

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-17
26 JUNE 2016**

The Requester, the American Institute of Certified Public Accountants, seeks reconsideration of the Community Priority Evaluation (CPE) panel's report, and ICANN's acceptance of that report, finding that the Requester's community-based application for .CPA did not prevail in CPE (CPE Report).

I. Brief Summary.

The Requester submitted two applications for the .CPA gTLD, one community-based application and one standard application (meaning, not community-based). Both of the Requester's applications were placed into a contention set with all other .CPA applications. The Requester's community-based application (Application), was invited to, and did, participate in CPE. The Application did not prevail in CPE. As a result, the Application remained in the contention set, which will proceed to ICANN's last resort auction absent private resolution among all applicants for .CPA.

The Requester claims that reconsideration is warranted because: (1) the CPE panel that issued the CPE Report (CPE Panel) did not give sufficient weight to the fact that the Application complied with the Governmental Advisory Committee's (GAC's) Beijing Communiqué; (2) ICANN did not grant the Requester's change request for the Application prior to CPE; (3) the CPE Panel did not ask enough clarifying questions; (4) the CPE Panel misapplied the criteria set forth in the Applicant Guidebook (Guidebook) with respect to two of the CPE criteria; (5) documents such as the CPE Frequently Asked Questions (FAQs) page were promulgated after the Guidebook was released; and (6) ICANN changed the "Contention Resolution Status" of the Application to "Active" after the CPE Report was issued. In addition to the initial written

submission, the Requester made a presentation regarding Reconsideration Request 15-17 (Request 15-17) to the BGC at its meeting on 12 April 2016, and submitted a written summary (Presentation Summary) of that presentation on 28 April 2016.¹

The Requester's claims do not warrant reconsideration. The Requester does not identify any misapplication of policy or procedure by ICANN staff or the CPE Panel. Rather, the Requester simply disagrees with the CPE Panel's determination and scoring of the Application. Substantive disagreements with the CPE Report, however, are not proper bases for reconsideration. Because the Requester has failed to show that either ICANN staff or the CPE Panel acted in contravention of established policy or procedure, the BGC concludes that Request 15-17 be denied.

II. Facts.

A. Background Facts.

The Requester submitted two applications for the .CPA gTLD, a community-based application,² and a standard (meaning, not community-based) application.³ Both applications for .CPA were placed into a contention set with a total of six applications for .CPA.⁴

On 11 April 2013, in its Beijing Communiqué, the GAC recommended that certain additional safeguards be applied to “[s]trings that are linked to regulated or professional sectors,” because those strings “are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm” (Category 1 Advice).⁵ The .CPA gTLD

¹ Presentation Summary, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-17-aicpa-post-hearing-submission-28apr16-en.pdf>.

² Application Details: Application ID: 1-1911-56672, *available at* <https://gtdresult.icann.org/applicationstatus/applicationdetails/208>.

³ Application Details: Application ID: 1-1910-48133, *available at* <https://gtdresult.icann.org/applicationstatus/applicationdetails/209>.

⁴ See Contention Set Status, *available at* <https://gtdresult.icann.org/applicationstatus/stringcontentionstatus>.

⁵ GAC Beijing Communiqué, Annex 1, Pg. 8, *available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.

was one of the strings subject to the GAC’s Category 1 Advice.⁶ The Beijing Communiqué also recommended that certain additional safeguards be applied to “strings representing generic terms,” namely that “exclusive registry access should serve a public interest goal” (Category 2 Advice).⁷ The .CPA gTLD was also subject to the GAC’s Category 2 Advice.⁸

Applicants were given through 10 May 2013 to respond to the GAC’s advice contained in the Beijing Communiqué.⁹ While other applicants for the .CPA string submitted responses to the GAC’s Beijing Communiqué using the GAC Advice Response Form, the Requester chose not to do so.¹⁰

On 5 February 2014, the Board accepted the GAC’s advice contained in the Beijing Communiqué concerning Category 1 Advice.¹¹

In December 2014, the Requester submitted a change request (Change Request) seeking to amend, among other things, the Application’s community definition and registration policies. Pursuant to established process and procedure, ICANN deferred consideration of the Change Request until after the application completed CPE, as it has done with all community applications seeking to revise the community definition; the Change Request remains pending.

On 21 June 2015, the Board accepted the GAC’s advice contained in the Beijing Communiqué concerning the Category 2 Advice.¹²

On 8 April 2015, the Requester was invited to participate in CPE.¹³ The Requester chose to and did participate in CPE and, on 3 September 2015 the CPE Panel issued the CPE Report,

⁶ *Id.*, Pg. 9.

⁷ *Id.*

⁸ *Id.*

⁹ See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a>.

¹⁰ GAC Advice: Beijing Communiqué And Applicant Responses, *available at* <http://newgtlds.icann.org/en/applicants/gac-advice/beijing46>.

¹¹ See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a>.

¹² See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-06-21-en#2.a>.

¹³ Community Priority Evaluation (CPE), *available at* <https://newgtlds.icann.org/en/applicants/cpe>.

determining that the Application did not prevail in CPE.¹⁴

On 18 September 2015, the Requester filed Reconsideration Request 15-17 (Request 15-17) seeking reconsideration of the CPE Report. On the same day the Requester submitted Request 15-17, the Requester submitted a Documentary Information Disclosure Policy (DIDP) request seeking documents relating to the CPE Report (DIDP Request), and asked ICANN to postpone its review of Request 15-17 pending ICANN's response to the DIDP Request.¹⁵ ICANN agreed. On 18 October 2015, ICANN responded to the DIDP Request (DIDP Response). The Requester did not revise or amend Request 15-17 and, therefore, has not sought reconsideration of the DIDP Response.

In Request 15-17, the Requester asked for an opportunity to make a presentation to the BGC regarding Request 15-17.¹⁶ In response, pursuant to Article IV, Section 2.12, the BGC invited the Requester to make a presentation regarding Request 15-17 at the BGC's 12 April 2016 meeting, which the Requester did.¹⁷

On 28 April 2016, the Requester submitted a written summary of the 12 April 2016 presentation it made to the BGC.¹⁸

Further, on 21 June 2016, the Requester provided additional information to ICANN's President, Global Domains Division, which the Board also had the opportunity to consider.¹⁹

B. Relief Requested.

The Requester asks that:

1. "ICANN reverse the determination of the CPE Report and find that the AICPA's

¹⁴ *Id.*

¹⁵ Request, § 9, Pg. 13.

¹⁶ *Id.*

¹⁷ See <https://www.icann.org/resources/board-material/agenda-bgc-2016-04-12-en>; Bylaws, Art. IV, § 2.12.

¹⁸ See *generally* Presentation Summary.

¹⁹ See <https://www.icann.org/en/system/files/files/reconsideration-15-17-aicpa-letter-to-icann-redacted-21jun16-en.pdf>

CPE application for the .CPA gTLD string meets the requirements specified in the Applicant Guidebook, and prevails in Community Priority Evaluation.”

2. “In particular, [...] that ICANN amend the CPE Report to award [...] a score of 4 out of 4 points in relation to Criterion #2: Nexus between Proposed String and Community; and a score of 1 out of 1 points in relation to Criterion #3-D: Enforcement, for a total of 4 point [*sic*] for Criterion #3: Registration Policies.”²⁰
or
3. “Alternatively, [...] that ICANN remand the determinations of ‘Criterion #2: Nexus’ and ‘Criterion #3-D: Enforcement’ to the Community Priority Evaluation panel with instructions to reevaluate those scores consistent with the proper policies and procedures as set forth in this reconsideration request.”²¹

III. The Relevant Standards For Reconsideration Requests And CPE.

A. Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.²² Request 15-7 is evaluated as a challenge to staff action. Dismissal of a request for reconsideration of staff action or inaction is appropriate only if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

²⁰ Request, § 9, Pg. 13.

²¹ *Id.*

²² 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.

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the Economist Intelligence Unit (EIU), where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.²³

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the CPE Panel violated any established policy or procedure.

B. Community Priority Evaluation.

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 do not alter the CPE standards, but provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.²⁴

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.²⁵ CPE is performed by an independent panel appointed by the EIU.²⁶ 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 policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least

²³ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

²⁴ For CPE Guidelines, see <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

²⁵ Guidebook, § 4.2.

²⁶ *Id.* at § 4.2.2.

14 out of 16 points on the scoring of foregoing four criteria, each of which is worth a maximum of four points.

IV. Analysis and Rationale.

The Requester does not identify any misapplication of policy or procedure by ICANN staff or the CPE Panel. Rather, the Requester disagrees with the CPE Panel's determination and scoring of the Application. Substantive disagreements with the CPE Panel's Report, however, are not proper bases for reconsideration.

A. No Reconsideration Is Warranted With Respect To The CPE Report.

The Requester challenges the CPE Panel's determination that the Application did not qualify for community priority. As discussed below, the CPE Panel adhered to the applicable policies and procedures in rendering the CPE Report. Accordingly, no reconsideration is warranted.

1. No Reconsideration Is Warranted Based On The Beijing Communiqué.

The Requester argues that reconsideration is warranted because the CPE Panel did not "give weight" to the fact that its Application complied with the GAC's Beijing Communiqué.²⁷ Reconsideration is not supported on this basis.

The GAC issued the Beijing Communiqué on 11 April 2013, wherein the GAC recommended Category 1 Advice that certain additional safeguards be applied to "[s]trings that are linked to regulated or professional sectors," because those strings "are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm."²⁸ The .CPA gTLD was one of the strings subject to the GAC's Category 1 Advice.²⁹ As

²⁷ Request, § 8.1, Pgs. 4-5.

²⁸ GAC Beijing Communiqué, Annex 1, Pg. 8, *available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.

such, the Requester contends that reconsideration is warranted because the “appropriate entity to manage the .CPA gTLD . . . should not be selected through an auction process.”³⁰ The Requester further notes that it “will administer the .CPA gTLD as a regulated gTLD, only open for CPAs who are working under the rules and oversight of a governmental body,” which it contends complies with the Category 1 Advice protocols.³¹

The Requester’s reliance on the Beijing Communiqué does not support reconsideration. The Beijing Communiqué does not advise that auctions should be prohibited with respect to the strings subject to Category 1 Advice, and the Requester provides no support that it should be interpreted in such a manner. The Beijing Communiqué did not speak to string contention resolution procedures at all. Instead, it stated that the registry operator for the TLDs subject to Category 1 Advice must operate the TLD in accordance with the Board’s implementation of the GAC’s Category 1 Advice, which implies that whichever applicant prevails and becomes the registry operator for each of those strings must do so.³² The Board implemented the GAC’s Category 1 advice by a 5 February 2014 resolution, and again did not speak to which string contention resolution procedures may resolve contention sets for strings that are subject to Category 1 Advice.³³

During its presentation to the BGC, the Requester contended that the EIU “failed to give proper weight” to the GAC’s advice that .CPA is a “regulated string[.]”³⁴ It argued that reconsideration of the CPE Report is warranted because “there is no organization in the world

²⁹ *Id.*, Pg. 9.

³⁰ Request, § 8.1, Pg. 5.

³¹ *Id.*, Pg. 4.

³² GAC Beijing Communiqué, Annex 1.

³³ See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a>; <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-05feb14-en.pdf>.

³⁴ Presentation Summary at Pgs. 4-5.

better suited to monitor, regulate and administer the .CPA gTLD”³⁵ But this argument goes to the merits of the CPE Report, which explained why the Application did not meet the criteria set forth in the Guidebook and the CPE Guidelines, and fails to identify any procedural error. Indeed, whichever .CPA application prevails, the Registry Operator must comply with the implementation framework for Category 1 Advice in order to proceed with delegation.³⁶ As such, the claim that the Application met the criteria outlined in the Beijing Communiqué does not support reconsideration because no policy or procedure mandated the CPE Panel to award the Application a passing score on that basis.

In short, nothing in the Beijing Communiqué sets forth a policy or procedure barring .CPA from being awarded via auction procedures, because the Beijing Communiqué did not speak in any way to string contention procedures applicable to Category 1 strings. Similarly, nothing in the Beijing Communiqué required the CPE Panel to award the Application a passing score simply because it might satisfy the requirements set forth in the implementation of the Category 1 Advice.

2. No Reconsideration Is Warranted Based On ICANN’s Deferral Of The Change Request.

The Requester claims that ICANN’s deferral of the Change Request until after it completed CPE “is a procedural error that has affected the scoring of . . . the CPE Report.”³⁷ This claim does not support reconsideration.

First, any challenge to ICANN’s deferral of the Change Request is now time-barred. The deferral of the Change Request, and subsequent notification to the Requester of that deferral, occurred in December 2014, approximately nine months before the Requester submitted Request

³⁵ *Id.* at Pg. 5.

³⁶ See GAC Category 1 Advice Implementation, *available at* <https://newgtlds.icann.org/en/applicants/advisories/gac-cat1-advice-19mar14-en>.

³⁷ Request, § 8.2, Pg. 6.

15-17. 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.”³⁸ The 15-day window to seek reconsideration has long since passed.

Second, established policies and procedures required ICANN to defer consideration of the Change Request until after the Requester completed CPE. On 30 September 2014, a few months before the Requester submitted its Change Request, ICANN issued a change request advisory (Change Request Advisory), which documented the practice that:

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.*³⁹

The Change Request falls squarely within the ambit of the Change Request Advisory. The Change Request sought to amend the Requester’s responses to the application questions specifically relating to community definition and registration policies—namely the Question 20 subdivisions,⁴⁰ 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

³⁸ Bylaws, Art. IV, § 2.5.

³⁹ 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).

⁴⁰ Request, Annex B.

community-based purpose of the applied-for gTLD[.]”⁴¹ Because ICANN’s practice and procedure regarding these sorts of change requests is to defer them until CPE is complete, ICANN’s decision to adhere to that policy and defer the Change Request cannot support reconsideration.

In its presentation before the BGC, the Requester argued that its Change Request “was made necessary” by the GAC’s early warning “recommend[ation] that to continue to pursue the [A]pplication, remediation steps would include submitting a change request[.]”⁴² This argument fails to support reconsideration for several reasons. First, the early warning did not make the recommendation the Requester suggests, but instead provided instructions for submitting a change request “[i]f your remediation steps involve submitting requests for changes to your application[.]”⁴³ Second, nothing in the GAC early warning (or elsewhere) required or suggested that change requests addressing remediation steps necessitated a change in the community definition. Third, the early warning was issued on 20 November 2012, and the Requester did not submit its change request until years later, and not until after the Board had already implemented the GAC Category 1 and Category 2 Advice.⁴⁴ As such, the argument that the Change Request was a reaction to the GAC early warning the Requester received is not persuasive. Fourth, the Change Request does not concern the matters raised in the GAC’s Category 1 Advice at all, but instead Category 2 Advice, concerning exclusive registry access.⁴⁵ ICANN’s practice and procedure is not to approve a change request seeking to alter a community-based application’s community definition prior to the application’s completion of CPE, and the Requester does not

⁴¹ Application Details, Application ID: 1-1911-56672, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/208>.

⁴² Presentation Summary at Pg. 3.

⁴³ <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197804/CPA-AU-56672.pdf>, at Pg. 2.

⁴⁴ Request, Annex A.

⁴⁵ *Id.*

argue otherwise. Nothing about the GAC’s early warning here requires different treatment.

The Requester recognizes that its Change Request was treated in accordance with this procedure, but argued during its presentation to the BGC that the “general consideration” underlying the Change Request Advisory “does not apply for .CPA” because its application purportedly “reflects a partnership with the only other community applicant – CPA Australia.”⁴⁶ As an initial matter, while the Requester and CPA Australia have informally stated that they have “entered into a partnership,”⁴⁷ CPA Australia has not withdrawn its application, and it remains a community applicant that is in contention with the Requester for .CPA. Moreover, the Requester’s success in CPE would impact not only CPA Australia but also the other three .CPA applicants, as the Guidebook provides that “[a]n application that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage.”⁴⁸ The rationale underlying the Change Request Advisory, which ICANN followed here, apply to .CPA, contrary to the Requester’s assertions otherwise.

In sum, no reconsideration is warranted with respect to the Requester’s claims regarding the deferral of its Change Request—any such challenge is time-barred and, moreover, ICANN’s deferral of the Change Request did not violate any established policy or procedure. Rather, deferral of the Change Request was wholly consistent with established procedure.

3. No Policy or Procedure Requires The CPE Panel To Ask Clarifying Questions About Each Criterion For Which It Does Not Award A Passing Score.

The Requester claims reconsideration is warranted because the CPE Panel did not ask the Requester clarifying questions (CQs) regarding element 2-A, nexus, or element 3-D,

⁴⁶ <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197804/CPA-AU-56672.pdf>, at Pg. 4.

⁴⁷ Presentation Summary at Pg. 4.

⁴⁸ Guidebook § 4.1.4.

enforcement.⁴⁹ However, there is no policy or procedure dictating whether or when a CPE panel should issue CQs. The Requester mistakenly interprets ICANN’s response to a Frequently Asked Question (FAQ) as imposing a requirement that the CPE Panel ask CQs about every CPE criterion for which it has not initially awarded a passing score. There is no such requirement.

The response to the question cited by the Requester - “Why have I received CQs?” - is as follows:

You received CQs because the evaluation panel(s) did not have sufficient information to award a passing score. CQs are issued once the evaluation panels have completed an initial evaluation of your application and have found that additional information is needed before a passing score can be given.⁵⁰

The Requester contends this statement implies that “if an evaluation panel is unable to give a passing score . . . the evaluation panel should issue a Clarifying Question[.]”⁵¹ But this is simply not the case. This response merely describes why CQs are posed if an evaluation panel, in its discretion, determines they are necessary. Indeed, the CPE Panel Process Document explicitly provides that: “If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant”⁵²

In the Requester’s presentation to the BGC, it provided substantive disagreement with the CPE Panel’s factual findings regarding the percentage of CPAs who are members of the Requester’s organization, stating “*we believe 90+% of CPAs in the US are included within our defined community.*”⁵³ The Requester’s belief regarding facts that the CPE Panel can and did research independently does not provide grounds for reconsideration (as discussed in more detail in section IV.A.4.a, *infra*). The Requester recognizes that it challenges in this regard a “*substantive* issue[] that will form the basis of a denial” and does not contend that the CPE Panel

⁴⁹ Request, § 8.5, Pg. 10.

⁵⁰ FAQs: Clarifying Questions (CQs), *available at* <https://newgtlds.icann.org/en/applicants/clarification-questions/faqs>.

⁵¹ Request, § 8.5, Pg. 10 (emphasis added).

⁵² See Community Priority Evaluation (CPE), *available at* <https://newgtlds.icann.org/en/applicants/cpe>.

⁵³ Presentation Summary at Pg. 3 (emphasis added).

violated any policy or procedure in the course of its factual findings, other than its failure to ask a CQ about an issue that the Requester contends the CPE Panel got wrong.⁵⁴ However, because there is no established policy or procedure requiring a CPE panel to ask CQs, no reconsideration is warranted based on the fact that the CPE Panel here did not issue CQs with respect to element 2-A, nexus or element 3-D, enforcement.⁵⁵

4. The CPE Panel Applied The CPE Criteria In Accordance With Established Policies And Procedures.

The Requester objects to the CPE Panel’s decision to award only 11 of the possible 16 points to the Application. As noted above, the reconsideration process does not permit evaluation of the CPE Panel’s substantive conclusion, but only whether the CPE Panel (or ICANN staff) violated any established policy or procedure. The Requester claims that reconsideration is warranted as to the number of points awarded by the CPE Panel for two criteria, 2-Nexus and 3-Registration Policies. However, for the following reasons, the Requester does not identify any policy or procedure violation with respect to the CPE Panel’s assessment of those criteria, and therefore reconsideration is not warranted.

a. The CPE Panel Applied The Second CPE Criterion In Accordance With Established Policies And Procedures.

The Requester claims that the CPE Panel improperly awarded the Application zero out of four points on the second criterion, which evaluates “the relevance of the string to the specific community that it claims to represent” through the scoring of elements 2-A, nexus, worth three points, and 2-B, uniqueness, worth one point. The Requester challenges the CPE Panel’s findings with respect to both.⁵⁶

⁵⁴ *Id.* at Pg. 2 (emphasis added).

⁵⁵ The CPE Panel did ask the Requester CQs relating to other criteria, to which the Requester responded. *See* Request, Annex C.

⁵⁶ Guidebook, § 4.2.3.

The Requester challenges the CPE Panel’s decision to award zero points for nexus for three reasons. The Requester contends that: (i) the CPE Panel did not adhere to the Guidebook’s standards; (ii) different CPE panels have reached inconsistent conclusions as to the nexus element; and (iii) the CPE Panel relied on erroneous factual information in considering the nexus element. Reconsideration is not warranted on any of these three asserted grounds because the CPE Panel adhered to all applicable policies and procedures in determining that the Application merits zero points with respect to element 2-A, nexus.

First, in awarding zero out of three points for the nexus element, the CPE Panel accurately described and applied the Guidebook scoring guidelines. To receive a maximum score for element 2-A, the applied-for string must “match[] the name of the community or [be] a well-known short-form or abbreviation of the community name.”⁵⁷ The CPE Panel found that the Application defined the community as “the membership structure of [the Requester’s] own organization[,]” which has over 412,000 members in 144 countries.⁵⁸ The CPE Panel reviewed that definition and found that, because there are over 650,000 CPAs in the United States alone, the .CPA string “does not identify the community defined by the applicant, since that community does not include all CPAs.”⁵⁹ The CPE Panel then cited the Guidebook’s standard that the string must not “over-reach[] substantially beyond the community” and for that reason determined not to award any “credit on nexus.”⁶⁰ The Requester fails to identify any way in which the CPE Panel misapplied the Guidebook’s standards in scoring the nexus element.

Second, the Requester contends that “the EIU’s standards for determining nexus have

⁵⁷ *Id.*

⁵⁸ CPE Report, Pg. 3.

⁵⁹ *Id.*, Pg. 5.

⁶⁰ *Id.*; Guidebook, § 4.2.3.

become inconsistent as against ... the precedent set by other applications[.]”⁶¹ Specifically, in the Request, the Requester argues that here the CPE Panel found that the Application lacked a nexus to the CPA community because the Application’s community definition was over-inclusive, yet in two other unrelated CPE panel reports (for the .SPA and .ART applications), the panels determined that over-inclusiveness was not an “impediment for satisfying the nexus criterion.”⁶² Similarly, in its presentation to the BGC, the Requester offered comparisons between its Application’s nexus to the community defined therein and the nexus the CPE panels found to exist with respect to five of the applications that prevailed in CPE.⁶³ Prior CPE panel determinations in unrelated matters do not establish policy or procedure. For instance, the Requester notes that the applicant for .ECO that prevailed in CPE “was formed only three years before the gTLD application was filed[.]”⁶⁴ But the Requester does not contend that an applicant must prevail in CPE merely because the applicant’s organization has existed for a long time, because no such requirement exists. The other comparisons the Requester makes fail to support reconsideration for similar reasons, as none identify a procedural error on the part of the CPE Panel here, but instead each reflects the fact that different independent experts have reached different outcomes related to different gTLD applications, as is to be expected.

Comparing other CPE reports to the CPE Report here discloses no inconsistency that could constitute a policy or procedure violation. As for .SPA, the CPE panel awarded full credit to the applicant, finding the “common usage of the applied-for string closely aligns with the community as defined in the application[.]” namely spa operators, service providers and

⁶¹ Request, § 8.9.3.A, Pg. 18.

⁶² *Id.*, § 8.3, Pg. 8.

⁶³ Presentation Summary at Pg. 5.

⁶⁴ *Id.*

associations.⁶⁵ The CPE panel also noted that while there are other uses for the word spa, the same is true for many combinations of letters.⁶⁶ With respect to .SPA, the CPE panel reasonably concluded that common usage of the word matched the community as described in the application, which accords with the standards set forth in the above-cited Guidebook provisions. As for .ART, the CPE panel awarded only partial credit, noting that “[t]he string closely describes the community and *does not over-reach substantially*, as the general public will associate the string with the community as defined by the applicant.”⁶⁷ In contrast, the CPE Panel here made no such finding. In short, there is no inconsistency: the .SPA report found the string matched the community and awarded full credit; the .ART report identified some problems with the proposed community definition and awarded a partial nexus score; and here the CPE Panel identified an over-inclusiveness as between the Requester’s proposed community and the string, and therefore awarded no points for the nexus element. As such, comparison of these three reports discloses no policy or procedure violation that supports reconsideration.

Third, the Requester argues that the nexus determination was based on “incorrect factual inferences[.]”⁶⁸ It claims that the CPE Panel’s finding that there are 650,000 CPAs in the United States is erroneous, stating that this figure in fact comprises the number of CPA *licenses* currently held in the United States.⁶⁹ As an initial matter, no policy or procedure requires (or even permits) ICANN to sit as an appellate tribunal assessing the propriety of the CPE Panel’s factual findings. Moreover, the Requester does not appear to identify any easily verifiable factual error; it notes that one CPA may hold more than one state’s CPA license, so the number

⁶⁵CPE Report for Application ID 1-1309-81322, .SPA, *available at* <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>.

⁶⁶*Id.* at Pg. 5.

⁶⁷ CPE Report for Application ID 1-1675-51302, .ART, *available at* <https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf> (emphasis added).

⁶⁸ Request, § 8.2, Pg. 6.

⁶⁹ *Id.*; *see also id.*, Annex B.

of *licenses* likely exceeds the number of CPAs.⁷⁰ But the CPE Panel cited a 2010 National Association of State Boards of Accountancy report that states that there are “650,000 CPAs,” and does not reference CPA licenses.⁷¹ The Requester also contends that the CPE Panel was “demonstrably wrong” in construing the Application without regard to the amendments proposed in the Change Request,⁷² but as the CPE Panel properly noted, it is required to conduct CPE as to the Application before it.⁷³

The Requester also briefly challenges the decision to award zero points for element 2-B, uniqueness.⁷⁴ To fulfill the requirements for element 2-B, a string must have “no other significant meaning beyond identifying the community described in the application” and the application must have “identif[ied] the community,” *i.e.*, scored 2 or 3 on element 2-A, nexus.⁷⁵ The Requester argues that “the CPE Report denied awarding the point solely because the Application failed to receive 2 or 3 Nexus points.”⁷⁶ The Guidebook sets forth an express “requirement that the string [must] identify the community, *i.e.* scores 2 or 3 for ‘Nexus,’ in order to be eligible for a score of 1 for ‘Uniqueness.’”⁷⁷ In other words, the Guidebook instructs that a uniqueness point should not be awarded unless two or three points are awarded for nexus.⁷⁸ Therefore the Requester has identified no policy or procedure violation in this regard.

In sum, the Requester has failed to show any policy or procedure violation in connection with the CPE Panel’s decision to award it zero points for the second CPE criterion, and no reconsideration is warranted with respect to the scoring of this element.

⁷⁰ *Id.*

⁷¹ NASBA Addresses AICPA SEC Conference, *available at* <http://nasba.org/blog/2010/01/07/january-2010-nasba-addresses-aicpa-sec-conference>.

⁷² Request, § 8.2, Pg. 6.

⁷³ CPE Report, Pg. 5 n.9.

⁷⁴ Request, § 8.2, Pg. 7.

⁷⁵ Guidebook, § 4.2.3.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

b. The CPE Panel Applied The Third CPE Criterion In Accordance With Established Policies And Procedures.

The Requester claims that the CPE Panel improperly awarded the Application only three out of four points on the third criterion, which evaluates an applicant’s registration policies through the scoring of four elements—3-A, eligibility (worth one point); 3-B, name selection (worth one point); 3-C, content and use (worth one point); and 3-D, enforcement (worth one point).⁷⁹ The Requester challenges only the CPE Panel’s evaluation of criterion 3-D, enforcement.

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for element 3-D, enforcement, an applicant’s policies must “include specific enforcement measures (e.g., investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.” In awarding zero out of one point for element 3-D (enforcement), the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁸⁰ The CPE Panel found that the Application “does not outline ‘a coherent and appropriate appeals mechanism[.]’”⁸¹ In so finding, the CPE Report adhered to all applicable policies and procedures. The Requester now states that its internal practices include “processes to adjudicate member eligibility,” including an appeal process.⁸² However, the Application does not discuss or reference this possibility, and the Requester does not explain how the CPE Panel could have known that the Requester might utilize the appellate mechanism it utilizes for its day-to-day business in the course of its operation of .CPA.⁸³

In short, no policy or procedure violation can be found in the CPE Panel’s determination

⁷⁹ *Id.*

⁸⁰ CPE Report, Pg. 7.

⁸¹ *Id.*

⁸² Request, § 8.4, Pg. 9.

⁸³ See Application Details: Application ID: 1-1911-56672, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/208>.

that the Application lacks any proposed appellate mechanism. As such, the Requester has not stated a basis for reconsideration with respect to the CPE Panel’s scoring of element 3-D.

B. The CPE Guidelines Do Not Change Or Violate Any Policies Or Procedures.

The Requester claims that reconsideration is warranted because the EIU’s use of the CPE Guidelines itself constitutes a violation of policy and procedure. It argues that “[a]t the time the Application was filed, the [Guidebook] set forth the CPE criteria” and that since the Guidebook was released, “the EIU has introduced no less than five (5) additional documents, guidelines or procedures” related to CPE, namely three iterations of the Guidelines, the Frequently Asked Questions page, and a CPE Processing Timeline.⁸⁴ The Requester contends that the EIU’s reliance upon these documents violates the policy recommendations or guidelines issued by the Generic Names Supporting Organization (GNSO) relating to the introduction of new gTLDs.⁸⁵ At the outset, any such claim is time-barred. Moreover, nothing about the development of the CPE Guidelines or the related documents violates the GNSO Policy recommendations or guidelines relating to the introduction of new gTLDs.

As a threshold issue, any challenge to the cited documents is time-barred. The last of the five challenged documents was released on 10 September 2014, over a year before the Requester submitted Request 15-17. As previously explained, 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.”⁸⁶ The proper time to challenge the development of the CPE Guidelines or the other documents related to CPE has long since passed.

⁸⁴ Request, § 8.6, Pgs. 11-12.

⁸⁵ *Id.* at Pg. 12.

⁸⁶ Bylaws, Art. IV, § 2.5

Moreover, nothing about the EIU's use of the CPE Guidelines in administering CPE violates any policy or procedure. As the Requester recognizes:⁸⁷

The [CPE] Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the scoring principles outlined in the AGB. The Guidelines are intended to increase transparency, fairness and consistency in the evaluation process.⁸⁸

In other words, the CPE Guidelines are complementary to the terms of the Guidebook, not supplementary. While the Requester complains of "ICANN staff's adoption and use of these new requirements . . . without an opportunity for Requester to supplement and/or clarify the Application," reconsideration is not warranted on this basis because the CPE Guidelines did not add anything "new" to the Guidebook's provisions related to CPE.⁸⁹

The Requester also incorrectly argues that the development of the CPE Guidelines violates the GNSO's Policy recommendations or guidelines relating to the introduction of new gTLDs. On 8 August 2007, the GNSO published the Final Report on the Introduction of New Generic Top-Level Domains (GNSO Final Report), which sets forth the principles and implementation guidelines for the introduction of new gTLDs.⁹⁰ On 28 June 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs as set forth in the GNSO Final Report.⁹¹ After approval of the 19 Policy recommendations, ICANN undertook an open and transparent implementation process, culminating in the Board's approval of the Guidebook. For that reason, actions taken pursuant to the Guidebook – such as the development of the CPE Guidelines – are not inconsistent with the relevant GNSO recommendations.

⁸⁷ Request, § 8.6, Pg. 12.

⁸⁸ Community Priority Evaluation (CPE), *available at* <https://newgtlds.icann.org/en/applicants/cpe>.

⁸⁹ Request, § 8, Pgs. 7-8.

⁹⁰ See <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

⁹¹ See http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm#_Toc76113171.

All in all, any arguments arising out of the development or use of the CPE Guidelines and related documents are both time-barred and do not support reconsideration.

C. No Policy Or Procedure Was Violated Concerning The Change In The Application's Status.

The Requester argues that reconsideration is warranted because ICANN staff “changed the ‘Contention Resolution Status’ of [the Application] to ‘Active’ and the ‘Contention Resolution Result’ into ‘Into Contention’” after the CPE Report was issued.⁹² However, ICANN staff in fact followed all established policies and procedures in updating the Requester’s contention set status. The labels for the contention set status are explained on ICANN’s website as follows:

Explanation of Contention Set Status: The following will be used to indicate the status of Contention Sets:

- Active – *The set contains at least two active applications in direct contention with each other* and no applications are identified as On Hold.
- On Hold – The set contains at least one application with a status of On Hold. Applications in the set cannot proceed to New gTLD Program Auctions until the set is no longer on hold.
- Resolved – No direct contention remains amongst the active applications and no applications are identified as On-Hold.⁹³

The CPE Report determined that the Application had not prevailed, and therefore the Application was to remain in contention with the other applications for .CPA. Designation of the Application with the “Active” label was entirely consistent with the aforementioned procedure.

The Requester also briefly argues that reconsideration is warranted based on these status designations because the CPE Report contains a disclaimer that its determination “do[es] not

⁹² Request, § 3, Pg. 2.

⁹³ Update On Application Status And Contention Sets, *available at* <http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en> (emphasis added).

necessarily determine the final result of the application.”⁹⁴ Yet, similarly, nothing in the Application’s “Active” label or the contention set status labels suggests that the “final result of the application” has been decided; to the contrary, the applications in the contention set must reach private resolution, or participate in an ICANN last resort auction, before any application will proceed to contracting and delegation.

In short, to the extent the Requester argues that reconsideration is warranted arising out of the Application’s contention set status, that argument fails because it accurately reflects the Application’s status in accordance with the relevant policies and procedures. Moreover, the change of status in no way harmed the Requester, and the Requester does not argue otherwise.

V. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 15-17. If the Requester believes that it has somehow been treated unfairly here, it is free to ask the Ombudsman to review this matter.

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 consideration is required. As discussed above, Request 15-17 seeks reconsideration of a staff action or inaction. As such, after consideration of Request 15-17, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing of this decision, 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, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 October 2015. However, the Requester asked that Request 15-17 be suspended until ICANN responded to the Requester’s DIDP Request, and the

⁹⁴ Request, § 3, Pg. 2.

Requester was provided with an opportunity to submit any additional arguments. ICANN agreed, and the Requester was provided fourteen days within which to amend Request 15-17 after receiving the DIDP Response on 18 October 2015 (which the Requester opted not to do). Then the Requester sought, was invited to, and did make a presentation to the BGC, which further delayed the BGC's consideration of Request 15-17, as the Requester was provided two weeks after the 12 April 2016 presentation to submit a written summary of its position, which it did on 28 April 2016. The first practical opportunity to address Request 15-17 after receiving that summary was 26 June 2016.