

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-6**

6 MAY 2015

The Requester, .Music LLC, seeks reconsideration of ICANN’s decisions to: (1) approve a change request submitted by DotMusic Limited; and (2) defer a change request submitted by the Requester, both of which were submitted pursuant to the New gTLD Application Change Request Process and Criteria (“Change Request Process”).

I. Brief Summary.

The Requester submitted a community application for .MUSIC (the “Application”). DotMusic Limited (“DML”) also submitted a community application for .MUSIC. Six other applicants submitted standard (meaning not community-based) applications for .MUSIC. All eight applications were placed in a contention set.

In May 2014, the Requester submitted a change request (“Requester’s Change Request”) seeking to modify its answers to Questions 18(a)-(b) and 20(a)-(e) in its Application. Question 18(a)(b) relates to the mission/purpose of the proposed TLD. Question 20 relates to the community based designation, including the description of the community that the applicant is committing to serve as well as the community-based purpose for the applied for gTLD. ICANN staff evaluated the Requester’s Change Request in accordance with the Change Request Process and informed the Requester that the determination of its Change Request would be deferred until the completion of Community Priority Evaluation (“CPE”) of its Application.

ICANN issued a Change Request Advisory, published on 30 September 2014 (the “September 2014 Advisory”), which embodied the then-existing practice and policy, and

explained that “[a]pproval of a change request *to update a community definition and registration policies* would allow a CPE applicant to update its *application* based on learnings from previously posted CPE results” and, therefore, would not be permitted in order to prevent any unfair advantage in the process.¹

Subsequently, the Requester participated in CPE. The CPE Panel determined that the Requester’s Application for .MUSIC did not prevail in CPE and therefore should not be granted priority over the other applications for .MUSIC.

DML also submitted a change request (“DML’s Change Request”), but it was not a request to change its application or any responses to questions in its application. Rather, DML’s Change Request sought to add commitments per Section 2 of the Specification 11 Public Interest Commitment (“PIC”) to the Registry Agreement that DML would sign if it were eventually approved as the registry operator for .MUSIC. ICANN staff evaluated DML’s Change Request in accordance with the Change Request Process and approved DML’s Change Request to amend its PIC, the content of which was fully consistent with the DML’s application for .MUSIC.

On 17 April 2015, the Requester filed the instant request for reconsideration (“Reconsideration Request”), seeking reconsideration of ICANN’s decisions to: (1) approve DML’s Change Request in March 2015 prior to the completion of its CPE; and (2) defer the Requester’s Change Request in May 2014 until after the completion of its CPE.

The Requester’s claims do not support reconsideration. ICANN did not violate any established policy or procedure either in approving DML’s Change Request or in deferring the Requester’s Change Request. DML’s Change Request sought to amend the PIC to its potential Registry Agreement, and thus did not propose any amendment to DML’s application. The

¹Change Requests: New gTLD Advisory R1-A01-CR, *available at* <http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en> (emphasis added).

Requester's Change Request, by contrast, sought to amend portions of its Application specifically related to, among other things, the community definition and registration policies prior to completing CPE. Pursuant to ICANN policy, those types of changes to an application may not be made prior to the completion of CPE, so as not to risk unfairness to other applicants. No such concerns arose with respect to the type of change request submitted by DML. Further, the Requester has failed to demonstrate, as it must, that it has been materially affected by either decision. Because the Requester has failed to demonstrate any violation of an ICANN policy or procedure, the BGC concludes that Request 15-6 be denied.

II. Facts

A. Background Facts.

The Requester submitted a community application for .MUSIC.² DML also submitted a community application for .MUSIC.³ Six other applicants submitted standard (meaning not community-based) applications for .MUSIC. All eight applications were placed in a contention set.⁴

In May 2014, the Requester submitted its change request, which sought to modify its responses to Questions 18(a)-(b) and 20(a)-(e) of its Application; namely, those questions pertaining to the mission and purpose of the proposed gTLD, the benefits it might confer, and the definition of and registration policies relating to the community the string seeks to serve.⁵

ICANN staff evaluated the Requester's Change Request in accordance with the Change Request Process and, on 27 May 2014, ICANN informed the Requester that the determination of

² Application Details, Application ID: 1-959-51046, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1659>.

³ Application Details, Application ID: 1115-14110, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>.

⁴ *See* Contention Set Status, .MUSIC, *available at* <https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus>.

⁵ Request, § 6, Pg. 4; Application Details, Application ID: 1-959-51046, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1659>.

the Requester's Change Request would be deferred until the completion of CPE of the Application.⁶ CPE is a method of resolving string contention, described in section 4.2 of the Applicant Guidebook ("Guidebook"). CPE will occur only if a community application is in contention and if that applicant elects to pursue CPE.

On 18 June 2014, the Requester was invited to participate in CPE for .MUSIC.⁷ The Requester elected to participate in CPE for .MUSIC, and its Application was forwarded to the Economist Intelligence Unit ("EIU"), the CPE provider, for evaluation.

On 30 September 2014, ICANN issued the September 2014 Advisory, which set forth the existing practice and policy, and explained that "[a]pproval of a change request *to update a community definition and registration policies* would allow a CPE applicant to update its *application* based on learnings from previously posted CPE results. This causes issues of unfairness to the first applicants that went through CPE and did not have the benefit of learning from others."⁸

On 7 October 2014, the CPE Panel issued its report on the Application ("CPE Report"). The CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application did not prevail in CPE.⁹ In fact, the CPE Panel awarded only three out of the possible 16 points to the Application; an application must garner 14 points in order to prevail in CPE.¹⁰

On 24 March 2015, ICANN approved DML's Change Request. DML's Change Request did not request any changes to the text or intent of its application, but instead sought to add a

⁶ Request, Attachment.

⁷ See <http://newgtlds.icann.org/en/applicants/cpe#invitations>.

⁸ Change Requests: New gTLD Advisory R1-A01-CR, *available at*

<http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en> (emphasis added).

⁹ See Report, *available at* <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>.

¹⁰ *Id.*

Section 2 Specification 11 Public Interest Commitment (“Spec 11 PIC”)¹¹ to DML’s Registry Agreement (that would be applicable if DML were eventually approved as the registry operator for .MUSIC). While the document submitted by DML contained several hundred pages in length, only the first two pages constitute the PIC and the remaining pages constitute nothing more than explanatory commentary about the PIC. ICANN staff evaluated DML’s Change Request in accordance with the Change Request Process. DML has not yet been invited to participate in CPE.¹²

On 17 April 2015, the Requester filed the instant Reconsideration Request, seeking reconsideration of what the Requester suggests is an inconsistency between ICANN’s decisions to approve DML’s Change Request prior to the initiation of DML’s CPE on its application for .MUSIC, and to defer the Requester’s Change Request until after the completion of CPE of the Requester’s Application. Specifically, the Requester claims: (1) ICANN’s approval of DML’s Change Request violated the September 2014 Advisory; and (2) ICANN’s deferral of the Requester’s Change Request violated established policies and procedures because it was inconsistent with ICANN’s approval of DML’s Change Request and the deferral preceded the September 2014 Advisory.

B. Relief Requested.

The Requester asks ICANN: (1) to approve “the previously-submitted .Music LLC Change Request and re-submit the [A]pplication to the EIU for a new CPE with different panelists”; and/or (2) “[a]t the very least, [...] rescind the staff approval of the non-PIC portion of [DML’s] Change Request.”¹³

¹¹ Application Update History for DML’s Application, *available at* <https://gtldresult.icann.org/applicationstatus/applicationchangehistory/1392>.

¹² See Community Priority Evaluation (CPE), *available at* <http://newgtlds.icann.org/en/applicants/cpe>.

¹³ *Id.* at § 9, Pg. 7.

III. Issues.

In view of the claims set forth in the Reconsideration Request, the issues for reconsideration are whether applicable policies or procedures were violated because:

1. ICANN approved DML's Change Request prior to CPE being completed as to DML's application; or
2. ICANN deferred its decision on the Requester's Change Request because the Requester had not yet completed CPE.¹⁴

IV. The Relevant Standards for Evaluating Reconsideration Requests and Change 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, or if the Board or the NGPC¹⁶ agrees to the extent the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. The BGC's review is limited to whether ICANN staff violated any established policy or procedure in deferring the Requester's Change Request or in approving DML's Change Request.

The Change Request Process was implemented pursuant to Section 1.2.7 of the Guidebook, which provides:

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the

¹⁴ *Id.* at § 8, Pgs. 6-7.

¹⁵ Article IV, Section 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.

applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.¹⁷

This section of the Guidebook further states:

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.¹⁸

The Change Request Process was created during the application window in order to allow applicants to notify ICANN of changes to application materials, as required by Section 1.2.7 of the Guidebook.¹⁹ In evaluating each change request, ICANN staff considers all available information concerning the change request against the seven change request determination criteria specified on the New gTLD microsite under New gTLD Application Change Request Process and Criteria, at <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>. These criteria were carefully developed to enable applicants to make necessary changes to their applications while ensuring a fair and equitable process for all applicants.²⁰ The Change Request Process is used to assess all change requests, including those proposing amendments to PIC specifications.²¹ The weight of each criterion may vary on a case-by-case basis, depending on the facts and circumstances surrounding the change request, the application, and the string.²²

¹⁷ Guidebook, § 1.2.7.

¹⁸ *Id.*

¹⁹ Change Request overview, *available at*: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

²⁰ *Id.*

²¹ Frequently Asked Questions, Specification 11 Of The Revised New gTLD Registry Agreement: Public Interest Commitments, *available at* <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>.

²² Change Request overview, *available at*: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

On 30 September 2014, ICANN issued the September 2014 Advisory, which provided guidance regarding the existing process and explained that “[a]pproval of a change request *to update a community definition and registration policies* would allow a CPE applicant to update its *application* based on learnings from previously posted CPE results” and, therefore, such a change request would not be permitted prior to the completion of the requester’s CPE in order to prevent any unfair advantage in the process.²³

V. Analysis and Rationale.

A. ICANN Acted in Accordance with Established Policy In Approving DML’s Change Request.

The Requester argues that ICANN’s approval of DML’s Change Request prior to CPE of DML’s .MUSIC application violates established policies and procedures.²⁴ Specifically, the Requester argues that the approval of DML’s Change Request contravenes the September 2014 Advisory, which provides that a narrow category of change requests – namely those seeking to amend an application’s community definition or registration policies – will be deferred until after the completion of the corresponding CPE.²⁵ The September 2014 Advisory, however, is not applicable in this instance because DML’s Change Request did not seek to amend DML’s application, and specifically did not seek to amend its community definition or registration policies.

The September 2014 Advisory was formulated according to the Change Request Process, and comprises a policy that reflects the careful balancing of the criteria against which ICANN must weigh all change requests.²⁶ The September 2014 Advisory provides:

²³ Change Requests: New gTLD Advisory R1-A01-CR, *available at* <http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en> (emphasis added).

²⁴ Request, § 6, Pgs. 4-5.

²⁵ Request, § 8, Pg. 6.

²⁶ *Id.*

Approval of a change request *to update a community definition and registration policies* would allow a CPE applicant to *update its application* based on learnings from previously posted CPE results. This causes issues of unfairness to the first applicants that went through CPE and did not have the benefit of learning from others. Allowing such a change request would also improve the CPE applicant's chances to prevail in CPE, negatively impacting the other applicants in the same contention set. Therefore, although viewed as necessary from the CPE applicant's perspective to maximize its ability to pass CPE, approval of a change request *to update a community's definition and registration policies* prior to the completion of CPE would cause issues of unfairness to other applicants in the same contention set.²⁷

The September 2014 Advisory is specific to change requests that seek to update an application's community definition or registration policies; it does not apply to all change requests generally.

DML's Change Request consisted of a request to add commitments per Section 2 of the Spec 11 PIC to its potential Registry Agreement, along with numerous pages of supporting clarifications.²⁸ First, PIC specifications are *not* part of new gTLD applications. As noted in the Specification 11 FAQ, "[t]he purpose of Specification 11 is to ensure new gTLD registry operators use only registrars that have signed the 2013 Registrar Accreditation Agreement (which is under negotiation), and to allow applicants the opportunity to make specific public interest commitments. These commitments can be certain statements made in their applications and/or additional public interest commitments that were not included in their applications but to which the applicants intend to commit. These commitments will become part of the applicant's new gTLD registry agreement."²⁹ As such, a change request seeking to add a PIC specification is not a "request to update [an] application"³⁰ at all.

²⁷ See Change Requests: New gTLD Advisory R1-A01-CR, *available at* <http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en> (emphasis added).

²⁸ Application Update History: Application ID: 1-1115-14110, *available at* <https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory/1392>.

²⁹ <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>

³⁰ See Change Requests: New gTLD Advisory R1-A01-CR, *available at* <http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>.

More specifically, DML's Change Request pertained only to Section 2 of its Spec 11 PIC.³¹ As explained on ICANN's PIC Frequently Asked Questions page, Section 2 is for applicants to indicate which parts of their applications they will incorporate into their registry agreements as binding commitments.³² DML's Change Request did not pertain to Section 3 of its Spec 11 PIC, which "is for applicants to identify additional commitments that are not part of their applications but which the applicants intend to incorporate as binding commitment into their registry agreements."³³ Furthermore, "[a]ny commitments set out in a PIC Specification[] that result in a change to the application must be accompanied by a change request to change the corresponding portions of the application."³⁴ DML's Change Request was not accompanied by any such request to change the text of the application.

Second, the additional pages of explanation that DML submitted with its PIC amendment also do not constitute an amendment of the application. Indeed, these pages are not even considered part of the PIC and will not be included in the PIC of a Registry Agreement (if DML were approved as the registry operator for .MUSIC). Moreover, DML's clarifications do not modify or update DML's existing community definition or registration policies stated in its application. Accordingly, neither the PIC amendment nor the additional clarifications sought to amend DML's application, unlike the Requester's Change Request.

Furthermore, ICANN adhered to the Change Request Process in considering DML's Change Request. All change requests are evaluated according to the Change Request Process,³⁵

³¹ See Application Update History: Application ID: 1-1115-14110, available at <https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory/1392>.

³² Frequently Asked Questions, Specification 11 Of The Revised New gTLD Registry Agreement: Public Interest Commitments, available at <http://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>.

³³ *Id.*

³⁴ *Id.*

³⁵ See New gTLD Application Change Request Process And Criteria, available at <https://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

and the Requester does not argue that ICANN failed to consider any of the Change Request Process criteria in the evaluation of DML's Change Request.

As such, the Requester has identified no policy or procedure that ICANN violated in connection with ICANN's approval of DML's Change Request.

B. ICANN Acted in Accordance with Established Policy in Deferring Its Decision On The Requester's Change Request Until The Requester Completed CPE.

The Requester claims that ICANN's deferral of the Requester's Change Request until after it completed CPE violates established policies and procedures because the deferral was issued prior to the September 2014 Advisory and, in the Requester's view, the deferral is inconsistent with ICANN's decision to approve DML's Change Request. The Requester's claims do not support reconsideration. First, any challenge to ICANN's deferral of the Requester's Change Request, which was issued on 27 May 2014, is now time-barred. Second, while the September 2014 Advisory had not yet been issued at the time of the deferral, the policy and practice of preventing the risk of unfairness in the CPE process by deferring change requests that sought to modify the community definition and/or registration policies of an application was already in place. Third, the two change requests are not at all comparable, as one (the Requester's) proposed a change to its Application, while the other (DML's) sought to add Section 2 to the Spec. 11 PIC, which would be part of the Registry Agreement if DML were to become the registry operator for .MUSIC. ICANN's policies reflect the different considerations that come into play with respect to different types of change requests, and ICANN's treatment of each type of request at issue adhered to all applicable policies and procedures.

First, to the extent the Reconsideration Request comprises a challenge to the deferral of the Requester's Change Request such a claim is time-barred. The deferral of the Requester's Change Request occurred on 27 May 2014, almost a full year ago. Reconsideration requests

challenging ICANN staff action must be submitted within 15 days of “the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action.”³⁶ Any challenge to ICANN’s deferral of the Requester’s Change Request is undoubtedly time-barred, as that 15-day window has long since passed.

Second, as the Requester notes, the September 2014 Advisory was not in effect at the time of the deferral, which was conveyed to the Requester on 27 May 2014. However, the Requester’s claim that “ICANN staff created this policy ‘on the fly’” is a baseless allegation. Indeed, ICANN’s then-existing (unwritten) policy and practice was to defer its determinations regarding change requests seeking to amend the portions of an application concerning community definition or registration policies until after the completion of the corresponding CPE so as not to risk unfairness to other applicants within the contention set. Moreover, the September 2014 Advisory makes clear that it is the embodiment of prior practice, as it was issued in response to “inquiries regarding why requested changes to community definition and registration policies are deferred until after the completion of CPE.”³⁷ In contrast, no policy (then or now) requires the deferral of change requests that seek only to add Section 2 to a Spec 11 PIC commitment to an applicant’s potential Registry Agreement (like DML’s Change Request).

Third, the Requester’s and DML’s change requests are substantively and importantly different. In contrast to DML’s Change Request, which did not seek to amend its application at all, the Requester’s Change Request is of a type that falls squarely into the purview of the September 2014 Advisory (and its precursor practices). The September 2014 Advisory states that if an applicant requests to “update its application” with respect to “community definition and

³⁶ Bylaws, Art. IV, § 2.5

³⁷ See Change Requests: New gTLD Advisory R1-A01-CR, *available at* <http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>.

registration policies,” then the “approval of [such] a change request prior to the completion of CPE would cause issues of unfairness to other applicants in the same contention set,” and thus would not be permitted.³⁸

It is beyond dispute that the Requester’s Change Request sought to amend its responses to the Application questions specifically relating to community definition and registration policies, namely Question 18(a) (“Describe the mission/purpose of your proposed gTLD”), Question 18(b) (“How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?”), and its responses to the Question 20 subdivisions, all of which pertain to the “Community-based Designation” and seek information such as a description of the community and the “intended registration policies in support of the community-based purpose of the applied-for gTLD[.]”³⁹ These types of proposed amendments are exactly what is covered by the September 2014 Advisory, which reflects ICANN’s policy and practice regarding these sorts of change requests.

In contrast, DML’s Change Request did not propose to amend any of DML’s application’s responses, let alone responses to Questions 18 or 20. Indeed, DML submitted a letter to ICANN in connection with the instant Reconsideration Request and emphasized that “the Community Definition and Registration Polices stated in its [a]pplication remain unchanged.”⁴⁰ Rather, DML sought to augment its potential Registry Agreement with a Spec 11 PIC that includes Section 2. A Spec 11 PIC’s purpose is “to allow applicants the opportunity to make specific public interest commitments. . . . These commitments will become part of the

³⁸ See Change Requests: New gTLD Advisory R1-A01-CR, *available at* <http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>.

³⁹ Application Details, Application ID: 1-959-51046, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1659>.

⁴⁰ Letter from Constantine Roussos of DML to BGC, dated 27 April 2015, Pg. 2, *available at* <https://www.icann.org/en/system/files/correspondence/dotmusic-to-bgc-redacted-27apr15-en.pdf>.

applicant's new gTLD registry agreement."⁴¹ Indeed, the Frequently Asked Questions regarding Spec 11 PIC policies make clear that submission of that additional document does *not* constitute an amendment to the application itself.⁴²

In sum, there is no inconsistency between ICANN's decisions to defer the Requester's Change Request on the one hand and to approve DML's Change Request on the other. Any alleged discrepancy is explained by the plain text of the September 2014 Advisory, which reflects the policy already in practice at the time of the deferral and explains why pre-CPE change requests to amend the community definition and registration policies portions of the Application would be unfair; whereas no policy or procedure prevents a pre-CPE submission of a Spec 11 PIC.⁴³

No reconsideration is warranted with respect to the Requester's claims regarding the deferral of Requester's Change Request—any such challenge is time-barred and, moreover, ICANN's deferral of the Requester's Change Request did not violate any established policy or procedure.

C. The Requester Has Not Demonstrated It Has Been Materially Affected By ICANN's Decisions on the Requester's and DML's Change Requests.

Absent evidence that the Requester has been materially and adversely affected by the decisions on the Requester's and DML's Change Requests, reconsideration is not appropriate.⁴⁴

Here, the Requester argues that it was, or might be, potentially materially affected in two ways: (1) ICANN's deferral of the Requester's Change Request may have contributed to the

⁴¹ Frequently Asked Questions: Specification 11 Of The Revised New gTLD Registry Agreement: Public Interest Commitments, *available at* <http://newgtlds.icann.org/en/applicants/agn/base-agreement-specs-pic-faqs>.

⁴² Frequently Asked Questions: Specification 11 Of The Revised New gTLD Registry Agreement: Public Interest Commitments, *available at* <http://newgtlds.icann.org/en/applicants/agn/base-agreement-specs-pic-faqs> (emphasis added).

⁴³ See Change Requests: New gTLD Advisory R1-A01-CR, *available at* <http://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>.

⁴⁴ Bylaws, Art. IV, §§ 2.1-2.2.

Requester being “denied community status” through CPE; and (2) ICANN’s approval of DML’s Change Request might result in an “unfair advantage” for DML in its own CPE, which has not yet occurred (or even been scheduled).⁴⁵ These concerns are merely speculative, and fail to demonstrate that the Requester has suffered any material harm.

First, there is no indication that the Application amendments submitted in the Requester’s Change Request would have had any effect on the scoring of the Requester’s CPE. This is especially true given that the Requester itself characterizes these amendments as “relatively minor and non-material,”⁴⁶ and the CPE Panel awarded only three out of the possible 16 points to the Application.⁴⁷ Moreover, while the Requester’s Application will not be given priority over other applications for the same string, it currently is still in contention to ultimately be, following contention resolution, the prevailing application for .MUSIC. As the Requester acknowledges, it still has “the opportunity to win the string at auction unless [DML] prevails in CPE.”⁴⁸

Second, there is no indication that the addition of Section 2 to the Spec 11 PIC in DML’s potential registry agreement will have any effect on the scoring of its CPE. DML has not yet been invited to CPE, let alone prevailed through any “unfair advantage” as the Requester fears might happen.

Reconsideration is only warranted as to those persons who “*have been* adversely affected by” an ICANN action.⁴⁹ Because the only harm the Requester identifies is merely speculative and hypothetical, the Requester has failed to demonstrate that it *has been* materially affected by the deferral of the Requester’s Change Request or the approval of DML’s Change Request. For this separate and independent reason, reconsideration is not warranted.

⁴⁵ Request, § 10, Pg. 8.

⁴⁶ Request, § 6, Pg. 4.

⁴⁷ See Report, available at <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>.

⁴⁸ Request, § 10, Pg. 8.

⁴⁹ Bylaws, Art. IV, § 2.2 (emphasis added).

VI. Determination.

Based upon the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 15-6. If the Requester believes it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

The BGC does note, however, that staff is taking steps to clarify on its website which portion of DML's submission constitutes the PIC, and which portion is simply explanatory in nature and not part of the PIC that would be incorporated into a registry agreement if DML were to become the registry operator for .MUSIC.

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. In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 15-6 shall be final and does not require Board (or NGPC) consideration.⁵⁰ As discussed above, Request 15-6 seeks reconsideration of a staff action or inaction. As such, after consideration of this Reconsideration Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

⁵⁰ Bylaws, Art. IV, § 2.15.