

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-41
20 JANUARY 2015**

The Requesters, Afiliast Limited, BRS Media, Inc, and Tin Dale, LLC (three of the four applicants for the .RADIO string), seek reconsideration of: (i) the Community Priority Evaluation (“CPE”) Panel’s Report, and ICANN’s acceptance of that report, finding that the European Broadcasting Union’s (“EBU’s”) application for .RADIO prevailed in CPE; and (ii) ICANN staff’s response to the Requesters’ request pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”) for documents relating to the CPE Panel’s Report.¹

I. Brief Summary

The Requesters each submitted a standard (meaning not community-based) application for .RADIO. Those applications were placed in a contention set with the EBU’s community-based application for .RADIO (the “Application”). As the EBU’s Application was community-based, the EBU participated in CPE for .RADIO, and ultimately prevailed. As a result, the contention set for .RADIO has been resolved and only the EBU’s Application will proceed.

The Requesters’ initial Reconsideration Request claimed that the CPE Panel failed to comply with established ICANN policies and procedures in determining that the Application met the criteria needed to achieve community priority over the standard applications for .RADIO. The day after submitting their initial Reconsideration Request, the Requesters submitted a DIDP request seeking documents relating to the CPE Panel’s

¹ The Requesters submitted their initial Reconsideration Request on 25 September 2014 and a revised Reconsideration Request on 11 November 2014. This determination responds to arguments raised in both Requests.

Report (the “DIDP Request”), and asked ICANN to postpone its review of the initial Reconsideration Request pending ICANN’s response to the DIDP Request. ICANN agreed. On 24 October 2014, ICANN responded to the DIDP Request (the “DIDP Response”). On 11 November 2014, the Requesters submitted a revised Reconsideration Request, which added a call for reconsideration of the DIDP Response.² The Requesters claim that ICANN staff improperly determined that some of the documents sought by the Requesters are not appropriate for publication and/or are not in ICANN’s possession.

The Requesters’ claims are unsupported. The Requesters do not identify any misapplication of policy or procedure by ICANN staff or the CPE Panel. Rather, the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and with ICANN staff’s application of the DIDP Defined Conditions for Nondisclosure. Substantive disagreements with the CPE Panel’s Report and the DIDP Response, however, are not proper bases for reconsideration. Because the Requesters have failed to show that either the CPE Panel or ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Request 14-41 be denied.

II. Facts.

A. Background Facts.

The Requesters each submitted a standard application for .RADIO³ that was placed in a contention set with the EBU’s community-based Application.⁴

² As noted, the revised Reconsideration Request challenges the DIDP Response, which was issued on 24 October 2014. The revised Reconsideration Request was therefore submitted one-day after the 15-day period to file a reconsideration request. (Bylaws, Art. IV, § 2.5.) In addition to being untimely, the Requests have not stated any proper bases for reconsideration, as explained herein.

³ See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/624>, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1848>, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1508>.

⁴ See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1468>.

On 19 February 2014, the EBU's Application was invited to participate in CPE. CPE is a method of resolving string contention that will occur only if a community application is in contention and if that applicant elects to pursue CPE.

The EBU elected to participate in CPE for .RADIO, and its Application was sent to the Economist Intelligence Unit ("EIU"), the CPE provider, for evaluation. On 10 September 2014, the CPE Panel issued its report on the EBU's Application.⁵ The CPE Panel's Report explained that the Application met the CPE requirements specified in the Guidebook and, therefore, the Application prevailed in CPE. Because the Application prevailed in CPE, the Requesters' applications for .RADIO will not proceed.⁶

On 25 September 2014, the Requesters submitted Request 14-41, requesting reconsideration of the CPE Panel's Report, and ICANN's acceptance of that report.⁷ On 26 September 2014, the Requesters submitted the DIDP Request, seeking: (i) the agreement(s) between ICANN and the CPE provider; (ii) guidance given by ICANN relating to the [CPE] process; (iii) internal ICANN documents relating to the Application's CPE; and (iv) information exchanged with or considered by the CPE provider and Panel relating to the Application's CPE.⁸

The Requesters asked ICANN, and ICANN agreed, for ICANN's review of Reconsideration Request 14-41 to be postponed pending ICANN's response to the DIDP Request.⁹ On 24 October 2014, ICANN responded to the DIDP Request.¹⁰ ICANN

⁵ See CPE Panel Report, available at <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

⁶ See Guidebook, § 4.2.3.

⁷ Reconsideration Request, available at <https://www.icann.org/en/system/files/files/request-afiliat-et-al-25sep14-en.pdf>.

⁸ DIDP Request at 2, available at <https://www.icann.org/en/system/files/files/lieben-request-26sep14-en.pdf>.

⁹ Reconsideration Request, § 9, Pgs. 4-5

provided links to all publicly available documents responsive to the DIDP Request, including comments regarding the Application, which were posted on ICANN’s website and considered by the CPE Panel.¹¹ ICANN noted that documents responsive to the requests were either: (1) already public; (2) not in ICANN’s possession; or (3) not appropriate for public disclosure because they were subject to certain DIDP Nondisclosure Conditions.¹²

On 10 November 2014, the Requesters submitted a revised Request 14-41.¹³ In addition to requesting reconsideration of the CPE Panel’s determination that the Application prevailed in CPE, the revised Request also sought reconsideration of the DIDP Response.

B. Relief Requested.

The Requesters ask the BGC to: (a) “suspend the process for awarding the .RADIO gTLD to the EBU”; (b) “restore the ‘Application Status’ of the Requesters’ applications and the Application submitted by the EBU to ‘Evaluation Complete’, their respective ‘Contention Resolution Statuses’ to ‘Active’, and their ‘Contention Resolution Result’ to ‘In Contention’”; (c) “reconsider the Determination [by the CPE Panel], and in particular not award a passing score” to the EBU’s Application; (d) “reconsider [...] ICANN’s respective decisions that each of the Requesters’ applications for the .RADIO gTLD ‘Will Not Proceed’ to contracting”; and (e) “reconsider [ICANN’s DIDP Response] by providing Requesters[] with the information requested in [the DIDP Request].”¹⁴

¹⁰ See DIDP Response, available at <http://www.icann.org/en/system/files/files/lieben-response-24oct14-en.pdf>.

¹¹ *Id.*, Pgs. 1-3.

¹² *Id.*, Pgs. 2-4.

¹³ Revised Reconsideration Request, available at <https://www.icann.org/en/system/files/files/request-afiliias-et-al-with-annexes-10nov14-en.pdf>.

¹⁴ *Id.*, § 9, Pg. 8-9.

II. Issues.

In view of the claims set forth in Request 14-41, the issues are whether:

1. The CPE Panel violated established policy or procedure by failing to properly apply the CPE criteria set forth in the Guidebook in evaluating the EBU's Application; and
2. ICANN staff violated established policy or procedure by determining that certain documents sought in the DIDP Request were subject to DIDP Nondisclosure Conditions.

III. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁵ Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC¹⁶ agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

A. Community Priority Evaluation.

The reconsideration process can properly be invoked for challenges to expert determinations rendered by third party evaluators, such as the EIU, where it can be stated that the evaluator(s) failed to follow the established policies or procedures in reaching the

¹⁵ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN's Bylaws states 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:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

¹⁶ New gTLD Program Committee.

determination, or that staff failed to follow its policies or procedures in accepting that determination.¹⁷

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE reports. Accordingly, the BGC does not evaluate the CPE Panel's substantive conclusion that the Application prevailed in CPE. Rather, the BGC's review is limited to whether the CPE Panel violated any established policy or process, which the Requesters suggest occurred when the CPE Panel purportedly misapplied the CPE criteria set out in the Guidebook.¹⁸

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – 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.¹⁹

CPE will occur only if a community-based applicant selects CPE and the other applications in the contention set have completed all previous stages of the gTLD evaluation process.²⁰ CPE is performed by an independent community priority panel appointed by the EIU to review such applications.²¹ A CPE panel's role is to determine whether the community-based application satisfies the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration

¹⁷ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

¹⁸ Revised Reconsideration Request, § 10, Pgs. 10-19.

¹⁹ The CPE Guidelines may be found here: <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

²⁰ Guidebook, § 4.2.

²¹ *Id.*, § 4.2.2.

policies; and (iv) community endorsement.²² To prevail in CPE, an application must receive a minimum of 14 points on the scoring of foregoing four criteria, each of which is worth a maximum of four points (for a total of 16 points).²³

B. Documentary Information Disclosure Policy (DIDP)

ICANN considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multi-stakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN’s approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN’s operational activities. In that regard, ICANN has identified many categories of documents that are made public as a matter of due course.²⁴ In addition to ICANN’s practice of making many documents public as a matter of course, the DIDP allows community members to request that ICANN make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control,” that is not already publicly available.²⁵

In responding to a request for documents submitted pursuant to ICANN’s DIDP, ICANN adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (“DIDP Response Process”).²⁶ The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the

²² *Id.*, § 4.2.3.

²³ *Id.*

²⁴ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁵ *Id.*

²⁶ See DIDP Response Process, *available at* <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN’s website].”²⁷

Per the DIDP, ICANN reserves the right to withhold documents if they fall within any of the Nondisclosure Conditions, which include, among others: (i) “[i]nformation provided by or to a government or international organization . . . in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN’s relationship with that party;” (ii) “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process [. . .];” (iii) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates [. . .];” and (iv) “[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege.”²⁸ In addition, ICANN may refuse “[i]nformation requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) [where compliance] is not feasible; or (iv) [which] are made with an abusive or vexatious purpose or by a vexatious or querulous individual.”²⁹

The DIDP Response Process also provides that “[t]o the extent that any responsive documents fall within any [Nondisclosure Conditions], a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.”³⁰

It is within ICANN’s sole discretion to determine whether the public interest in the

²⁷ *Id.*; see also “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>

²⁸ Nondisclosure Conditions.

²⁹ *Id.*

³⁰ See DIDP Response Process.

disclosure of responsive documents that fall within one of the Nondisclosure Conditions outweighs the harm that may be caused by such disclosure.³¹ Finally, the DIDP does not require ICANN staff to “create or compile summaries of any documented information,” including logs of documents withheld under one of the Nondisclosure Conditions.³²

IV. Analysis and Rationale.

The Requesters do not identify any misapplication of policy or procedure by ICANN staff or the CPE Panel. Rather, the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and with ICANN staff’s substantive application of the DIDP Defined Conditions for Nondisclosure. Substantive disagreements with the CPE Panel’s Report and the DIDP Response, however, are not proper bases for reconsideration.

A. The CPE Panel Adhered To Applicable Policies and Procedures in Rendering the CPE Panel’s Report.

The Requesters’ arguments regarding the CPE Panel’s Report reflect only their disagreement with the CPE Panel’s conclusions and scoring. The fact that the Requesters would have liked the CPE Panel to reach a different conclusion is not, however, a proper basis for reconsideration. As discussed below, the CPE Panel adhered to the applicable policies and procedures in rendering The CPE Panel’s Report.

1. The CPE Panel Properly Applied the First CPE Criterion.

Pursuant to the first CPE criterion, the CPE Panel evaluates “the community as explicitly identified and defined according to statements in the application” through the scoring of two elements, each worth two points—1-A, “Delineation,” and 1-B,

³¹ *Id.*

³² See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

“Extension.”³³ The Requesters claim that the CPE Panel improperly awarded the Application one out of two points on the “Delineation” element.³⁴

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the “Delineation” element, an application must identify a “clearly delineated, organized, and pre-existing community.”³⁵ Section 4.2.3 also sets forth further guidelines for determining delineation. In awarding one out of two points for “Delineation,” the CPE Panel accurately described and applied the Guidebook scoring guidelines.³⁶

The CPE Panel determined that the Application’s community definition “show[ed] a clear and straightforward membership and w[as] therefore well defined,” noting that “[a]ssociation with, and membership in, the radio community can be verified” through things such as “licenses held by professional and amateur radio broadcasters” and “internet radios that meet certain minimum standards.”³⁷ The CPE Panel also determined that the community as defined in the Application (1) “ha[d] awareness and recognition among its members . . . because the community . . . consists of entities and individuals that are in the radio industry, and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community,” and (2) was pre-existing because it was active prior to September 2007.³⁸ The CPE Panel nonetheless awarded the Application only one out of two points on the “Delineation” element because it determined that the community was not organized, *i.e.*, it did not have at least one entity mainly dedicated to the community and it did not have documented

³³ Guidebook, § 4.2.3.

³⁴ Revised Reconsideration Request, § 10, Pgs. 10-15.

³⁵ Guidebook, § 4.2.3.

³⁶ CPE Panel Report, Pgs. 1-3.

³⁷ *Id.*, Pg. 2.

³⁸ *Id.*, Pgs. 2-3.

evidence of community activities.³⁹

In challenging the CPE Panel’s Report, the Requesters do not identify any policy or procedure that the CPE Panel misapplied in scoring the “Delineation” element. Instead, they disagree with the CPE Panel’s substantive application of the element. The CPE Report notes that the “radio industry” is included in the North American Industrial Classification System (“NAICS”) and that the NAICS definition of the industry “includes the vast majority of [the] entities included in the [] community [as defined in the Application].”⁴⁰ The Requesters claim that in their view, the community as defined in the Application is broader than the NAICS definition of “radio industry.”⁴¹ Specifically, the Requesters claim that groups such as podcasters and companies offering “Internet radio” are not properly considered part of the radio community contemplated by the NAICS.⁴² In addition, the Requesters argue that because the CPE Panel found that the community as defined in the Application was not organized, it could not have found that the community was well-defined.⁴³ Both of the Requesters’ arguments reflect only substantive disagreement with the CPE Panel’s findings. Such substantive disagreement is not a proper basis for reconsideration.

2. The CPE Panel Properly Applied the Second CPE Criterion.

The Requesters claim that the CPE Panel improperly awarded the Application three out of four points on the second criterion, pursuant to which the CPE Panel assesses the nexus between the proposed string and the community.⁴⁴ This CPE Panel evaluates “the relevance of the string to the specific community that it claims to represent” through

³⁹ *Id.*

⁴⁰ Report, Pg. 2. The Application itself does not refer to the NAICS definition.

⁴¹ Revised Reconsideration Request, § 10, Pgs. 11-13.

⁴² *Id.*, § 10, Pg. 13.

⁴³ *Id.*, § 10, Pg. 14.

⁴⁴ *Id.*, § 10, Pgs. 15-16; *see also* Guidebook, § 4.2.3.

the scoring of two elements—2-A, “Nexus” (worth three points), and 2-B, “Uniqueness” (worth one point).⁴⁵

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the “Nexus” element, the applied-for string must “match[] the name of the community or [be] a well-known short-form or abbreviation of the community name.”⁴⁶ In awarding two out of three points for the “Nexus” element, the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁴⁷ The CPE Panel determined that while the applied-for string “closely resemble[d] the community, without overreaching substantially beyond the community,” it “also include[d] some entities that are only tangentially related to radio, such as companies providing specific services or products to radio broadcasting organizations and which may not be automatically associated with the gTLD string.”⁴⁸ The CPE Panel therefore determined that the Application “partially” met the requirements of criterion 2-A.⁴⁹

To fulfill the requirements for the “Uniqueness” element, a string must have “no other significant meaning beyond identifying the community described in the application.”⁵⁰ In awarding the Application one out of one point on element 2-B, the CPE Panel determined that “the string as defined in the application demonstrate[d] uniqueness, as the string h[ad] no other significant meaning beyond identifying the community described in the application.”⁵¹

⁴⁵ Guidebook, § 4.2.3.

⁴⁶ *Id.*

⁴⁷ CPE Panel Report, Pgs. 4-5.

⁴⁸ *Id.*, Pg. 5.

⁴⁹ *Id.*

⁵⁰ Guidebook, § 4.2.3.

⁵¹ CPE Panel Report, Pg. 5.

In challenging the CPE Panel’s Report, the Requesters do not identify any policy or procedure that the CPE Panel misapplied in scoring elements 2-A and 2-B. Instead, they claim that “[a] simple search on Wikipedia shows that the word ‘radio’ extends far beyond the narrow concept as described in the application, and in particular the description provided in the [NAICS’s] ‘radio industry’ definition. . . .”⁵² Requesters’ arguments represent only a substantive disagreement with the CPE Panel’s findings, which again, is not a proper basis for reconsideration.

The Requesters also claim that the CPE Panel should have referred to the Oxford English Dictionary’s definition of “radio,” a definition which the Requesters contend includes “various other meanings that fall outside of the remit of [the community as defined in the Application].”⁵³ The Requesters claim that in “various cases,” other CPE Panels have referred to Oxford English Dictionary definitions in scoring the second CPE criterion. However, there is no requirement that the CPE Panel must consider Oxford English Dictionary definitions. Instead, it is within the discretion of each CPE panel to determine which outside sources, if any, to refer to in evaluating an application.⁵⁴ The fact that the CPE Panel determined not to rely on the Oxford English Dictionary in this case is not a basis for reconsideration.

3. The CPE Panel Properly Applied the Third CPE Criterion.

The Requesters claim that the CPE Panel improperly awarded the Application four out of four points on the third criterion, which assesses an applicant’s registration

⁵² Revised Reconsideration Request, § 10, Pg. 15.

⁵³ *Id.*, § 10, Pg. 16.

⁵⁴ Guidebook, § 4.2.3 (“The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.”)

policies.⁵⁵ Pursuant to this criterion, the CPE Panel evaluates the applicant’s registration policies through the scoring of four elements, each worth one point—3-A, “Eligibility;” 3-B, “Name Selection;” 3-C, “Content and Use;” and 3-D, “Enforcement.”⁵⁶

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the “Eligibility” element, eligibility to register for a domain name on a gTLD must be “restricted to community members.”⁵⁷ In awarding one out of one point for that element, the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁵⁸ The CPE Panel determined that the Application “demonstrate[d] adherence to [the element’s] requirement by restricting eligibility to [] community members . . . and additionally requiring that the registered domain name be ‘accepted as legitimate; and beneficial to the cause and values 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.’”⁵⁹

To receive a maximum score for the “Name Selection” element, an applicant’s policies must “include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD.”⁶⁰ In awarding one out of one point for that element, the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁶¹ The CPE Panel determined that the Application satisfied the requirements for “Name Selection” because it “specif[ied] that the registrant’s nexus with the radio community and use of the domain must be commensurate with the role of the registered

⁵⁵ *Id.*, § 10, Pgs. 16-17; *see also* Guidebook, § 4.2.3.

⁵⁶ Guidebook, § 4.2.3.

⁵⁷ *Id.*

⁵⁸ CPE Panel Report, Pg. 6.

⁵⁹ *Id.* (quoting the EBU’s Application).

⁶⁰ Guidebook, § 4.2.3.

⁶¹ CPE Panel Report, Pg. 6.

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 a domain name.”⁶²

To receive a maximum score for the “Content and Use” element, an applicant’s policies must “include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD.”⁶³ In awarding one out of one point for that element, the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁶⁴ The CPE Panel determined that the Application satisfied the requirements for “Content and Use” because it “specifi[ed] that use of the domain name must be beneficial to the cause and values of the radio industry, and commensurate with the role and importance of the registered domain name.”⁶⁵

To receive a maximum score for the “Enforcement” element, an applicant’s policies must “include specific enforcement measures (*e.g.*, investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.”⁶⁶ In awarding one out of one point for that element, the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁶⁷ The CPE Panel determined that the Application both “include[d] specific enforcement measures constituting a coherent set” and had “an appeals mechanism, which [was] managed in the first instance by the registry, with appeals heard by an independent, alternative dispute resolution provider.”⁶⁸

In challenging the CPE Panel’s Report, the Requesters do not identify any policy

⁶² *Id.*

⁶³ Guidebook, § 4.2.3.

⁶⁴ CPE Panel Report, Pg. 6.

⁶⁵ *Id.*

⁶⁶ Guidebook, § 4.2.3.

⁶⁷ CPE Panel Report, Pg. 6.

⁶⁸ *Id.*

or procedure that the CPE Panel misapplied in scoring the third criterion. Rather, they claim that it is “unclear which standards and criteria are going to be used . . . by the EBU in view of ensuring that only members of the ‘radio community’ or ‘radio industry’ can register domain names.”⁶⁹ They also state that they “do not understand” the EBU’s name selection, the EBU’s content and use policies, and the “standards and criteria” that the CPE Panel used to determine that those policies were sufficient.⁷⁰ Finally, in their 25 September 2014 Request, the Requesters claimed that because, in their view, “eligibility criteria contained in the Application for registering domain names under the .RADIO gTLD . . . are contradictory, vague, and ill defined,” “the effective enforcement of [those] criteria upon registrants and candidate registrants cannot be guaranteed by the EBU.”⁷¹ Once again, the Requesters’ arguments reflect only substantive disagreement with the CPE Panel’s findings, which is not a proper basis for reconsideration.

4. The CPE Panel Properly Applied the Fourth CPE Criterion.

The Requesters claim that the CPE Panel improperly awarded the Application four out of four points on the fourth criterion, pursuant to which the CPE Panel assesses community endorsement of an application.⁷² This criterion calls for the evaluation of community support for and/or opposition to an application through the scoring of two elements, each worth two points—4-A, “Support,” and 4-B, “Opposition.”

a. The CPE Panel Properly Applied Element 4-A.

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the “Support” element, the applicant must be, or “ha[ve] documented support from, the

⁶⁹ Revised Reconsideration Request, § 10, Pg. 17.

⁷⁰ *Id.*

⁷¹ Request, § 10, Pg. 7.

⁷² Revised Reconsideration Request, § 10, Pgs. 18-19; *see also* Guidebook, § 4.2.3.

recognized community institution(s)/member organization(s) or ha[ve] otherwise documented authority to support the community.”⁷³ The CPE Panel determined that although the EBU “was not the recognized community institution(s)/member organization(s),” it had “documented support from institutions/organizations representing a majority of the community addressed, and this documentation contained a description of the process and rationale used in arriving at the expression of support.”⁷⁴ The CPE Panel further noted that the EBU had received support from a “broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant.”⁷⁵

In challenging the CPE Panel’s Report, the Requesters do not identify any policy or procedure that the CPE Panel misapplied in scoring the “Support” element. Instead, the Requesters claim that the EBU did not in fact receive support from a majority of the community addressed, because, as asserted by the Requesters, there are over 50,000 radio stations in the world, and “the ‘Member Unions’ that have provided their support only account for 589 full members that are involved in the ‘radio business.’”⁷⁶ They further claim that “the majority of these ‘members’ are state-owned or related to public broadcasters,” and/or are involved in television broadcasting.⁷⁷ These arguments reflect only a substantive disagreement with the CPE Panel’s finding that the EBU had the support of institutions and organizations representing a majority of the defined community, and do not support reconsideration.

b. The CPE Panel Properly Applied Element 4-B.

⁷³ *Id.*

⁷⁴ CPE Panel Report, Pg. 7.

⁷⁵ *Id.*

⁷⁶ Revised Reconsideration Request, § 8, Pg. 18.

⁷⁷ *Id.*

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the “Opposition” element, the applied-for string must have “no opposition of relevance” from the community.⁷⁸ In awarding two out of two points for the “Opposition” element, the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁷⁹ The CPE Panel reviewed each letter of opposition received regarding the Application and “determined [them] not to be relevant, as they were (1) from individuals or groups of negligible size, or (2) were not from communities either explicitly mentioned in the application [or] from those with an implicit association to such communities.”⁸⁰

In challenging the CPE Panel’s Report, the Requesters do not identify any policy or procedure that the CPE Panel misapplied in scoring the “Opposition” element. Instead, the Requesters state that they “do not agree” with the CPE Panel’s determination that the opposition received was from “a group of negligible size.”⁸¹ The Requesters also claim that “public comments . . . submitted by or on behalf of the Requesters to ICANN in relation to the Application . . . contained strong opposition” to the Application, and further note that one of the Requesters, BRS Media, Inc., is the registry for the .FM gTLD.⁸² Once again, the Requesters have only a substantive disagreement with the CPE Panel’s conclusion, which is not a basis for reconsideration.

B. ICANN Staff Adhered to Applicable Policies and Procedures in Responding to the DIDP Request.

The Requesters disagree with ICANN staff’s determination that certain requested documents were subject to DIDP Nondisclosure Conditions, as well as ICANN’s

⁷⁸ Guidebook, § 4.2.3.

⁷⁹ CPE Panel Report, Pg. 7.

⁸⁰ *Id.*

⁸¹ Request, § 10, Pg. 8.

⁸² Revised Reconsideration Request, § 8, Pg. 19.

determination that, on balance, the potential harm from the release of the documents subject to the Nondisclosure Conditions outweigh the public interest in disclosure.⁸³ The Requesters, however, do not identify any policy or procedure that ICANN staff violated in responding to the DIDP Request. As such, reconsideration is not appropriate.

1. ICANN Staff Adhered to the DIDP and DIDP Response Process in Finding Certain Requested Documents Subject to DIDP Nondisclosure Conditions.

The DIDP identifies a number of “conditions for the nondisclosure of information,” such as documents containing “information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constitutes, and/or other entities” and “drafts of all correspondence, reports, documents . . . or any other forms of communication.”⁸⁴ It is ICANN’s responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP Response Process, “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN’s website].”⁸⁵

Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP Response Process. As to the contract between ICANN and the EIU for the coordination of the independent panels to perform CPEs, ICANN analyzed the Requesters’ request in view of the DIDP Nondisclosure Conditions. ICANN determined that the contract was subject to several Nondisclosure Conditions,

⁸³ *Id.*, § 8, Pg. 6-8.

⁸⁴ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁸⁵ See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf> (Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests)); see also “Nondisclosure Conditions,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

including those covering “information . . . provided to ICANN pursuant to a nondisclosure agreement or nondisclosure condition within an agreement” and “confidential business information and/or internal policies and procedures.”⁸⁶ As to the remaining items sought by the Requesters, ICANN staff determined that insofar as those documents existed in ICANN’s possession and had not already been made public, those documents were also subject to several Nondisclosure Conditions, including those covering “information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constitutes, and/or other entities,” “confidential business information and/or internal policies and procedures,” and “drafts of all correspondence, reports, documents . . . or any other forms of communication.”⁸⁷

As ICANN noted in the DIDP Response, notwithstanding the fact that the Requesters’ “analysis in [their DIDP] Request concluded that no [Nondisclosure Conditions] should apply, ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply.”⁸⁸ In conformance with the publicly posted DIDP Response Process, ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. While the Requesters may not agree with ICANN’s determination that certain Nondisclosure Conditions apply here, the Requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters’ substantive disagreement with that determination is not a basis for reconsideration.

⁸⁶ DIDP Response, Pg. 2.

⁸⁷ *Id.*, Pg. 3.

⁸⁸ *Id.*, Pg. 4.

2. ICANN Staff Adhered to the DIDP and DIDP Response Process in Determining that the Potential Harm Caused by Disclosure Outweighed the Public Interest in Disclosure.

The DIDP states that if documents have been identified within the Nondisclosure Conditions, they “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”⁸⁹ In responding to the DIDP Request, ICANN staff determined that “[f]or each of the [requested] items identified [] as subject to Defined Conditions of Nondisclosure, . . . there are no particular circumstances in the public interest in disclosing the information.”⁹⁰

The Requesters do not dispute this determination, nor do they identify any public interest in the disclosure of the requested documents. Instead, the Requesters argue that they personally have been harmed by being denied access to the requested documents.⁹¹ The Requesters’ belief that they personally would benefit from the disclosure of the requested documents is not evidence that ICANN staff improperly determined that the documents were inappropriate for disclosure. Here, in accordance with the DIDP Response Process, ICANN staff conducted a review of all responsive documents that fell within the Nondisclosure Conditions, and determined that the potential harm outweighed the public interest in the disclosure of those documents.⁹² Indeed, as noted, many of the items in the DIDP Request seek documents containing “confidential business information,” including documents subject to contractual confidentiality provisions.⁹³ The Requesters identify no policy or procedure that ICANN staff violated in determining

⁸⁹ See <https://www.icann.org/resources/pages/didp-2012-02-25-en> .

⁹⁰ DIDP Response, Pg. 4.

⁹¹ Revised Reconsideration Request, § 8, Pgs. 3-4.

⁹² DIDP Response, Pg. 4.

⁹³ *Id.*, Pgs. 2-4.)

that the harm that may be caused by the disclosure of such documents outweighed the public interest in disclosure.

3. ICANN Staff Adhered to the DIDP in Finding that Certain Requested Documents Were Not in ICANN's Possession.

The Requesters also appear to object to ICANN's representation that certain of the requested documents could not be made publicly available because they were not within ICANN's possession.⁹⁴ The Requesters claim that "[i]n [their] opinion, the EIU, who has been appointed by ICANN as the [CPE] independent panel firm, is subject to the same policies – especially those relating to transparency and accountability – as ICANN."⁹⁵ However, the DIDP is only available as a means to collect documents "within ICANN's possession, custody, or control."⁹⁶ ICANN staff acted in accordance with that established policy in noting that ICANN is not able to make public documents that are not within its possession, custody, or control.

V. Decision

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-41. As there is no indication that: (i) either the CPE Panel or ICANN violated any policy or procedure with respect to the CPE Panel's Report, or ICANN's acceptance of that report; or (ii) ICANN staff violated any policy or procedure in responding to the Requesters' DIDP Request, Request 14-41 should not proceed. If the Requesters believe they have somehow been treated unfairly in the process, the Requesters are free to ask the Ombudsman to review this matter.

⁹⁴ Revised Reconsideration Request, § 8, Pg. 7.

⁹⁵ *Id.*, § 8, Pg. 6; *see also id.*, § 10, Pg. 10.

⁹⁶ *See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board (or NGPC) consideration is required.⁹⁷ As discussed above, Request 14-41 seeks reconsideration of a staff action or inaction. As such, after consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of the BGC's Determination, the BGC notes that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical.⁹⁸ In this case, the BGC's Determination was delayed due to the Requesters' request for a postponement of the BGC's review of their initial Reconsideration Request and submission of a revised Reconsideration Request. As such, the first practical opportunity for the BGC to take consider this Request was on 20 January 2015.

⁹⁷ Bylaws, Art. IV, § 2.15.

⁹⁸ *Id.*, Art. IV, § 2.16.