

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 17-5
5 APRIL 2018**

The Requestor, DotKids Foundation, seeks reconsideration of ICANN organization’s decision to take the Requestor’s .KIDS community gTLD application off hold before the Community Priority Evaluation (CPE) Process Review was completed.¹ Specifically, the Requestor disagrees with the evaluation of its community application for the .KIDS gTLD² and claims that “the findings [of the CPE Process Review] will affect the approach that the DotKids Foundation would take for the redress of the .KIDS CPE process.”³ The Requestor also claims that other community applicants “not explicitly identified in the CPE [P]rocess [R]eview (e.g. the .SPA CEP/IRP by Donuts) have been put on hold we believe due to the ongoing CPE [P]rocess [R]eview,” such that the Requestor asserts that taking .KIDS off hold “is therefore counter to the established processes.”⁴

I. Brief Summary.

The Requestor submitted a community-based application for .KIDS (DotKids Application), which was placed in a contention set with one other .KIDS application and an application for .KID (the .KID/.KIDS contention set).⁵ The Requestor participated in CPE, but did not prevail. The Requestor previously challenged the CPE Provider’s evaluation of its community application in Reconsideration Request 16-6 (Request 16-6). The filing of Request

¹ Request 17-5, § 2, at Pg. 2.

² Request 17-5, § 5, at Pg. 3.

³ Request 17-5, § 7, at Pg. 6.

⁴ Request 17-5, § 7, at Pg. 6.

⁵ https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus:viewcontentionsetimage/215?_csrf=2fa3a5b7-ca97-4722-bb10-02acbf6ac234.

16-6 impacted the status of the .KID/.KIDS contention set, which was placed on hold pending resolution of Request 16-6.⁶ ICANN's Board Governance Committee (BGC) issued a final determination denying Request 16-6 on 21 July 2016,⁷ after which the .KID/.KIDS contention set was taken off hold.⁸

On 17 September 2016, the ICANN Board directed ICANN organization to undertake the CPE Process Review to evaluate the process by which ICANN organization interacted with the CPE Provider.⁹ 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.¹⁰ The BGC determined that the pending Reconsideration Requests regarding the CPE process would be placed on hold until the CPE Process Review was completed.¹¹ As the Requestor did not have a pending Reconsideration Request at the time, the DotKids Application was not placed on hold pending completion of the CPE Process Review.

⁶ Update on Application Status and Contention Sets, *available at*

<https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

⁷ Prior to 22 July 2017, the BGC was designated by the ICANN Board to review and consider Reconsideration Requests pursuant to Article 4, Section 4.2 of the Bylaws. *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>.

⁸ Attachment 1, at Pg. 1-3.

⁹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

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

¹¹ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, *see* <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

On 2 October 2017, ICANN organization invited the Requestor to an ICANN Auction for the .KID/.KIDS contention set.¹² Between October and December 2017, ICANN organization sent the Requestor several reminders to submit certain requested information by an 8 December 2017 deadline in order to participate in the ICANN Auction.

On 6 December 2017, two days before the deadline to submit information for the ICANN Auction, the Requestor filed Reconsideration Request 17-5 (Request 17-5) challenging ICANN organization's decision to take the Requestor's .KIDS gTLD application off hold before the CPE Process Review was completed.¹³ The filing of Request 17-5 impacted the status of the .KID/.KIDS contention set, which was placed on hold pending resolution of Request 17-5, and which resulted in the cancellation of the ICANN Auction of the .KID/.KIDS contention set.¹⁴

On 13 December 2017, ICANN organization published the three reports on the CPE Process Review.¹⁵

On 15 March 2018, the Board 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 remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.¹⁶

The BAMC has considered Request 17-5 and all relevant materials and recommends that the Board deny Request 17-5 because: (1) the Requestor has received the relief requested and

¹² Attachment 1, at Pg. 3.

¹³ Request 17-5, § 2, at Pg. 2.

¹⁴ Update on Application Status and Contention Sets, *available at* <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

¹⁵ See <https://www.icann.org/news/announcement-2017-12-13-en>.

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

therefore Request 17-5 is moot; and (2) ICANN organization complied with established policy(ies) when it took the .KID/.KIDS contention set off hold after the resolution of all accountability mechanisms affecting the contention set.

II. Facts.

A. The CPE Process Review

CPE is a method of resolving string contention,¹⁷ described in section 4.2 of the gTLD Applicant Guidebook (Guidebook). It will occur only if a community application is in contention and if that applicant elects to pursue CPE. CPE is performed by an independent provider (CPE Provider).¹⁸ If the application does not prevail in CPE, string contention may be resolved by an ICANN Auction of Last Resort (Auction) among the applications within the contention set.¹⁹ An application may be placed on hold “if there are pending activities (e.g., ICANN accountability mechanisms . . .) that may impact the status of the application.”²⁰

On 17 September 2016, ICANN’s Board directed ICANN organization 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.²¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process.

On 18 October 2016, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.²² The BGC determined that, in

¹⁷ “String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings.” Guidebook § 1.1.2.10.

¹⁸ The CPE Provider includes those who were involved in: (i) evaluating and scoring the Application; (ii) validating letters of support and opposition; and (iii) issuing the CPE Report on the Requestor’s Application.

¹⁹ Guidebook § 4.3, available at <https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>.

²⁰ <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

²¹ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

²² <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (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).²³ 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 that the then eight pending Reconsideration Requests relating to the CPE process would be on hold until the CPE Process Review was completed.²⁴

On 13 December 2017, ICANN organization published FTI’s reports issued in connection with the CPE Process Review.²⁵

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 process²⁶;

For Scope 2, FTI concluded that “the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook (Applicant Guidebook)²⁷ and the CPE Guidelines throughout each CPE.”²⁸

²³ *Id.*

²⁴ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

²⁵ See <https://www.icann.org/news/announcement-2017-12-13-en>.

²⁶ 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>.

²⁷ See Guidebook § 4.2 at Pgs. 4-7 to 4-19, available at <https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>.

²⁸ Scope 2 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

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.”²⁹ 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 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 other instance (for which two CPE reports were completed on the same application) FTI did not find citations to each reference to research in the working papers underlying the relevant report. However, FTI did find citations to the research in the working papers underlying the first CPE of that same application.³⁰ Accordingly, based on FTI’s observations, it is possible that the research being referenced in the relevant CPE report was the research for which citations were found in the working papers underlying the first CPE on that particular application.³¹

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the three 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 remaining Reconsideration

²⁹ 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>.

³⁰ 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>.

³¹ *Id.* at Pg. 34.

Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Reviews.³²

B. The Requestor's Application for .KIDS and the .KID/.KIDS Contention Set

The Requestor submitted a community-based application for .KIDS, which was placed in the .KID/.KIDS contention set.³³ The Requestor participated in CPE, but did not prevail. On 23 April 2016, the Requestor submitted Request 16-6, seeking reconsideration of the CPE Provider's conclusion that the Requestor did not prevail in CPE.³⁴ The filing of Request 16-6 impacted the status of the .KID/.KIDS contention set, which was placed on hold pending resolution of Request 16-6.³⁵ The BGC issued a final determination denying Request 16-6 on 21 July 2016.³⁶ On 16 September 2016, ICANN organization notified the Requestor that the application statuses and contention sets have been updated on the New gTLD Program microsite and that the "[t]he KID/KIDS contention set and your application status are no longer 'On-Hold'" given that there are no pending accountability mechanisms impacting the status of the contention set.³⁷

On 18 October 2016, the Requestor sent a case comment to ICANN organization asserting that the BGC's Determination on Request 16-6 was not final because the Board should consider the Request as required under the amended Bylaws effective 1 October 2016.³⁸

³² <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

³³ https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus:viewcontentionsetimage/215?_csrf=2fa3a5b7-ca97-4722-bb10-02acbf6ac234.

³⁴ Request 16-6, available at <https://www.icann.org/en/system/files/files/reconsideration-16-6-dotkids-request-23apr16-en.pdf>.

³⁵ Update on Application Status and Contention Sets, available at <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

³⁶ Attachment 1, at Pg. 1.

³⁷ Attachment 2, at Pg. 1.

³⁸ Attachment 3, at Pg. 1.

On 31 October 2016, in response to the Requestor's case comment inquiry, ICANN organization explained that the Bylaws in effect at the time Request 16-6 was filed allowed the BGC to issue a final determination on challenges relating to staff action and therefore, no further consideration by the Board was warranted.³⁹ ICANN organization also explained that the Requestor's "application and the .KID/.KIDS contention set was updated to 'Active'" on 12 September 2016 following the posting of the 21 July 2016 BGC meeting minutes.⁴⁰

On 2 October 2017, ICANN organization sent the Requestor an update regarding the .KID/.KIDS contention set.

In light of the fact that the .KID/.KIDS Reconsideration Request has been resolved and there are currently no other accountability mechanisms or other activities pending for the contention set, ICANN will be moving forward with the .KID/.KIDS contention set and plans to invite the contention set to an ICANN Auction of Last Resort 30 days from this notification. At that time, you will receive information regarding the auction, including the date, time and how to begin the process of completing your auction documentation. Typically, auctions are scheduled three months from the date of invitation.⁴¹

On 4 October 2017, the Requestor responded to ICANN organization's update, stating:

Thanks for your note, however, we must admit that we were not expecting such a notice given the ongoing CPE review process: <https://www.icann.org/news/announcement-2017-09-01-en>

The DotKids Foundation remains committed to contend, in collaboration with ICANN and the ICANN community, that the CPE process was inadequately executed and that kids around the world do form a distinct community worthy of consideration as a community TLD through the new gTLD process.

Since mid 2016, we have been in communications with the ICANN Ombudsman and have been provided with information

³⁹ Attachment 4, at Pg. 1.

⁴⁰ *Id.*; see also <https://www.icann.org/resources/board-material/minutes-bgc-2016-07-21-en>.

⁴¹ Attachment 5, at Pg. 1.

that we should wait for the CPE Review to be completed first before we, together with the ICANN Ombudsman, the ICANN community and the Childrens Rights and welfare community should consider what further steps to take on the matter.⁴²

On 28 October 2017, ICANN organization replied to the Requestor's case comment.

Your message referenced the Board-directed Community Priority Evaluation (CPE) process review (CPE Process Review). In his letter of 26 April 2017 to concerned parties, Chris Disspain, the Chair of the Board Governance Committee, advised that the Board's consideration of certain Reconsideration Requests related to CPE are on-hold pending completion of the CPE Process Review; these Reconsideration Requests affect the following strings: .LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK. The letter is published at <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The letter has been incorporated in the 2 June 2017 (<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>) and 1 September 2017 (<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-01sep17-en.pdf>) updates on the CPE Process Review issued by ICANN organization.

Reconsideration Request 16-6, affecting the .KID/.KIDS contention set resolved in July 2016 and the contention set was subsequently taken off hold. As mentioned in our [2 October 2017] communication, there are currently no accountability mechanisms or other pending activities that would interfere with progression of the contention set.⁴³

On 10 November 2017, ICANN organization sent the Requestor a Notice of Intent to Auction and Notice to Participate in an Action. The Notice to Participate identified four forms that needed to be completed and submitted within 28 days of the notice, by 8 December 2017.⁴⁴

⁴² Attachment 6, at Pg. 1.

⁴³ Attachment 7, at Pg. 1.

⁴⁴ Attachment 8, at Pg. 1; Attachment 9, at Pg. 1.

On 17 November 2017, 27 November 2017, and 4 December 2017, ICANN organization sent the Requestor additional reminders regarding the information required to be submitted by 8 December 2017 in order to participate in an Auction to resolve string contention.⁴⁵

On 5 December 2017, the Requestor notified ICANN organization that

[w]e have been advised by the ICANN Ombudsman that there is an open case for DotKids Foundation at the Ombudsman office, mainly on the seemingly unfair treatment of the DotKids application, including but not limited to the unknown reason for .kids to be pushed to auction at this time while the CPE review is still ongoing and other community applications are held.

Please confirm the above and that given that there is an accountability mechanism open, the application and the auction process should be held.⁴⁶

The next day, on 6 December 2017, the Requestor filed the instant Request 17-5.⁴⁷ Request 17-5 claims that a “mistaken CPE process [was] applied to the DotKids Foundation .KIDS community gTLD application,”⁴⁸ that “the findings [of the CPE Process Review] will affect the approach that the DotKids Foundation would take for the redress of the .KIDS CPE process,”⁴⁹ and that other community applicants “not explicitly identified in the CPE process review (e.g. the .SPA CEP/IRP by Donuts) have been put on hold we believe due to the ongoing CPE process review,” such that the Requestor asserts that taking .KIDS off hold “is therefore counter to the established processes.”⁵⁰ The Requestor also suggested (wrongly, as discussed below) that ICANN

⁴⁵ Attachment 10, at Pg. 1; Attachment 11, at Pg. 1; Attachment 12, at Pg. 1.

⁴⁶ Attachment 13, at Pg. 1; Attachment 14, at Pg. 1.

⁴⁷ <https://www.icann.org/en/system/files/files/reconsideration-17-5-dotkids-request-06dec17-en.pdf>.

⁴⁸ Request 17-5, § 5, at Pg. 3.

⁴⁹ Request 17-5, § 7, at Pg. 6.

⁵⁰ Request 17-5, § 7, at Pg. 6.

organization did not notify it of the change in the .KIDS application status until over a year after the application was taken off hold.⁵¹

Following ICANN organization's receipt of Request 17-5, the .KID/.KIDS contention set Auction, which was scheduled for 25 January 2018, was cancelled, and the Requestor's .KIDS application was put back on hold, because string contention sets are only eligible to enter into an Auction if, among other things, there is no pending ICANN Accountability Mechanism.⁵²

On 16 January 2018, the BAMC concluded that Request 17-5 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws.⁵³

In accordance with the Reconsideration process, ICANN organization transmitted Request 17-5 to the Ombudsman for consideration pursuant to Article 4, Section 4.2(l) of the ICANN Bylaws. On 21 January 2018, the Ombudsman recused himself pursuant to Article 4, Section 4.2(l)(iii) of ICANN's Bylaws.⁵⁴ Accordingly, the BAMC reviews Request 17-5 pursuant to Article 4, Sections 4.2(l)(iii) and 4.2(q).

C. Relief Requested

The Requestor asks the BAMC “[t]o place the DotKids Foundation .KIDS community gTLD application on hold until the CPE [Process R]eview reports are complete and published.”⁵⁵

III. Issues Presented.

The issues are as follows:

1. Whether Request 17-5 is moot because the CPE Process Review reports are complete and published; and

⁵¹ Request 17-5, § 7, at Pg. 5-6.

⁵² <http://newgtlds.icann.org/en/applicants/auctions>.

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

⁵⁴ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Request 17-5, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-17-5-dotkids-ombudsman-action-21jan18-en.pdf>.

⁵⁵ Request 17-5, § 8, at Pg. 6.

2. Whether ICANN organization complied with applicable Commitments, Core Values, and established policies when it took the .KID/.KIDS contention set off “Hold” status and resumed processing the contention set in accordance with the New gTLD Program by scheduling an ICANN Auction.

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.⁵⁶

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BGC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁵⁷ 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.⁵⁸ Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC

⁵⁶ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

⁵⁷ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

⁵⁸ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁵⁹

On 16 January 2018, the BAMC determined that Request 17-5 is sufficiently stated and sent Request 17-5 to the Ombudsman for review and consideration.⁶⁰ The Ombudsman thereafter recused himself from this matter.⁶¹ Accordingly, the BAMC has reviewed Request 17-5 and issues this Recommendation.

V. Analysis and Rationale.

A. The Requestor has Received the Relief Requested, and Therefore Request 17-5 is Moot.

The Requestor asked ICANN organization to “place the [.KIDS] application on hold until the CPE review reports are complete and published.”⁶² This is precisely what ICANN organization has done. Immediately following ICANN organization’s receipt of Request 17-5, ICANN organization cancelled the .KID/.KIDS contention set Auction, and placed the .KID/.KIDS contention set on hold, because string contention sets are only eligible to enter into an Auction if, among other things, there is no pending ICANN Accountability Mechanism relevant to the string.⁶³

On 13 December 2017, while the .KID/.KIDS contention set was on hold pending resolution of Request 17-5, ICANN organization published three reports in connection with the CPE Process Review.⁶⁴ On 15 March 2018, the ICANN Board acknowledged and accepted the

⁵⁹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁶⁰ Ombudsman Action Regarding Request 17-5, Pg. 2.

⁶¹ Ombudsman Action Regarding Request 17-5, Pg. 1.

⁶² Request 17-5, § 8, at Pg. 6.

⁶³ See Application Details, “Application Status,” available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/161>; see also <http://newgtlds.icann.org/en/applicants/auctions>.

⁶⁴ See <https://www.icann.org/news/announcement-2017-12-13-en>.

findings set forth in the three CPE Process Review reports, and declared that the CPE Process Review was complete.⁶⁵ Accordingly, the Requestor has received the relief requested in Request 17-5, which renders Request 17-5 moot and reconsideration unnecessary.

B. ICANN Complied with Its Commitments When it Took the .KID/.KIDS Contention Set Off Hold and Moved Forward with Processing the .KID/.KIDS Contention Set By Scheduling an Auction.

The Requestor claims that other community applicants “not explicitly identified in the CPE process review (e.g. the .SPA CEP/IRP by Donuts) have been put on hold we believe due to the ongoing CPE process review,” such that the Requestor asserts that taking .KIDS off hold “is therefore counter to the established processes.”⁶⁶ This claim conflates multiple issues and relies on facts which are not supported. There is no evidence that the Cooperative Engagement Process (CEP) initiated on 20 January 2016 by Donuts, Inc. a relating to the .SPA string was put on hold due to the ongoing CPE Process Review. Further, the Requestor does not indicate which “established processes” it believes ICANN organization violated by taking the .KID/.KIDS contention off hold in September 2016 following the resolution of Request 16-6,⁶⁷ nor does the Requestor provide any evidence of such a process violation, because none exists.

To the extent the Requestor is referring to ICANN organization’s commitment to

[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties),⁶⁸

this argument does not support reconsideration.

⁶⁵ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁶⁶ Request 17-5, § 7, at Pg. 6.

⁶⁷ *See id.*

⁶⁸ ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(v).

The BGC's Chair, Chris Disspain, identified certain Reconsideration Requests that would be on hold until the completion of the CPE Process Review.⁶⁹ Each of the Reconsideration Requests placed on hold raised claims relating to CPE, and each was pending at the time the CPE Process Review was commenced. Because the Requestor did not have a pending Reconsideration Request at the time the CPE Process Review was commenced, the DotKids Application and the .KID/.KIDS contention set were not placed on hold.

Contrary to the Requestor's claims and consistent with its commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly,"⁷⁰ ICANN organization treated the DotKids Application and the .KID/.KIDS contention set the same way it treated other gTLD applications and contention sets that had no pending Accountability Mechanism when the CPE Process Review started. Specifically, *none* of the applications or contention sets that were in active status when the CPE Process Review commenced, including the DotKids Application and .KID/.KIDS contention set, were placed on hold in connection with the CPE Process Review. If the BAMC were to adopt the Requestor's position, ICANN organization would have had to "single out" the DotKids Application and "mak[e] an unjustified prejudicial distinction between or among different parties" to place it on hold without placing all of the other active gTLD applications that had undergone CPE on hold as well, which itself would comprise a violation of this commitment.⁷¹

⁶⁹ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The reconsideration requests on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, *see* <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷⁰ ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(v).

⁷¹ *Id.*

The Requestor’s claim that it was treated differently than the applicant for .SPA is factually incorrect and does not support reconsideration. The Requestor asserts that ICANN organization placed the .SPA contention set “on hold, we believe due to the ongoing CPE [P]rocess [R]eview.”⁷²

In fact, the .SPA application was placed on hold on 20 January 2016 when the applicant for .SPA initiated a CEP proceeding, nine months before the Board directed ICANN organization’s President or his designee to commence the CPE Process Review.⁷³ The CEP is an accountability mechanism; accordingly Donuts Inc.’s initiation of CEP caused the .SPA contention set to be placed on hold.⁷⁴ As such, there is no evidence that the .SPA CEP “ha[s] been put on hold we believe due to the ongoing CPE process review” as claimed by the Requestor.⁷⁵

Ultimately, the “on hold” status of the .SPA contention set does not reflect inconsistent or discriminatory application of established policy or procedure, because the .SPA contention set is on hold as a result of Donuts Inc.’s initiation of CEP and *not* as a result of an ICANN organization determination to place the contention set on hold pending completion of the CPE Process Review.⁷⁶ ICANN organization applied its policies consistently, insofar as both the DotKids Application and Donuts Inc.’s application for .SPA were placed on hold as a result of pending Accountability Mechanisms (albeit different Accountability Mechanisms). Reconsideration is not warranted on these grounds.

⁷² Request 17-5, § 7, at Pg. 6.

⁷³ See <https://www.icann.org/en/system/files/files/irp-cep-status-15nov17-en.pdf>.

⁷⁴ <http://newgtlds.icann.org/en/applicants/auctions>.

⁷⁵ Request 17-5, § 7, at Pg. 6.

⁷⁶ Request 17-5, § 7, at Pg. 6.

Finally, the Requestor suggests that it did not receive notice from ICANN organization indicating that the .KID/.KIDS contention set had been taken off hold until 2 October 2017.⁷⁷ While the Requestor does not specifically assert that reconsideration is warranted on these grounds, the BAMC addresses the Requestor's claims, as the Requestor is mistaken.

The Requestor was notified by ICANN organization on 16 September 2016 that its Application was no longer on hold.⁷⁸ ICANN organization notified the Requestor less than one week after the BGC issued its determination on Request 16-6 that the determination was available on ICANN organization's website, and provided a URL to the determination.⁷⁹ Moreover, Global Support explained that "[t]he [.]KID/[.]KIDS contention set and your application status are no longer 'On-Hold'" less than one week after the BGC posted minutes on the ICANN website indicating that the .KID/.KIDS contention set would be taken off hold,⁸⁰ and more than one year before scheduling the Auction.⁸¹ Indeed, on 18 October 2016, the Requestor expressly acknowledged that "we see that the application status ha[s] been updated."⁸² Later that month, ICANN organization reiterated to the Requestor that "[i]n light of the BGC determination that no further consideration by the Board is required, your application and the .KID/.KIDS contention set was updated to 'Active'" on 12 September 2016 following the posting of the 21 July 2016 BGC meeting minutes.⁸³

Ultimately, the Requestor has not identified any element of ICANN's Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN

⁷⁷ Request 17-5, § 4, at Pg. 2.

⁷⁸ Attachment 1, at Pg. 1.

⁷⁹ Attachment 1, at Pg. 1.

⁸⁰ Compare <https://www.icann.org/resources/board-material/minutes-bgc-2016-07-21-en> (ICANN minutes, posted 12 September 2016) with Attachment 1, at Pg. 1 (notice to the Requestor dated 16 September 2016).

⁸¹ See Attachment 1, at Pg. 1, 3.

⁸² Attachment 1, Pg. 1-2.

⁸³ *Id.*, Pg. 2.

organization's correspondence with the Requestor, as none were violated. Accordingly, reconsideration is not warranted.

VI. Recommendation

The BAMC has considered the merits of Request 17-5, and, based on the foregoing, concludes that ICANN organization did not violate ICANN's Mission, Commitments and Core Values or established ICANN policy(ies) when it took .KID/.KIDS off hold and further that Request 17-5 is moot. Accordingly, the BAMC recommends that the Board deny Request 17-5.

In terms of the timing of this decision, Section 4.2(q) of Article 4 of the Bylaws provides that the BAMC "shall endeavor to produce its final recommendation to the Board within 90 days of receipt of the Reconsideration Request."

To satisfy the ninety-day target deadline, the BAMC would have to have acted by 6 March 2018. On 17 January 2018 and 2 February 2018, the BAMC recommended that the Board acknowledge and accept the findings set forth in the CPE Process Review reports, declare that the CPE Process Review was complete, and conclude that there will be no overhaul or change to the CPE process in the current New gTLD round.⁸⁴ The Board did not have the opportunity to adopt Resolutions 2018.03.15.08 – 2018.03.15.11 accepting the BAMC's recommendations until 15 March 2018.⁸⁵ As the Board's actions concerning the CPE Process Review in Resolutions 2018.03.15.08 – 2018.03.15.11 are relevant the BAMC's consideration of Request 17-5, the first opportunity that the BAMC has to make a recommendation on Request 17-5 is 5 April 2018.

⁸⁴ <https://www.icann.org/resources/board-material/minutes-bamc-2018-01-17-en>;
<https://www.icann.org/resources/board-material/minutes-bamc-2018-02-02-en>.

⁸⁵ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>; *see also* <https://www.icann.org/resources/board-material/minutes-2018-02-04-en#2.e> (Board Minutes of 4 February 2018 continuing the Board's consideration of the CPE Process Review until the Board's 15 March 2018 meeting in Puerto Rico to allow the Board members additional time to consider letters and reports submitted by community applicants whose pending Reconsideration Requests were placed on hold pending completion of the CPE Process Review).