), which the Requestor submitted in support of Request 16-3 and referenced in Request 18-4,⁸² makes several arguments criticizing the scope of the CPE Process Review:

- FTI “failed to recognize or engage the many criticisms of the [CPE Provider’s] application of ICANN’s and CPE’s guidelines to the dotgay and other applications;”⁸³
- FTI’s conclusion that “the CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements . . . was supported by no independent analysis [and] the approach followed by FTI was a ‘description’ of the CPE Reports, but not an ‘evaluation’ to determine whether the CPE Reports were actually following the applicable guidelines;”⁸⁴
- “Because its personnel simply repeated the analysis announced by the [CPE Provider] for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as those made in the CPE Reports; and⁸⁵
- FTI “completely failed to examine the [CPE Provider’s] analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these

⁸⁰ San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

⁸¹ *Id.*

⁸² Request 18-4, § 8, at Pg. 14.

⁸³ Second Eskridge Op., ¶ 3.

⁸⁴ *Id.* ¶¶ 37-38.

⁸⁵ *Id.* ¶ 42.

applications.”⁸⁶

While these claims will be addressed as part of the BAMC and Board’s consideration of Request 16-3, it should be noted that Professor Eskridge’s primary complaint is that FTI did not re-evaluate the merits of the CPE applications or consider the substance and reasonableness of the CPE Provider’s research.⁸⁷ However, as discussed above, that was not what FTI was tasked to do and the Requestor provides no evidence of any policy or procedure requiring that the Board instruct FTI to re-evaluate the applications. These claims do not support reconsideration.

Additionally, the BAMC notes that the Board has already considered and rejected the Requestor’s “assertion that ‘a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.’” As the Board explained, neither the Requestor nor Professor Eskridge “offers any support for this baseless claim, and there is none.”⁸⁸ Therefore, reconsideration is not warranted.

4. The Third-Party Letters of Support Do Not Support Reconsideration.

The BAMC has considered three letters submitted to the Board by third parties in support of the dotgay Application, criticizing the CPE Process Review.⁸⁹ Although all three letters express “frustration” or dissatisfaction with the findings of the CPE Process Review, none states grounds for reconsideration, nor do they identify any policy or procedures that ICANN organization or FTI violated in the course of the CPE Process Review. Accordingly, they do not support reconsideration.

⁸⁶ *Id.* ¶ 76.

⁸⁷ Request 18-4, § 8, at Pg. 13.

⁸⁸ ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁸⁹ <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>;
<https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>;
<https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>.

5. The BAMC Will Consider All of the Evidence Submitted by the Requestor as Part of its Consideration of Request 16-3.

The Requestor claims that the BAMC’s “reliance on” the CPE Process Review Reports would “directly affect its consideration of [Request] 16-3.”⁹⁰ When the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.⁹¹ The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-3 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-3), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-3.

The BAMC will “carefully review and consider”⁹² all of the materials that the Requestor submitted in support of Request 16-3 since 2016, including both Eskridge Opinions, the “Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay’s Community Priority Application No: 1-1713-23699” (Badgett Opinion), the CoE Report, and the ICC Determination in *ILGA v. Afiliat*, as the Requestor has asked it to do. The BAMC notes that it also provided the Requestor an opportunity to “be heard [concerning the FTI Report] as it relates to [the] pending reconsideration requests,” which the Requestor sought on 20 January 2018,⁹³ but declined to accept the opportunity when offered in March 2018.⁹⁴

6. ICANN Organization Adhered to its Transparency Obligations.

⁹⁰ Request 18-4, § 6, at Pg. 4.

⁹¹ See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, available at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁹² <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>. See also <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

⁹³ <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

⁹⁴ 23 March 2018 Letter from Ali to ICANN, available at <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

Finally, the Requestor asserts that ICANN organization “has been remarkably nontransparent throughout” the CPE Process Review, and “has, and continues to, rebuff all efforts to obtain detailed information about FTI’s independent review,” because the “only substantive information available to the public about the independent review is the CPE Process Review Reports themselves.”⁹⁵

The Requestor has not explained how making the CPE Process Review Reports public somehow falls short of ICANN organization’s transparency obligations. The Board addressed and resolved this claim in its determination on the Requestor’s Request 18-2,⁹⁶ which is incorporated herein, and will not repeat itself here, except to say that the Requestor has raised no additional argument here that warrants reconsideration based on this assertion.

For all of the reasons discussed above, reconsideration is not warranted.

VI. Recommendation

The BAMC has considered the merits of Request 18-4 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments and Core Values when it passed the Resolutions. Accordingly, the BAMC recommends that the Board deny Request 18-4.

Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC shall make a final recommendation with respect to a reconsideration request within thirty days following receipt of the reconsideration request involving matters for which the Ombudsman recuses himself or herself, unless impractical. The first opportunity that the BAMC has to consider the Request is 14 June 2018.

⁹⁵ Request 18-4, § 8, at Pg. 12.

⁹⁶ See BAMC Recommendation on Request 18-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf>.