

APPENDIX 2: Materials and Arguments Submitted by the Requestor/ Its Supporters in Support of Reconsideration Request 16-3

SUBMISSION	ARGUMENT(S)
Request 15-21	<ul style="list-style-type: none"> • The CPE Provider imposed additional criteria or procedural requirements beyond those set forth in the Guidebook; • The Second CPE Panel failed to comply with certain established ICANN policies and procedures because, in the Requester’s view, the Second CPE Panel: <ol style="list-style-type: none"> 1. posed an insufficient number of clarifying questions; 2. is obligated to, but did not, disclose the identity of the objector to the Application; 3. wrongly concluded that an opposition letter was relevant; 4. should have considered certain unrelated community objection determinations; 5. did not adhere to the Guidebook in scoring element 2-A, nexus; 6. scored element 2-A, nexus, in a manner that is inconsistent with other CPE reports; and 7. scored element 4-A, support, in a manner that is inconsistent with other CPE reports; and • The CPE Provider did not comply with the BGC’s directives in its determination on Request 14-44.¹
Request 16-3 ²	<ul style="list-style-type: none"> • The BGC erred in its Determination on Revised Request 15-21 when it concluded that the CPE Provider complied with the BGC’s directives in its Determination on Request 14-44, because the CPE Provider appointed the same evaluator in the First and Second CPEs to verify letters of support.

¹ Revised Request 15-21, available at <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.

² Request 16-3, available at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

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	<ul style="list-style-type: none"> Request 16-3 asked the BGC to set aside its Determination on Request 15-21 and “determine that . . . any and all of [Requestor’s] requests set out in [Request 15-21] be awarded.”³
Requestor’s 15 May 2016 oral presentation to the BGC ⁴	<ul style="list-style-type: none"> Reiterated the arguments raised in Request 15-21 (see above); did not provide additional information relevant to evaluation of Request 16-3.⁵ Submitted a written summary of the arguments raised in its 2016 Presentation, along with other background materials and letters of support.
Former ICANN Ombudsman Chris LaHatte’s investigative report concerning the Application, in connection with Request 16-3. ⁶	<ul style="list-style-type: none"> ICANN organization ought to be more active in rejecting the findings of the CPE Provider, including in the case of the dotgay Application, because “even if the [Application] did not achieve the appropriate number of points, . . . the [gay] community is real, does need protection and should be supported.” The BGC did not address Requestor’s arguments that the CPE Provider applied the CPE criteria inconsistently in the dotgay Application, and noted that ICANN “has a commitment to principles of international law . . . including human rights, fairness, and transparency.”⁷
“Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay’s Community Priority Application” (First Eskridge Opinion). ⁸	<ul style="list-style-type: none"> The CPE Provider applied sub-criterion 2-A, Nexus, incorrectly when it: <ul style="list-style-type: none"> Required that “gay” <i>both</i> be a well-known short form of the community <i>and</i> identify the community and its members to earn 3 points;⁹ Required that “gay” be “the only” short form or identifying name for the community;¹⁰

³ *Id.* § 9, at Pg. 8-9.

⁴ See <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

⁵ *Id.*

⁶ <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>.

⁷ Ombudsman’s Updated Report dated 27 July 2017 (Ombudsman’s Report), available at <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

⁸ <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

⁹ First Eskridge Op., at ¶ 15, Pg. 8, ¶ 25, Pg. 12; Second Eskridge Op., at ¶ 21, Pg. 9, ¶ 43, Pg. 18.

¹⁰ First Eskridge Op., at ¶¶ 25-26, Pg. 12; Second Eskridge Op., at ¶¶ 43-44, Pg. 18-19.

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	<ul style="list-style-type: none"> • Required that “gay” identify all, or almost all, community members;¹¹ • Concluded that “gay” was not a short-form for the defined community and did not closely describe the defined community because not all individuals who identify as intersex, transgender, and ally identify as “gay”;¹² and • Deducted points based on its conclusion that “gay” “under-reached” the community, when the Guidebook only authorizes deducting points if an applied-for string “over-reaches” the community.¹³
<p>“Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay’s Community Priority Application No: 1-1713-23699” (Badgett Opinion).¹⁴</p>	<ul style="list-style-type: none"> • “ICANN’s failure to grant dotgay’s community priority application for the .GAY top level domain name would generate economic and social costs by creating a barrier to the development of a vibrant and successful gay economic community[.]” • Without community oversight provided by the Requestor, “the platform would be highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people.”¹⁵
<p>Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs):</p>	<ul style="list-style-type: none"> • The CPE Provider applied sub-criterion 2-A, Nexus, and sub-criterion 4-A, Support, inconsistently across CPE applications, penalizing the Requestor when, facing similar facts in other applications, it awarded full points;¹⁷ • “[T]he [Requestor was] penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights

¹¹ First Eskridge Op., at ¶ 15, Pg. 8, ¶¶ 37-38, Pg. 18; Second Eskridge Op., at ¶ 21, Pg. 9, ¶¶ 59-60, Pg. 28.

¹² First Eskridge Op., at ¶¶ 25-26, Pg. 12, ¶¶ 75-77, Pg. 35-36; Second Eskridge Op., at ¶¶ 43-44, Pg. 18-19, ¶¶ 113-117, Pg. 55-58 (Pulse shooting “gay victims” included trans, drag, and allied persons; gay pride events include lesbians, gay men, bisexuals, transgender, intersex, queer, and allies). *See also* Second Eskridge Op., at ¶¶ 89-91, Pg. 41-43.

¹³ First Eskridge Op., at ¶ 27, Pg. 13, ¶ 32, Pg. 16, ¶ 35, Pg. 17-18; Second Eskridge Op., at ¶ 45, Pg. 20, ¶ 55, Pg. 26, ¶ 52, Pg. 24.

¹⁴ <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

¹⁵ Badgett Opinion, Oct. 17, 2016, at Pg. 1, available at <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

¹⁷ CoE Report, at Pg. 49-52.

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<p>Opportunities and challenges from a human rights perspective” (CoE Report).¹⁶</p>	<p>around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime;”¹⁸</p> <ul style="list-style-type: none"> • The [CPE Provider] changed its own process as it went along;¹⁹ • The CPE Provider counts awareness and recognition of the community amongst its member twice in violation of the Guidebook’s commitment to avoid double-counting;²⁰ • The CPE Provider and the BGC should be more flexible in their application of the Guidebook; the CPE Provider should not apply a “literal” or “restrictive interpretation” of its mandate,²¹ and the BGC should more actively reject CPE Provider recommendations, “especially when public interest considerations are involved;”²² • “ICANN has a positive obligation to foster diversity on the Internet,” including through the Community gTLD program. Denying Community Priority to dotgay “will undermine diversity and public interest;”²³ • ICANN’s accountability mechanisms are insufficient to provide applicants with an “appeal of substance or on merits” of the CPE Reports,²⁴ and “limits access to court and thus access to justice, which is generally considered a human right or at least a right at the constitutional level;”²⁵ • “ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities;” and²⁶ • The Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC (Dot Registry

¹⁶ See <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>. The CoE Report is available at <https://rm.coe.int/16806b5a14>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at Pg. 49.

²¹ *Id.* at Pg. 31.

²² CoE Report, at Pg. 69-70.

²³ Dotgay PowerPoint presentation at Pg. 24; 15 Nov. 2016 letter from A. Ali to ICANN Board at 3-4, citing CoE Report, at Pg. 19, 22, 34.

²⁴ CoE Report, at Pg. 69-70.

²⁵ CoE Report, at Pg. 25.

²⁶ CoE Report, at Pg. 26.

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	<p>IRP) found that ICANN Board failed to exercise due diligence and care, and did not exercise independent judgment, failing to fulfill its transparency obligations, the Articles of Incorporation, and the Bylaws.²⁷</p>
<p>15 November 2016 letter from Requestor to ICANN</p>	<ul style="list-style-type: none"> • Asked the Board to consider: <ul style="list-style-type: none"> • Badgett Opinion, • First Eskridge Opinion, • Ombudsman’s Report, • Dot Registry IRP Panel’s determination that the BGC “must determine whether the CPE [Provider] . . . and ICANN staff respected the principles of fairness, transparency, avoiding conflict of interest, and non-discrimination.”²⁸ • Expert Determination issued in <i>The International Lesbian Gay Bisexual trans and Intersex Association v. Afilias Limited</i>, ICC Case No. EXP/390/ICANN/7 (ICC Determination) (Requestor cited the ICC Determination in Request 15-21, but not in Request 16-3)²⁹ which asserted that the dotgay Application “is designed to serve the gay community.”³⁰
<p>15 January 2018 letter from Requestor to ICANN</p>	<ul style="list-style-type: none"> • Argued that the CPE Process Review Reports lacked transparency and independence and were not sufficiently thorough. • Asked the Board to “carefully review and consider dotgay’s previous submissions prior to making a decision on dotgay’s community application and . . . Request 16-3,” and identified

²⁷ CoE Report, at Pg. 60 quoting the Dot Registry IRP, which is available at

<https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

²⁸ See <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>, quoting Dot Registry IRP, at Pg. 34.

²⁹ See <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>. ICC Determination available at <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf>.

³⁰ See <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>, quoting ICC Declaration ¶ 22. In Request 15-21, the Requestor asked the BGC to consider the ICC Determination statement that the gay community “could file and has filed its own application for a gTLD that is designed to serve the gay community and to operate accordingly: dotgay’s community application for the string .gay.” Request 15-21, § 8.7, at Pg. 14.

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	<p>several of the materials it had submitted in prior letters to the Board:</p> <ul style="list-style-type: none"> • CoE Report, • former Ombudsman’s Report, • ICC Determination, • First Eskridge Opinion, and • Badgett Opinion.³¹
20 January 2018 letter	<ul style="list-style-type: none"> • Argued that the CPE Process Review Reports lacked transparency and independence and were not sufficiently thorough. • Reiterated request that the Board consider: <ul style="list-style-type: none"> • CoE Report, • Ombudsman’s Report, • ICC Determination, • First Eskridge Opinion, and • Badgett Opinion,³² • Asserted that these materials “independently and collectively confirm the arbitrary and discriminatory manner in which dotgay’s application was treated by the [CPE Provider] and ICANN.”³³
31 January 2018 letter ³⁴	<ul style="list-style-type: none"> • “[U]rge[d] . . . the Board

³¹ <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

³² <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

³³ *Id.*

³⁴ 31 January 2018 Letter from A. Ali to ICANN Board, at Pg. 3, available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>. The Board responded to the Requestor’s 31 January 2018 letter through counsel on 5 March 2018, noting that the Board was “in the process of considering the issues raised in your letter and the accompanying Second [Eskridge] Opinion,” but that the Requestor’s accusations that “a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind” were “as offensive as they are baseless,” and “insulting,” and concluded that “ICANN reject[ed] them unequivocally.” 5 March 2018 Letter from K. Wallace to A. Ali, at Pg. 1-2, available at <https://www.icann.org/en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf>. On 7 March 2018, the

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	<p>(i) to not rely on the FTI Reports in determining how to proceed with dotgay’s application;</p> <p>(ii) to not hide behind technicalities and process;</p> <p>(iii)to carefully review Professor Eskridge’s two detailed expert opinions;</p> <p>(iv)to act in accordance with the spirit and letter of ICANN’s Articles of Incorporation, Bylaws, [Guidebook], and the most basic principles of fairness, decency, and morality and, on these bases,</p> <p>(v) to approve dotgay’s community priority application.”</p> <ul style="list-style-type: none"> • Asked whether “such a blatant omission” as FTI’s purported failure to state in the Scope 3 Report that “one of the [CPE Provider’s] major sources confirms that the term ‘gay’ is in fact a well-recognized umbrella term for the entire LGBT community – completely contrary to the [CPE Provider’s] determination in dotgay’s CPE,” is “evidence of intentional discrimination against the gay community by ICANN, the [CPE Provider] and FTI?”³⁵ • Asserted that the Second Eskridge Opinion (see next entry) “unequivocally concludes that [FTI’s] findings are based on a superficial investigative methodology wholly unsuited for the purpose of an independent review,” and that the CPE Provider’s “evaluation of dotgay’s application was incorrect, superficial, and discriminatory.” • Asserted that “a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.”³⁶

Requestor responded to counsel that the 5 March 2018 letter “hyperbolically claims that there is no evidence that [FTI] undertook its investigation of the CPE [Process Review] with a pre-determined outcome in mind[, or that] FTI would blatantly violate best investigative practices and compromise its integrity,” calling the 5 March 2018 letter “bombastic and nonsensical,” and “made in obvious ignorance of the arguments made by Professor Eskridge in his two expert reports and the [CoE Report].” The Requestor asserted that the 5 March 2018 letter was a “blatant, feigned attempt to mask FTI’s failure to undertake an independent review and full look of the CPE Review Process.” 7 March 2018 letter from A. Ali to K. Wallace, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf> (internal quotation marks omitted).

³⁵ 31 January 2018 Letter from A. Ali to ICANN Board, at Pg. 3.

³⁶ *Id.*, at Pg. 1.

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<p>“Second Expert Opinion of Professor William N. Eskridge, Jr.” (Second Eskridge Opinion)</p>	<ul style="list-style-type: none"> • Repeated arguments made in the First Eskridge Opinion,³⁷ and added the following arguments challenging the Scope 2 and Scope 3 reports³⁸: • The CPE Provider applied sub-criterion 4-A, Support, incorrectly when it: <ul style="list-style-type: none"> • Concluded that supporting organization ILGA did not represent the defined community, “without citing any evidence;”³⁹ • Concluded that no single organization was recognized by the entire defined community as its representative; and⁴⁰ • Deducted points because no single representative organization existed, even though the Requestor demonstrated broad support from the community, and even though other Community Priority Applicants received full points when no single representative of their organization existed but they demonstrated support from recognized organizations representing a majority of the defined community;⁴¹ • The CPE Provider applied sub-criterion 4-B, Opposition, incorrectly when it treated a letter of opposition from the Q Center as relevant opposition from a group of non-negligible size because the Q Center is small, is a member of another organization that supported the Requestor’s Application, and Professor Eskridge believes that the Q Center submitted the letter of opposition for a prohibited purpose;⁴² • FTI “failed to recognize or engage the many criticisms of the [CPE Provider’s] application of ICANN’s and CPE’s guidelines to the dotgay and other applications;”⁴³

³⁷ Because the Second Eskridge Opinion includes every argument of substance contained in the First Eskridge Opinion (along with additional arguments), in the interest of efficiency, the BAMC cites the Second Eskridge Opinion below, although it has considered both Eskridge Opinions in forming its Recommendation on Request 16-3.

³⁸ 31 January 2018 Letter from A. Ali to ICANN Board attaching Second Eskridge Opinion, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

³⁹ Second Eskridge Op., at ¶¶ 77, 79, Pg. 35-36.

⁴⁰ Second Eskridge Op., at ¶¶ 77, 79, Pg. 35-36.

⁴¹ Second Eskridge Op., at ¶ 80, Pg. 36.

⁴² Second Eskridge Op., at ¶¶ 82-84, Pg. 37-39; ¶ 88, at Pg. 41.

⁴³ Second Eskridge Op., ¶ 3.

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	<ul style="list-style-type: none"> • FTI’s conclusion that “the CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements . . . was supported by no independent analysis [and] the approach followed by FTI was a ‘description’ of the CPE Reports, but not an ‘evaluation’ to determine whether the CPE Reports were actually following the applicable guidelines;”⁴⁴ • “Because its personnel simply repeated the analysis announced by the [CPE Provider] for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as those made in the CPE Reports;⁴⁵ • FTI “completely failed to examine the [CPE Provider’s] analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications”; and⁴⁶ • The Scope 3 Report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement),” and that some of the sources identified in the Scope 3 Report “directly support dotgay’s position.”⁴⁷
18 February 2018 letter from Sero to ICANN	<ul style="list-style-type: none"> • Sero, a U.S.-based network of people living with HIV and allies fighting for freedom from HIV-related stigma and injustice, submitted to the Board a letter of support for the dotgay Application “and also [to] express our frustration with the inexplicable complacency and lack of action on the demonstrative evidence surrounding discriminatory treatment .GAY has received.”⁴⁸
1 March 2018 letter from NLCC to ICANN	<ul style="list-style-type: none"> • The National LGBT Chamber of Commerce (NLCC) submitted a letter to the Board to express its support for the dotgay Application. The NLCC urged the Board to “review and agree with” the Second Eskridge Opinion, reject the CPE Process Review Reports, and grant Community Priority to the Requestor.⁴⁹

⁴⁴ *Id.* ¶¶ 37-38.

⁴⁵ *Id.* ¶ 42.

⁴⁶ *Id.* ¶ 76.

⁴⁷ *Id.* ¶¶ 37, 88.

⁴⁸ <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>.

⁴⁹ <https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>.

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6 March 2018 letter from EBU to ICANN	<ul style="list-style-type: none"> • The European Broadcasting Union (EBU) submitted a letter to the Board in support of the dotgay Application, asking the Board to “set aside the FTI reports when addressing the case of [the Requestor].”⁵⁰
23 March 2018 letter from Requestor to ICANN	<ul style="list-style-type: none"> • “[R]eject[ed] BAMC’s invitation to make a telephonic presentation limited to 30 minutes” and “reject[ed] ICANN’s attempt to impose an artificial two weeks deadline” for supplemental briefing.⁵¹ Instead, the Requestor asserted that “[i]f transparency and accountability are indeed the Board’s objectives, then” ICANN organization should: <ul style="list-style-type: none"> (i) Disclose all documents requested in DIDP Requests No. 20180115-1 and 20180110-1; (ii) Provide the Requestor at least 3 months to review the documents; (iii) Allow the Requestor “a meaningful opportunity to submit additional materials in support” of its application, “without artificial constraints (e.g., a 10-page limit); (iv) “[I]dentify specific concerns in writing that it may have regarding the applications” after the Requestor submits its supplemental submission; (v) Provide the Requestor the opportunity for an in-person oral presentation to the BAMC; (vi) Bear the costs and expenses for the Requestor to review the requested documents and prepare its additional submissions; (vii) Undertake a substantive review of the merits of the Application.⁵² • The Requestor asserted that if ICANN organization does not agree to all of the above conditions, “the Board cannot claim to

⁵⁰ <https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>.

⁵¹ 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5
<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>.

⁵² *Id.*

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	have discharged its duty to promote and protect transparency and accountability in good faith.” ⁵³
5 April 2018 email from Requestor to BAMC	<ul style="list-style-type: none"> <li data-bbox="537 344 1409 449">• “In order to provide ICANN with further substantive comments on the CPE Process Review,” the Requestor “must have” certain of the items it sought in its 23 March 2018 letter.⁵⁴

⁵³ *Id.* at Pg. 5.

⁵⁴ 5 April 2018 email from R. Wong to ICANN organization (<https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-bamc-recommendation-attachment-2-14jun18-en.pdf>).