

**ATTACHMENT 1 IN SUPPORT OF RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 16-3
25 JANUARY 2019**

The Requestor, dotgay LLC, seeks reconsideration of one aspect of the Board Governance Committee's (BGC)¹ denial of the Requestor's Reconsideration Request 15-21. Request 15-21 sought reconsideration of the results of the second Community Priority Evaluation (CPE) (Second CPE) of the Requestor's community-based application for the .GAY generic top-level domain (gTLD).² The Requestor claims that, in denying Request 15-21, the BGC erred when it determined that the independent provider that conducted the CPE (CPE Provider) adhered to all applicable policies and procedures in conducting the Second CPE.

I. Brief Summary.

The Requestor submitted a community-based application for the .GAY gTLD (dotgay Application), which was placed into a contention set with three other applications for the .GAY gTLD.³ In 2014, the Requestor participated in CPE, but did not prevail (First CPE). The Requestor challenged the results of the First CPE.⁴ The BGC determined that the CPE Provider violated an established procedure by inadvertently failing to verify some letters of support and

¹ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

² Request 16-3, § 3, at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>).

³ <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁴ Request 14-44 (<https://www.icann.org/en/system/files/files/request-dotgay-with-annexes-22oct14-en.pdf>).

directed the CPE Provider to set aside the First CPE and appoint new CPE Evaluators to conduct a Second CPE of the dotgay Application (Second CPE).⁵

The Second CPE evaluation was conducted in 2015. The Requestor once again did not prevail.⁶ The Requestor challenged the results of the Second CPE in Request 15-21, which was denied by the BGC.⁷ The Requestor then submitted Request 16-3, challenging one aspect of the BGC's determination on Request 15-21, namely the BGC's finding that the CPE Provider did not violate any established procedures by allowing another member of the CPE Provider's team other than the evaluators to verify the letters of support and opposition to the dotgay Application.⁸ On 26 June 2016, the BGC recommended that the Board deny Request 16-3, concluding that the Requestor's claim did not support reconsideration.⁹

While Request 16-3 was pending, the ICANN Board and BGC directed ICANN organization to undertake a review of certain aspects of the CPE process (CPE Process Review). As discussed in further detail in the Facts section below, the CPE Process Review: (i) evaluated the process by which ICANN org interacted with the CPE Provider; (ii) evaluated whether the CPE criteria were applied consistently throughout and across each CPE report; and (iii) compiled the research relied upon by the CPE Provider for the evaluations which are the subject of pending Reconsideration Requests.¹⁰ The BGC determined that the pending Reconsideration

⁵ BGC Determination on Request 14-44 (<https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>).

⁶ Second CPE (<https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

⁷ BGC Determination on Request 15-21 (<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>). Under the version of the Bylaws governing Request 15-21, the BGC was authorized to make final determinations on Reconsideration Requests challenging staff action or inaction. ICANN Bylaws, 30 July 2014, Art. IV, § 2.3.f.

⁸ Request 16-3.

⁹ BGC Recommendation on Request 16-3 (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>).

¹⁰ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>;
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

Requests relating to CPEs, including Request 16-3, would be placed on hold until the CPE Process Review was completed.¹¹

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).¹²

On 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11, which accepted the findings in the CPE Process Review Reports; declared the CPE Process Review complete; concluded that, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.¹³

Subsequently, the BAMC invited the Requestor to provide a telephonic presentation to the BAMC in support of Request 16-3. The BAMC also invited the Requestor to submit additional written materials in response to the CPE Process Review Reports.¹⁴ The Requestor rejected both invitations from the BAMC.¹⁵

The BAMC then re-evaluated the Requestor's claims, taking into consideration all relevant materials. Appendix 2 to this Recommendation identifies the materials submitted by the Requestor that were reviewed by the BAMC, and are incorporated herein by reference.¹⁶ Based on its extensive review of all relevant materials, the BAMC finds that the BGC did not rely on any false or inaccurate information nor did it disregard any material information that existed

¹¹ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

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

¹³ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁴ Attachment 2 to BAMC Recommendation on Request 18-4 (<https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-bamc-recommendation-attachment-2-14jun18-en.pdf>).

¹⁵ *Id.*

¹⁶ The materials that the BAMC considered include, but are not limited to, the documents listed in Appendix 2.

when it determined that that CPE Provider did not violate any established policies or procedure in conducting the Second CPE. The BAMC further finds that the Requestor does not identify any misapplication of policy or procedure by the CPE Provider that materially or adversely affected the Requestor. Accordingly, the BAMC recommends that the Board deny Request 16-3.

II. Facts.¹⁷

A. The CPE Provider's Evaluation of the Requestor's dotgay Application.

The Requestor submitted a community-based application for the .GAY gTLD, which was placed into a contention set with three other applications for the .GAY gTLD.¹⁸ As a community-based application, the Requestor participated in 2014 in CPE. CPE is a method of resolving string contention; an applicant must receive at least 14 points out of a possible 16 points to prevail in CPE.¹⁹ The Requestor received only 10 points in CPE and therefore did not prevail.²⁰

1. The First CPE of the dotgay Application.

On 6 October 2014, the CPE Provider issued the First CPE Report on the dotgay Application.²¹ The First CPE Report explained that the dotgay Application did not meet the CPE criteria specified in the Applicant Guidebook (Guidebook), awarded the Requestor 10 points, and concluded that the dotgay Application had not prevailed in CPE.²²

¹⁷ Appendix 1 to this Recommendation is a timeline that includes dates and summaries of some of the events relevant to this recommendation.

¹⁸ <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>;
<https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/29>.

¹⁹ Guidebook, Module 4, §§ 4.2, 4.2.1 (<https://newgtlds.icann.org/en/applicants/agb>).

²⁰ First CPE Report (<https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>).

²¹ *Id.*

²² See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

The Requestor sought reconsideration of the results of the First CPE Report on the basis that, among others, the CPE Provider failed to comply with established ICANN policies and procedures in rendering the First CPE Report (Request 14-44).²³

On 20 January 2015, the BGC granted reconsideration of Request 14-44. The BGC found that the CPE Provider inadvertently failed to verify 54 letters of support for the dotgay Application and that this failure contradicted an established procedure.²⁴ The BGC directed that the First CPE Report “shall be set aside, and that new [CPE] evaluators will be appointed to conduct a new CPE for the [dotgay] Application.”²⁵ In addition to directing that new evaluators conduct the Second CPE of the dotgay Application, the BGC also recommended that the CPE Provider consider including new members of its core team to assess the evaluation results.²⁶

2. The CPE Provider’s Second Evaluation of the Requestor’s dotgay Application.

Pursuant to the BGC’s directive in Request 14-44, in January 2015, the CPE Provider administered the Second CPE, appointing two new evaluators and one new core team member, as the BGC suggested.

On 8 October 2015, the CPE Provider issued the Second CPE Report. As discussed in detail below, the CPE Provider again awarded the Requestor 10 points and concluded that the dotgay Application did not prevail in the Second CPE.²⁷

B. The Requestor’s Challenge to the Second CPE Report.

1. Reconsideration Request 15-21.

²³ Request 14-44 (<https://www.icann.org/en/system/files/files/request-dotgay-with-annexes-22oct14-en.pdf>).

²⁴ BGC Determination on Request 14-44, at Pg. 31 (<https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf>).

²⁵ *Id.*

²⁶ *Id.*

²⁷ <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

The Requestor challenged the Second CPE Report in Reconsideration Request 15-21, which the Requestor subsequently Revised (Revised Request 15-21).²⁸ The Requestor asserted that in the course of the Second CPE, the CPE Provider imposed requirements beyond those set forth in the Guidebook, should have asked additional clarifying questions, should have disclosed the identity of the objector to the dotgay Application, incorrectly concluded that an opposition letter was relevant, should have considered certain community objection determinations,²⁹ scored criterion 2-A, Nexus, in a manner that was inconsistent with both the Guidebook and other CPE reports, and scored criterion 4-A, support, in a manner inconsistent with other CPE reports.³⁰ Revised Request 15-21 also asserted that the CPE Provider did not comply with the directives in the BGC's determination on Request 14-44 concerning the appointment of two new evaluators and one new core team member for the Second CPE.³¹ On 1 February 2016, the BGC issued the Determination on Revised Request 15-21, finding that Revised Request 15-21 did not warrant reconsideration.³²

2. Reconsideration Request 16-3.

The Requestor submitted Request 16-3 on 17 February 2016.³³ Request 16-3 asserted that 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 conducting the Second CPE. In support of

²⁸ Revised Request 15-21 (<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>).

²⁹ The community objection process is a dispute resolution procedure for the New gTLD Program. It is designed to protect certain interests and rights by allowing a party with standing to object to a New gTLD application before that application is resolved. A panel of qualified experts considers and issues a determination on the objection. See Guidebook Module 3, § 3.2, at Pg. 3-4.

³⁰ Revised Request 15-21 (<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>). For a more detailed list of the arguments therein, see Appendix 2.

³¹ *Id.*

³² Determination on Request 15-21 (<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>).

³³ Request 16-3 (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>).

its argument, the Requestor asserted that the same evaluator was appointed by the CPE Provider in the First and Second CPEs to verify letters of support and opposition.³⁴ Request 16-3 asked the Board to set aside the BGC’s Determination on Request 15-21 and “determine that . . . any and all of [Requestor’s] requests set out in [Revised Request 15-21] be awarded.” Although Request 16-3 only challenges one aspect of the BGC’s determination on Request 15-21, the Requestor’s requests for relief in Revised Request 15-21 are not limited to the CPE Provider’s verification of letters of support.³⁵

The Requestor made an oral presentation to the BGC on 15 May 2016 regarding Request 16-3 (2016 Presentation).³⁶ The 2016 Presentation reiterated the arguments raised in Revised Request 15-21.³⁷

C. The CPE Process Review.

On 17 September 2016, the Board directed ICANN org to undertake a review of the “process by which ICANN [org] interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the Board’s oversight of the New gTLD Program (Scope 1).³⁸ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC.

The BGC later determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and

³⁴ *Id.* § 8, at Pg. 3.

³⁵ *Id.* § 9, at Pg. 8-9.

³⁶ See <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

³⁷ *Id.* See Appendix 2 for arguments therein.

³⁸ ICANN Board Rationale for Resolution 2016.09.17.01 (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>).

(ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).³⁹ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the pending Requests relating to the CPE process, including Request 16-3, would be on hold until the CPE Process Review was completed.⁴⁰

FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. On 13 December 2017, ICANN org published FTI's reports issued in connection with the CPE Process Review (the CPE Process Review Reports).⁴¹

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN org[] had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.⁴²

FTI also concluded that "ICANN org[] had no role in the evaluation process and no role in writing the initial draft CPE report," and reported that the "CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN org[]'s comments."⁴³

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."⁴⁴

³⁹ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴⁰ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁴¹ See <https://www.icann.org/news/announcement-2017-12-13-en>.

⁴² Scope 1 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

⁴³ *Id.*, at Pg. 9, 15.

⁴⁴ Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

For Scope 3, “FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider’s working papers to the extent that such material was not otherwise cited in the final CPE report.”⁴⁵ FTI observed that all eight of the relevant CPE reports (which are the ones at issue in the Reconsideration Requests placed on hold) referenced research. Two of the eight relevant CPE reports included citations for referenced research in the reports themselves. For five of the eight CPE reports, FTI found that, while the reports did not include citations to referenced research, the citations or the materials that corresponded with the referenced research were contained in the working papers underlying the reports.

In the Requestor’s case (for which two CPE reports were completed), FTI found the citations to all the referenced research in either the Second CPE Report itself or in the working papers underlying the Second CPE, with the exception of one reference to the size of the gay community in the Second CPE Report’s consideration of sub-criterion 1-B-Extension.⁴⁶ FTI did not find the citation for this research in the Second CPE Report or in the working papers underlying the Second CPE. However, FTI did find citations to research relating to the size of the gay community for sub-criterion 1-B-Extension in the working papers underlying the First CPE Report.⁴⁷ FTI observed that, based on the similarity between the two evaluations on this issue, it would be reasonable to conclude that the research referenced without citation in the Second CPE Report may have been the same research that was cited in the working papers associated with the First CPE.⁴⁸

⁴⁵ Scope 3 Report, at Pg. 3-4 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

⁴⁶ *Id.* at Pg. 33-34.

⁴⁷ *Id.* at Pg. 34.

⁴⁸ *Id.* at Pg. 34.

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review (the 2018 Resolutions).⁴⁹ In adopting to the 2018 Resolutions, the Board acknowledged and considered submissions from the Requestor and community stakeholders concerning the CPE Process Review Reports (discussed below).⁵⁰ In its rationale for the 2018 Resolutions, the Board acknowledged the Requestor's submissions.⁵¹ The Board noted that dotgay and the other requestors with pending reconsideration requests

each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.⁵²

Accordingly, the Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),⁵³ and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).⁵⁴ As part of the Transition Process, the BAMC invited

⁴⁹ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁵⁰ See <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.rationale>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Available at <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

⁵⁴ 2018 Resolutions. See also Roadmap (available at <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>).

the Requestor to “submit additional information relating to Request 16-3, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the Requestor to “make a telephonic oral presentation to the BAMC in support of” Request 16-3. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-3 and that is not already covered by the written materials.”⁵⁵

The Requestor “reject[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.⁵⁶ Instead, the Requestor demanded that the BAMC first disclose the documents requested in DIDP Request 20180115-1 concerning the CPE Process Review, and allow the Requestor to submit additional materials in support of Request 16-3 after reviewing those documents.⁵⁷ Additionally, the Requestor demanded that the BAMC undertake a substantive review of the Second CPE Report, taking into consideration all materials that have been and will be submitted in support of the dotgay Application.⁵⁸

D. The Requestor’s Response to the CPE Process Review.

⁵⁵ See Attachments 1 and 2 to BAMC Recommendation on Request 18-4 (<https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-bamc-recommendation-attachment-1-14jun18-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-bamc-recommendation-attachment-2-14jun18-en.pdf>).

⁵⁶ Attachment 2 to BAMC Recommendation on Request 18-4 (<https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-bamc-recommendation-attachment-2-14jun18-en.pdf>).

⁵⁷ ICANN org responded to DIDP Request 20180115-1 on 14 February 2018. (<https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>). The Requestor challenged ICANN org’s response to the DIDP Request in Reconsideration Request 18-2 (<https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-request-redacted-15mar18-en.pdf>). The Board denied Reconsideration Request 18-2 on 18 July 2018 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.c>).

⁵⁸ 23 March 2018 letter from A. Ali to ICANN Board (<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>); 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>).

On 15 and 20 January 2018, the Requestor submitted letters to the Board, claiming that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough.⁵⁹ In the 15 January 2018 letter, the Requestor asked the Board to take no action with respect to the conclusions reached by FTI until the parties have had an opportunity to respond to the FTI Report and to be heard as it relates to their pending reconsideration requests.⁶⁰

On 13 April 2018, the Requestor submitted Request 18-4, challenging the 2018 Resolutions.⁶¹ The Requestor claimed that “ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness,” and was inconsistent with ICANN org’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination and operating with efficiency and excellence.⁶² The Board denied Request 18-4 (consistent with the BAMC’s recommendation) on 18 July 2018.⁶³

Pursuant to the Transition Process and Roadmap, the BAMC re-evaluated the claims raised in: Request 16-3 and subsequent submissions. Based on the BAMC’s extensive review of all relevant materials, the BAMC issues this Recommendation adopting the BGC’s conclusions in its Recommendation on Request 16-3⁶⁴ and supplementing the BGC’s Recommendation in

⁵⁹ <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>; <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

⁶⁰ 15 Jan. 2018 letter from A. Ali to ICANN Board (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>).

⁶¹ Request 18-4 (<https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-request-redacted-13apr18-en.pdf>).

⁶² *Id.* § 6, at Pg. 4-5.

⁶³ Board Action on Reconsideration Request 18-4 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.e>).

⁶⁴ <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

light of the submissions made by the Requestor and third parties, and in light of the CPE Process Review.

III. Relief Requested.

As explained above, the only claim raised in Request 16-3 is the Requestor's assertion that the CPE Provider "improperly permitted someone other than one of the 'evaluators' to send verification emails to the authors of letters of support and opposition to the [dotgay] Application."⁶⁵ However, in light of the concerns raised by the Requestor on 15 May 2016 during its presentation to the BGC regarding Request 16-3, concerns raised by other Community-Based Applicants, as well as issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC (Dot Registry IRP), all of which led to the Board's decision to institute the CPE Process Review, the BAMC will consider the submissions made subsequent to the submission of Request 16-3 in the course of considering this reconsideration request.

The Requestor asks the BAMC to:

1. Set aside the BGC's determination on Request 15-21;
2. Suspend the process for string contention resolution for the .GAY gTLD;
3. Review the Requestor's requests in view of identifying and correcting process and alleged policy errors made by the CPE Provider and ICANN org;
4. Set aside the Second CPE Report;
5. Request a third party other than the CPE Provider to perform a new CPE at ICANN org's cost in view of the CPE criteria set out in the Guidebook;
6. Within one month following the appointment of such third party, allow Requestor

⁶⁵ BGC Recommendation on Request 16-3 (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>).

- to submit a written statement to such third party;
7. Following that, organize a telephonic or in-person hearing whereby the Requestor can submit, present and discuss its arguments and relevant information before ICANN org or such third party appointed by ICANN org;
 8. If the Board decides not to award the Requestor the above remedies, the Requestor asks that ICANN org reconsider the Second CPE Report and determine that the Requestor's Application satisfies the CPE criteria based on the information and arguments provided in the Reconsideration Requests, and award the [dotgay] Application a score of 4 out of 4 points for Criterion 2, Nexus, and a score of 4 out of 4 points for Criterion 4, Community Endorsement, while keeping the scores on the other criteria reflected in the Second CPE Report, such that the [dotgay] Application would receive a total score of 16, thereby prevailing in CPE; and
 9. Refund Requestor's CPE fees.⁶⁶

IV. Issues Presented.

As noted above, the BAMC will consider the issues raised in Request 16-3 and the Requestor's subsequent submissions in the course of considering this reconsideration request.

Accordingly, the issues are as follows:

1. Whether the CPE Provider properly complied with the CPE Panel Process Document and the BGC recommendation in its Determination on Revised Request 14-44 when it verified the letters of support and opposition to the dotgay Application in conducting the Second CPE;

⁶⁶ Request 16-3, § 9, at Pg. 8-9; Request 15-21, § 9, at Pg. 24-25.

2. Whether the CPE Provider Adhered to applicable policies and procedures in its application of CPE sub-criterion 2-A-Nexus to the Requestor's Application in the Second CPE;
3. Whether the CPE Provider adhered to applicable policies and procedures in its application of CPE sub-criterion 4-A-Support to the Requestor's Application in the Second CPE;
4. Whether the CPE Provider adhered to applicable policies and procedures in its application of CPE sub-criterion 4-B-Opposition to the Requestor's Application in the Second CPE;
5. Whether the CPE Provider failed to consider material information available to it at the time it completed the Second CPE Report;
6. Whether the CPE Provider and ICANN org complied with applicable Commitments, Core Values, and policies when the CPE Provider completed the Second CPE Report and ICANN org accepted it; and
7. Whether the Board (through the BGC) failed to consider material information or relied on false or inaccurate information when it made its determination on Request 15-21.

V. The Relevant Standards for Reconsideration Requests and CPE.

A. The Relevant Reconsideration Request Standards.

Article IV, Section 2.1 and 2.2 of ICANN's Bylaws⁶⁷ provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction *to the extent that it has been adversely affected by*:

⁶⁷ The BAMC has considered Request 16-3 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestor submitted Request 16-3).

- (a) One or more Staff actions or inactions that contradict established ICANN policy(ies);
- (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.⁶⁸

Where, as here, the reconsideration request challenges a Board action or inaction, the operative version of the Bylaws direct the BAMC⁶⁹ to review the request and provide a recommendation to the Board.⁷⁰ Denial of a reconsideration request is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁷¹

B. The CPE Criteria and Procedures.

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.⁷² The standards and CPE process are defined in Module 4, Section 4.2 of the Guidebook. Community-based applications that elect to participate in CPE are evaluated by the following criteria: Criterion 1: Community Establishment; Criterion 2: Nexus Between the Proposed String and Community; Criterion 3: Registration Policies; and Criterion 3: Community Endorsement.⁷³ To prevail in CPE, an applicant must receive at least 14

⁶⁸ ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

⁶⁹ As noted above, *supra* n.1, the BAMC is currently tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

⁷⁰ See ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

⁷¹ *Id.*

⁷² See Guidebook, Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

⁷³ *Id.* at Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points. An application that prevails in CPE “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”⁷⁴

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.⁷⁵ CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.⁷⁶ The CPE Provider’s role is to determine whether the community-based application fulfills the four community priority criteria set forth in Module 4, Section 4.2.3 of the Guidebook.⁷⁷

The CPE process does not determine the existence, adequacy, or validity of a community. It merely evaluates whether a community-based application satisfies the CPE criteria for community priority. As the Guidebook notes, “a finding by the [CPE Provider] that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.”⁷⁸

In addition to the Guidebook, the CPE Provider’s supplementary guidelines (CPE Guidelines) provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.⁷⁹ The CPE Guidelines accompany the Guidebook and do not alter the CPE criteria established by the Guidebook.⁸⁰ Rather, the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process by

⁷⁴ *Id.* at Module 4, § 4.2.3, Pg. 4-9.

⁷⁵ Guidebook, Module 4, § 4.2.

⁷⁶ *Id.* Module 4, § 4.2.2.

⁷⁷ *Id.* at Modules 4, § 4.2.2 and 4.2.3. at Pgs. 4-8 and 4-9 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁷⁸ Guidebook, Module 4, § 4.2.3, at Pg. 4-9.

⁷⁹ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁸⁰ *Id.* at Pg. 2.

explaining the methodology that the CPE Provider undertook to evaluate each criterion.⁸¹ The CPE Provider also published the CPE Panel Process Document explaining that the CPE Provider was selected to implement the Guidebook’s CPE process.⁸²

VI. Analysis and Rationale.

A. The CPE Provider’s Verification Process did not Violate Applicable Policies and Procedures in a Manner that Materially or Adversely Affected the Requestor.

The sole issue in Request 16-3 is whether the BGC erroneously determined that the CPE Provider adhered to all applicable policies and procedures in conducting the Second CPE. The Requestor claims that the CPE Provider violated the CPE Panel Process Document by delegating the task of verifying the letters of support and opposition⁸³ to a member of the CPE core team rather than one of the two “evaluators” assigned to conduct the Second CPE.⁸⁴ According to the Requestor, this “rais[es] serious doubts as to who evaluated the application and giv[es] rise to a potential conflict of interest.”⁸⁵

The BGC addressed this argument in its Recommendation on Request 16-3, which is incorporated herein by reference. In short, the BGC concluded that the CPE Provider’s administrative protocol did not affect the Requestor, materially or adversely, as is a prerequisite to filing a reconsideration request. As noted in Section V.A. above, “[a]ny person or entity may submit a request for reconsideration . . . to the extent that he, she, or it have been adversely

⁸¹ *See id.*

⁸² *See* CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

⁸³ Organizations may indicate their support for or opposition to an application by sending a letter of support or opposition to ICANN org or to the applicant, who forwards the letters to ICANN org. Updated CPE Frequently Asked Questions, at Pg. 5, available at (<https://newgtlds.icann.org/en/applicants/cpe>). The letters of support and opposition are considered under Criterion 4, Community Endorsement. Guidebook Module 4, § 4.2.3, at Pgs. 4-17 – 4-19.

⁸⁴ Request 16-3 § 8.4, Pg. 5-6.

⁸⁵ Dotgay PowerPoint presentation at Pg. 13.

affected the actions (or inactions)” at issue.⁸⁶ The Requester fails to identify how it was adversely affected because a member of the CPE Provider’s core team sent the verification emails to the authors of the letters of support/opposition. As the CPE Provider explained in its letter of 14 March 2016,

the process of verification of letter(s) is an administrative task. Verification emails, where possible, are sent to every entity that has sent a letter(s) of support or opposition in order to validate the identity and authority of the sender....

For most evaluations, the verification is typically undertaken by one of the two evaluators assigned to the evaluation. However, for evaluations involving large numbers of letters of support or opposition, the [CPE Provider] assigned its Project Coordinator, a senior member of the core team, to serve as Verification Coordinator and to take the purely administrative step of ensuring that the large volume of verification emails, as well as follow-up emails and phone calls, were managed efficiently.

The need for a Verification Coordinator arose in April 2014 when administrative issues related to the verification of letters of support were first identified. Specifically, a number of letter-writers provided support/opposition for more than one application, which were under CPE at the same time. The [CPE Provider] attempted to contact the authors of the letters for each application separately [and] received complaints from the authors of the letters, who requested that they be contacted by a single individual. In May 2014 the [CPE Provider] revised its verification approach to address the need for a single point of contact for verification.

In all cases, the results of the verification were communicated to both of the evaluators and throughout the entire core team to permit a full and complete evaluation consistent with the Applicant Guidebook.⁸⁷

Based on the foregoing, the BAMC adopts the reasoning set forth in the BGC’s Recommendation on Request 16-3 and concludes that reconsideration is not warranted based on

⁸⁶ ICANN Bylaws, 11 February 2016, Art. IV § 2.2.

⁸⁷ Letter from the CPE Provider to ICANN, dated 14 Mar. 2016

(<https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>).

the CPE Provider's verification process.⁸⁸ The Requester does not identify any misapplication of policy or procedure by the CPE Provider that materially or adversely affected the Requester, and does not identify any action by the Board that has been taken without consideration of material information or on reliance upon false or inaccurate information.

B. The CPE Provider's Application of the CPE Criteria was Consistent with Applicable Policies and Procedures.

Although Request 16-3 on its face did not challenge the merits of the Second CPE, the BAMC acknowledges that, during the Requestor's oral presentation to the BGC on 15 May 2016 and in its supplemental written submissions,⁸⁹ the Requestor challenged the CPE Provider's evaluation of Criterion 2: Nexus and Criterion 4: Community Endorsement of the Second CPE Report. The Requestor raised many of these claims in Request 15-21, and the BAMC adopts and incorporates the BGC's reasoning in its Determination on Request 15-21 concerning the CPE Provider's application of the CPE criteria.⁹⁰ The BAMC has also independently considered these claims, as they were raised in the Requestor's submissions in support of Request 16-3,⁹¹ and for the reasons discussed herein, finds that the Requestor's claims do not support reconsideration.

1. The CPE Provider's Application of Criterion 2 was Consistent with Applicable Policies and Procedures.

⁸⁸ See BGC Recommendation on Request 16-3, at Pg. 11-14

(<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>).

⁸⁹ See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-background-information-ilga-15may16-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-centerlink-annual-report-2014-15may16-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-centerlink-to-icann-07mar14-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-centerlink-to-icann-redacted-24mar11-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>; and <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-statement-bgc-17may16-en.pdf>.

⁹⁰ <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>. The Requestor does not challenge the BGC's determination on these issues. See Request 16-3.

⁹¹ See Appendix 2 for a list of these arguments.

The Requestor’s Application received zero points for Criterion 2. Criterion 2 evaluates “the relevance of the string to the specific community that it claims to represent.”⁹² It is measured by two sub-criterion: Sub-criterion 2-A-Nexus; and Sub-criterion 2-B-Uniqueness.⁹³ Sub-criterion 2-A is worth a maximum of three points and sub-criterion 2-B is worth a maximum of one point, for a total of four points.

To obtain three points for sub-criterion 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.”⁹⁴ For a score of two, the applied-for string should “closely describe the community or the community members, without overreaching substantially beyond the community.”⁹⁵ The Guidebook explained the scoring rubric for sub-criterion 2-A as follows:

As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.⁹⁶

Zero points are awarded if the string “does not fulfill the requirements for a score of 2.”⁹⁷ It is not possible to obtain a score of one for this sub-criterion.

To obtain one point for sub-criterion 2-B, the applied-for string must have no other significant meaning beyond identifying the community described in the application.⁹⁸ An application that does not qualify for two or three points for sub-criterion 2-A will not qualify for

⁹² See Guidebook, Module 4, § 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁹³ *Id.* at Pgs. 4-12-4-13.

⁹⁴ *Id.*

⁹⁵ *Id.* at Pg. 4-12.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at Pg. 4-13.

a score of one for sub-criterion 2-B.⁹⁹ The Requestor challenges the CPE Provider’s analysis of sub-criterion 2-A-Nexus, for which it received zero of three possible points.¹⁰⁰ Specifically, the Requestor disagrees with the CPE Provider’s conclusions that: (1) “gay” does not identify or describe all individuals who identify as transgender, intersex, or ally; and (2) as a result, the dotgay Application does not satisfy either the two- or three-point tests under sub-criterion 2-A-Nexus.¹⁰¹ The Requestor does not challenge sub-criterion 2-B-Uniqueness. As discussed below, the Requestor has provided no evidence demonstrating that the CPE Provider failed to comply with the applicable CPE procedures when it evaluated sub-criterion 2-A.

- a. The CPE Provider Complied with Applicable Procedures when it Concluded that the Applied-for String Does Not Match the Name of The Community (Three-Point Test of Sub-criterion 2-A).

The CPE Provider determined that the applied-for string (.GAY) did not merit three points because it did not “identify or match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.”¹⁰² The CPE Provider explained in the Second CPE Report that, based upon its evaluation of the materials submitted by the Requestor and the Provider’s own research, the applied-for string does not sufficiently identify some members of the applicant’s defined community because “more than a small part of the applicant’s defined community is not identified by the applied-for string,...and that it therefore does not meet the requirements for Nexus.”¹⁰³

The community as defined by the Requestor’s Application consists of

individuals who identify themselves as male or female
homosexuals, bisexual, transgender, queer, intersex, ally and many

⁹⁹ *Id.* at Pg. 4-14.

¹⁰⁰ *See* Dotgay Second CPE Report, Pgs. 1, 5-8 (<https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹⁰¹ *E.g.* Dotgay presentation summary, 17 May 2016, at Pg. 4-6; Second Eskridge Opinion ¶ 21, at Pg. 9; *id.* ¶¶ 59-60, at Pg. 28; *id.* ¶¶ 85-87, at Pg. 39; ICC Determination, *ILGA v. Afilias*, Nov. 16, 2013, ¶ 16, at Pg. 6.

¹⁰² Second CPE Report., Pg. 5.

¹⁰³ *Id.*

other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. The Gay Community has also been referred to using the acronym LGBT, and sometimes the more inclusive LGBTQIA. The most common and globally understood term - used both by members of the Gay Community and in the world at large - is however “Gay”.¹⁰⁴

The CPE Provider found that the Requestor’s assertion that the applied-for string is the “most common” term used by members of its defined community to refer to all gay, lesbian, bisexual, transgender, queer, intersex, and ally individuals is central to its demonstration of sub-criterion 2-A-Nexus.¹⁰⁵ Based upon its evaluation of the evidence submitted by the Requestor and the independent research conducted by the CPE Provider, the CPE Provider concluded that there are certain members of the Requestor’s defined community that do not identify with the applied-for string, in particular transgender, intersex, and ally individuals.¹⁰⁶ The CPE Provider explained:

These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay”. Both within the community and outside of it, such as in the media, acronyms such as “LGBT,” “GLBT,” “LGBTQ,” or “LGBTQIA” are used to denote a group of individuals that includes those described above, i.e. transgender, intersex and ally individuals. In fact, organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor “gay,” preferring one of the more inclusive terms.¹⁰⁷

The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. . . . [T]ransgender, intersex, and ally individuals are not likely to consider “gay” to be their “most common” descriptor,

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at Pgs. 5-6.

as the applicant claims. These groups are most likely to use words such as “transgender,” “trans,” “intersex,” or “ally” because these words are neutral to sexual orientation, unlike “gay.”¹⁰⁸

The Requestor alleges that the Second CPE Report “misread ICANN’s Applicant Guidebook and ignored its Bylaws.” The Requestor claims that the CPE Provider substantially ignored the primary test for sub-criterion 2-A, which is whether the proposed string is a well-known short form or abbreviation of the defined community. Essentially, the Requestor disagrees with the CPE Provider’s conclusions that “gay” does not identify or describe all individuals who identify as transgender, intersex, or ally: the Requestor asserts that the defined community is “commonly known by others” as the gay community; and believes that the CPE Provider’s determination that “indeed ‘gay’ is used more frequently than terms such as LGBT or LGBTQIA in reference to both individuals and communities,” required an award of three points under sub-criterion 2-A.¹⁰⁹

The BAMC finds that the Requestor has not demonstrated that the CPE Provider failed to follow the CPE procedures or guidelines. The Requestor simply disagrees with the CPE Provider substantive conclusions, which is not grounds for reconsideration. The Requestor has identified no policy or procedure that the CPE Provider violated in its analysis of sub-criterion 2-A.

First, consistent with the Guidebook, the CPE Provider considered the evidence submitted by the Requestor and conducted its own research to determine whether the applied-for

¹⁰⁸ *Id.*

¹⁰⁹ See Dotgay presentation summary, 17 May 2016, at Pg. 4-6. See also Second Eskridge Opinion ¶¶ 59-60, at Pg. 28; *id.* ¶¶ 85-87, at Pg. 39 (“a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century” reflects that transgender, intersex, and ally individuals are likely to “consider ‘gay’ to be their ‘most common’ descriptor,” and the CPE Provider did not “identify the methodology or evidence [it] followed to support” its conclusion that these individuals would not identify with the term “gay”); ICC Determination, *ILGA v. Afilias*, Nov. 16, 2013, ¶ 16, at Pg. 6 (“[I]t is common knowledge that the term gay community refers to this wider community, wider even than a lesbian, gay, bisexual, and transgender community.”).

string, “gay,” matched the name of the community defined in the application or was a well-known short form of the defined community. As discussed above, the CPE Provider found that although the Requestor’s evidence showed that the term “gay” is used *more frequently* than the terms “LGBT” or “LGBTQIA,” it did not demonstrate to the CPE Provider that certain groups within the Requestor’s defined community (i.e., transgender, intersex, and/or ally individuals or communities) are likely to define themselves as “gay.”¹¹⁰ Specifically, the CPE Provider found that even those organizations that submitted letters of support did not use the term “gay” to refer to their transgender, intersex, or ally members in their own organizational materials, but instead used specific terms like “transgender” or “intersex.” Thus, the CPE Report states that “even the applicant’s supporters recognize that ‘gay’ is insufficient to identify the diversity of the LGBTQIA community, especially with regard to transgender, intersex, and ally individuals.”¹¹¹ Reconsideration is therefore not warranted.

Second, the BAMC finds no evidence supporting the Requestor’s argument that the CPE Provider ignored the Guidebook’s focus on whether the proposed string is “a well known short-form or abbreviation of the community.” The Requestor claims that the foregoing standard does not mean that the proposed string has to be “the *only* well-known short-form abbreviation of the community.”¹¹² The Requestor posits that by concluding that the applied-for string is not a well-known short form of the defined community, the CPE Provider incorrectly read into the standard an implicit requirement that the string must also ‘identify’ the community and its members.”¹¹³ The Requestor believes that this implicit requirement was improperly taken from

¹¹⁰ Second CPE Report, at Pg. 7.

¹¹¹ *Id.* at Pg. 8.

¹¹² Second Eskridge Op., ¶ 43, at Pg. 18.

¹¹³ Second Eskridge Opinion ¶ 20, Pg. 9.

the Guidebook’s explanation for a partial nexus score of 2 points, which evaluates whether the “[s]tring identifies the community, but does not qualify for a score of 3.”¹¹⁴

Contrary to the Requestor’s claims, the Second CPE Report demonstrates that the CPE Provider applied sub-criterion 2-A consistently with the Guidebook. The CPE Provider understood that there were two different standards for an award of two and three points, and evaluated the dotgay Application under each set of standards.¹¹⁵ As discussed above, the CPE Provider explained in detail its evaluation and conclusion for the three points test. As described below, the CPE Provider described its evaluation and conclusion for the two points test. The Requestor has provided no evidence that the CPE Provider conflated the two standards in violation of the Guidebook, the CPE Guidelines, or any other established procedures. Moreover, the CPE Process Review Scope 2 Report confirms that the CPE Provider’s evaluation of sub-criterion 2-A in the CPE reports (including the Second CPE Report) did not “deviate[] in any way from the applicable guidelines.”¹¹⁶

- b. The CPE Provider Complied with Applicable Procedures when It Concluded that the Applied-for-String Does Not Closely Describe the Community or the Community Members, without Overreaching Substantially Beyond the Community (Two Points Test of Sub-criterion 2-A).

An applicant may receive two out of a possible three points for sub-criterion 2-A if the applied-for string “closely describe(s) the community or the community members, without overreaching substantially beyond the community.”¹¹⁷ That is, the applied-for string identifies

¹¹⁴ Second Eskridge Opinion ¶ 21, Pg. 9; *id.* ¶ 43, Pg. 18 (citing Guidebook, Module 4, § 4.2.3 at Pg. 4-12). *See also* Dotgay PowerPoint presentation to ICANN board at Pg. 4.

¹¹⁵ Second CPE Report, at Pg. 5-8.

¹¹⁶ Scope 2 Report, at Pg. 3 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

¹¹⁷ Guidebook, Module 4, § 4.2.3., Pg. 4-12.

the community but does not fulfill the requirements for a score of three.¹¹⁸ The CPE Provider determined that the applied-for string failed this test because the term “gay” is not used to identify certain groups within the community such as transgender, intersex, and/or ally individuals or communities.”¹¹⁹ While the CPE Provider acknowledged the Requestor’s position that “the various parts of its defined community are engaged in the same activities, such as ‘gay pride’ events and ‘gay rights’ advocacy,” the CPE Provider concluded that “transgender people’s participation in these activities no more identifies them as gay than allies’ participation in transgender rights advocacy identifies them as transgender.”¹²⁰

The CPE Provider considered evidence submitted by the Requestor to demonstrate that “‘gay’ is used more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.”¹²¹ The CPE Provider noted, however, that “the analysis fails to show that when ‘gay’ is used . . . it is used to identify transgender, intersex, and/or ally individuals or communities. This is the key issue for the [CPE Provider’s] consideration of Nexus.”¹²² The CPE Provider noted in the Second CPE Report that it

research[ed] sources from the same periods as the [Requestor’s] analysis for the terms ‘transgender’ or ‘intersex’” and determined that “these terms refer to individuals and communities not identified by ‘gay.’ In other words, ‘gay’ is not used to refer to these individuals because it does not *closely describe* them and it is not *what they would naturally be called*, as the Guidebook requires for partial credit on Nexus.¹²³

Accordingly, the CPE Provider determined that Requestor’s Application does not satisfy the two points test because the applied-for string does not identify the community.

¹¹⁸ CPE Guidelines, Pg. 7.

¹¹⁹ Second CPE Report, Pg. 7.

¹²⁰ *Id.* at Pg. 7.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at Pg. 8.

The Requestor claims that the CPE Provider’s analysis and conclusions failed to comply with the Guidebook for several reasons. First, the Requestor asserts that the CPE Provider failed to consider whether the string identifies the community as a whole, and instead only considered whether it identifies each community member¹²⁴ by evaluating whether “gay” is what “the typical community member would naturally be called.”¹²⁵ This argument does not support reconsideration. Pursuant to the Guidebook, the two points test is whether “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.”¹²⁶ However, what a community member would naturally be called—which is set forth in the Guidebook as “an example” of when a two-point score would be warranted—is inextricably intertwined with the description of the community as a whole, and the CPE Provider considered both questions in its analysis.¹²⁷ The CPE Provider “considered the extent to which the string ‘gay’ *describes* the members of the applicant’s defined community and has evaluated whether ‘gay’ is what these individuals *would naturally be called*.”¹²⁸ The CPE Provider’s methodology for concluding that “more than a small part of the applicant’s defined community is not identified by” “gay” is discussed above. Because it concluded that more than a small part of the defined community would not naturally be called “gay,” the CPE Provider determined that the term “gay” does not closely describe the community that the Requestor seeks to represent.¹²⁹

Second, the Requestor (through Professor Eskridge) disagrees with the CPE Provider’s conclusion that the defined community would not naturally be called “gay.”¹³⁰ This argument

¹²⁴ Dotgay presentation summary, 17 May 2016, at Pg. 4-6.

¹²⁵ Guidebook Module 4, §4.2.3, at Pg. 4-13.

¹²⁶ *Id.*

¹²⁷ *Id.*; Second CPE Report, at Pg. 5, 8.

¹²⁸ Second CPE Report, at Pg. 5 (emphasis added).

¹²⁹ Second CPE Report, at Pg. 7-8.

¹³⁰ *See* Dotgay presentation summary, 17 May 2016, at Pg. 4-6; Second Eskridge Op., ¶¶ 87-92.

reflects a disagreement with the substantive conclusion reached by the CPE Provider, and is not evidence of a procedural violation by the CPE Provider. In fact, Professor Eskridge acknowledges that “[m]any of the sources” that the CPE Provider consulted in its research “relate to the widely-known distinction between sexual orientation and gender identity” and that those “and other sources can support the proposition that transgender persons distinguish between sexual orientation and gender identity and commonly use terms such as ‘trans’ or ‘transgender’ to describe themselves.”¹³¹ Although Professor Eskridge may disagree with the CPE Provider’s conclusions, the Requestor does not proffer any evidence demonstrating how the CPE Provider violated the Guidebook in reaching its conclusion.

Third, the Requestor (through Professor Eskridge) argues that the CPE Provider improperly created an “under-reach test” for sub-criterion 2-A, and that this was not consistent with the Guidebook. Specifically, the Requestor asserts that the CPE Provider created an improper “libertum veto” (“free veto”), “by importing a requirement that the applied-for string (.gay) can be vetoed if it ‘does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.’”¹³² The Requestor asserts that “the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application,” but the CPE Provider’s “‘under-reaching’” concern flips the ‘over-reaching’ concern of the Guidebook. In evaluating the dotgay application, the [CPE Provider] worried that the applied-for string is narrower than the community defined in the application.”¹³³ Additionally, the Requestor argues that this “under-reach test” was imposed

¹³¹ Second Eskridge Op., ¶ 90, at Pg. 42.

¹³² Second Eskridge Op. ¶ 45, Pg. 20.

¹³³ *Id.* ¶ 48, Pg. 22.

without notice to applicants. The Requestor believes that the CPE Provider applied such an “under-reach test” to other applicants.¹³⁴

The Requestor is correct that the CPE Provider was concerned that the applied-for string was too narrow in relation to the defined community, but is incorrect that the so-called “under-reach test” established a new standard or veto not contained in the Guidebook. Pursuant to the Guidebook, an application merits two points if the “[s]tring identifies the community, but does not qualify for a score of 3.”¹³⁵ “Identify” means that “the applied-for string *closely* describes the community or the community members, without over-reaching substantially beyond the community.”¹³⁶ The CPE Guidelines explain that

“Identify” does not simply mean ‘describe’ but means ‘closely describes the community.

“Over-reaching substantially” means that the string indicates a wider geographic or thematic remit than the community has.¹³⁷

The Guidebook provides the following example to illustrate this test:

As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.¹³⁸

According to the Guidebook, analysis of whether an applied-for string identifies the community thus involves two considerations: 1) the applied-for string must “closely describe” the community or the community members; and 2) the applied-for string may not over-reach substantially beyond the community.

¹³⁴ *Id.* ¶ 55, Pg. 26.

¹³⁵ Guidebook, Module 4, § 4.2.3, at Pg. 4-12.

¹³⁶ *Id.* at Pg. 4-13.

¹³⁷ CPE Guidelines, Pg. 7.

¹³⁸ Guidebook, Module 4, § 4.2.3., Pg. 4-23

In the Second CPE, the CPE Provider found that “the applied-for string does not sufficiently identify some members of the application’s defined community, in particular transgender, intersex, and ally individuals.”¹³⁹ In other words, the CPE Provider concluded that the applied-for string, “GAY” only identifies part of the Application’s defined community (in Professor Eskridge’s terms, the applied-for string “under-reaches”). Therefore, under the Guidebook’s definition of “identify,” the applied-for string does not “closely describe” the community. Because the CPE Provider determined that applied-for string did not closely describe the community as defined by the applicant, and therefore could not meet the requirement for “identify,” the second component of the “identify” definition, i.e., “over-reach,” was not implicated and the CPE Provider was not required to apply the “over-reach” test to the defined community.

Professor Eskridge appears to be conflating the “closely describe” requirement with the requirement that the applied-for string not substantially over-reach the community. But each aspect of the definition of “identify” provides a different constraint on the relationship between the applied-for string and the community defined in the application. In the example provided in the Guidebook, the applied-for string “.TENNIS” would *over-reach* if a local tennis club applied for .TENNIS.¹⁴⁰ But, at the other extreme, if the applied-for string “.TENNIS” was defined to represent the worldwide community of “athletes,” then it would not “over-reach” the community as defined; indeed, “tennis” very much “under-reaches” the community definition, because tennis is one of many sports that individuals identifying as athletes might play, and many people who consider themselves athletes have never played tennis. But the fact that in this case the string does not over-reach does not mean that .TENNIS should receive two points under the

¹³⁹ Second CPE Report, at Pg. 5.

¹⁴⁰ Guidebook, Module 4, § 4.2.3, Pg. 4-13.

Nexus sub-criterion. It means that .TENNIS does not “closely describe” the community of “athletes.” Professor Eskridge’s “under-reach” argument does not support reconsideration.

Because the CPE Provider interpreted the “identify” definition in accordance with the Guidebook and consistently applied it to the Requestor’s Application, the Requestor’s arguments that rest on an “under-reach” theory—that the “under-reach” test was applied without notice to CPE applicants and that it is inconsistent with ICANN’s commitment to informed participation--do not support reconsideration.

c. The CPE Provider Applied Sub-Criterion 2-A-Nexus Consistently Across All CPE Applications.

The Requestor asserts that the CPE Provider did not apply sub-criterion 2-A consistently across all CPEs that were conducted. Specifically, the Requestor claims that

the [CPE Provider] awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied[-]for string. However, the [CPE Provider] awarded 2 points to the EBU for [sub-criterion 2-A] for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO. There is no evidence provided of the relatively small and ‘more than small’ segments of the identified communities which justified giving a score of 0 to one applicant and 2 to another.¹⁴¹

The Requestor argues that this also violates ICANN org’s prohibition of discrimination in Article II, Section 3 of the Bylaws, insofar as the CPE Provider did not require the name of the community to apply to each member of the community (for example, in the Community Priority

¹⁴¹ 15 Nov. 2016 letter from A. Ali to ICANN Board at 6-7, quoting Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (CoE Report), at Pg. 49-50.

applications for .OSAKA, .HOTEL, and .RADIO), but it *did* apply that requirement to dotgay’s Application for sub-criterion 2-A.¹⁴²

This argument does not support reconsideration. The CPE Provider’s determinations in the identified applications were the result of different circumstances from those in dotgay’s Application. In .OSAKA, the CPE Provider concluded that the string matched the name of the community, and did not find that *any* part of the community would not likely be associated with the string.¹⁴³ In .RADIO, the CPE Provider concluded that *no more than* “a small part of the community” would not likely be associated with the word RADIO.¹⁴⁴ Similarly, in .HOTEL, the CPE Provider concluded that although “some entities” in the defined community, such as hotel marketing associations and hotel chains “may not be automatically associated with the gTLD, . . . these entities are considered to comprise *only a small part of* the community.”¹⁴⁵

In the Second CPE Report, by contrast, the CPE Provider determined that “*more than* a small part of the applicant’s defined community is not identified by the applied-for string.”¹⁴⁶ Of the seven groups of individuals that the Requestor listed in its definition of the community,¹⁴⁷ the CPE Provider concluded that three were “not likely to consider ‘gay’ to be their ‘most common’ descriptor .”¹⁴⁸ The Requestor has not shown that these three groups do not comprise “more than a small part” of the defined community. Further, the CPE Process Review Scope 2 Report

¹⁴² Dotgay presentation summary, 17 May 2016, at Pg. 4; dotgay PowerPoint presentation at Pg. 7.

¹⁴³ .OSAKA CPE Report, at Pg. 3-4 (<https://newgtlds.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

¹⁴⁴ .RADIO CPE Report, at Pg. 5 (<https://newgtlds.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁴⁵ .HOTEL CPE Report, at Pg. 4 (emphasis added) (<https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

¹⁴⁶ Second CPE Report, at Pg. 5 (emphasis added).

¹⁴⁷ “[I]ndividuals who identify themselves as male or female homosexuals, bisexual, transgender, queer, intersex, [and] ally.” Second CPE Report, at Pg. 2 (quoting dotgay Application, section 20(a)).

¹⁴⁸ *Id.* at Pg. 5-6.

confirms that the CPE Provider’s application of sub-criterion 2-A in the Second CPE Report was consistent with its applications of the same sub-criteria in the other CPE reports, including .OSAKA, .RADIO, and .HOTEL.¹⁴⁹ Therefore, reconsideration is not warranted on this basis.

2. The CPE Provider’s Application of Criterion 4, Community Endorsement was Consistent with Applicable Policies and Procedures.

Criterion 4 evaluates community support for and/or opposition to an application.¹⁵⁰ It is measured by two sub-criterion: Sub-criterion 4-A-Support and Sub-criterion 4-B-Opposition.¹⁵¹ Each sub-criterion is worth a maximum of two points. The Requestor received one point for sub-criterion 4-A and one point for sub-criterion 4-B, for a total of two points out of a possible four points for Criterion 4.

To obtain two points for sub-criterion 4-A-Support, an applicant must be the recognized community institution/member organization or have documented support from the recognized community institution(s)/member organization(s), or have otherwise documented authority to represent the community.¹⁵² “Recognized” community institutions are those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.¹⁵³ In cases of multiple institutions/organizations, there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score two points.¹⁵⁴ To be taken into account as relevant support, such documentation must contain a description of the

¹⁴⁹ CPE Process Review Scope 2 Report, Pg. 36-41 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

¹⁵⁰ See Guidebook, Module 4, § 4.2.3 at Pg. 4-17.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at Pgs. 4-17-4-18.

¹⁵⁴ *Id.* at Pg. 4-18.

process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.¹⁵⁵

One point is awarded if the applicant has submitted documented support with its application from at least one group with relevance,¹⁵⁶ but does not have documented support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application.¹⁵⁷ Zero points are awarded if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community.¹⁵⁸

To obtain two points for sub-criterion 4-B-Opposition, there must be “no opposition of relevance” to the application.¹⁵⁹ One point is awarded if there is “relevant opposition from one group of non-negligible size.”¹⁶⁰ Zero points are awarded if there is “relevant opposition from two or more groups of non-negligible size.”¹⁶¹ When scoring sub-criterion 4-B, previous objections to the application as well as public comments during the same application round will be taken into account and assessed. There is no presumption that such objections or comments would prevent a score of two or lead to any particular score for sub-criterion 4-B. To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at Pg. 4-17.

¹⁵⁷ *Id.* at Pg. 4-18.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at Pg. 4-17.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

with competition objectives, or filed for the purpose of obstruction will not be considered relevant.¹⁶²

The Requestor challenges the CPE Provider's application of both sub-criterion 4-A and sub-criterion 4-B. The Requestor claims that the CPE Provider failed to follow the Guidebook, thus resulting in awarding the Requestor with a partial rather than maximum score for Criterion 4. As discussed below, the Requestor has provided no evidence demonstrating that the CPE Provider failed to comply with the Guidebook's applicable CPE procedures when it evaluated Criterion 4.

- a. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 4-A-Support.

The CPE Provider determined that the Requestor's Application did not satisfy the two points test for sub-criterion 4-A because it was "not the recognized community institution(s)/ member organization(s), nor did it have documented authority to represent the community."¹⁶³ Additionally, CPE Provider concluded that, although the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which supported the Requestor's Application, was an "entity mainly dedicated to the community,"¹⁶⁴ it does not meet the standard of a "recognized organization" under sub-criterion 4-A because it lacked "recognition on the part of community members of the organization's authority to represent them," notwithstanding ILGA's clear dedication and service to the community.¹⁶⁵ However, the CPE Provider determined that the

¹⁶² *Id.* at Pgs. 4-18 and 4-19.

¹⁶³ Second CPE Report, at Pg. 11.

¹⁶⁴ Sub-criterion 1-A, Delineation, considers, among other things, whether the applicant represents an "organized" community. "'Organized' implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities." Guidebook, Module 4, § 4.2.3, at Pg. 4-11.

¹⁶⁵ *Id.*

Requestor did possess documented support from many groups of relevance and thus satisfied the one point test for sub-criterion 4-A.¹⁶⁶

The Requestor claims that the CPE Provider “applied a heightened standard that it would require a single organization to represent the community in its entirety, rather than consider support from multiple institutions and organizations representing different parts of the community.”¹⁶⁷ The Requestor also asserts that

[w]ithout citing any evidence, the [CPE Provider] concluded that there was no “recognition on the part of community members of the [ILGA’s] authority to represent them.” Indeed, the [CPE Provider] opined that “there is no single such organization recognized by all of the defined community members as the representative of the defined community in its entirety.”¹⁶⁸

The Requestor claims that this was inconsistent with the Guidebook, which “contemplates one or more ‘recognized community institution(s)/community organization(s)’ and does not contemplate a situation where there is no ‘recognized community institution(s)/community organization(s)’ at all.”¹⁶⁹

Further, the Requestor posits that the CPE Provider “has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process,” because the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a *majority* of the community,” whereas

.GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the [CPE Provider] was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the [CPE Provider] did not give full points. This is despite the fact

¹⁶⁶ *Id.*

¹⁶⁷ Dotgay presentation summary, 17 May 2016, at Pg. 8.

¹⁶⁸ Second Eskridge Op. ¶ 77, Pg. 35 (quoting Second CPE Report, at Pg. 11).

¹⁶⁹ *Id.* ¶ 79, Pgs. 35-36 (quoting Guidebook, Module 4, § 4.2.3, at Pg. 4-17).

that in both the case of the hotel and radio communities, no single organization exists either, but the [CPE Provider] did not appear to be demanding one.¹⁷⁰

The Requestor's arguments are based on an incorrect reading of the Guidebook's guidelines as to sub-criterion 4-A. "Recognized" community institutions are those "institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community."¹⁷¹ Contrary to the Requestor's claims, the Guidebook *does not* require the existence of a "single organisation recognised as representing the community in its entirety."¹⁷² Instead, the Guidebook specifically provides for situations where there is no single organization representative of the entire community: in cases of multiple institutions/organizations, "there must be documented support from institutions/organizations representing *a majority* of the overall community addressed in order to score a 2."¹⁷³

As the Requestor acknowledges, in the cases of .HOTEL and .RADIO, the CPE Provider determined that the *community* applicants for both .HOTEL and .RADIO *did* have documented support from institutions and/or organizations representing "a majority of the community."¹⁷⁴ Accordingly, consistent with the Guidebook, the CPE Provider awarded those applicants two points each under this sub-criterion.¹⁷⁵ By contrast, the CPE Provider *did not* conclude that the

¹⁷⁰ 15 Nov. 2016 letter from A. Ali to ICANN Board at 7, quoting CoE Report, at Pg. 51. *See also* Request 14-44, § 8, at Pg. 20 ("It does not appear to Request[o]r that there is one single organization recognized by the 'radio' community or the 'hotel' community, who have both obtained a score of 2 out of 2 points on this criterion."); Second Eskridge Op. ¶ 80, Pg. 36 (as to .HOTEL only).

¹⁷¹ Guidebook Module 4, § 4.2.3 at Pgs. 4-17 and 4-18.

¹⁷² 15 Nov. 2016 letter from A. Ali to ICANN Board at 7, quoting CoE Report, at Pg. 51.

¹⁷³ Guidebook Module 4, § 4.2.3 at Pg. 4-18 (emphasis added).

¹⁷⁴ 15 Nov. 2016 letter from A. Ali to ICANN Board at 7, quoting CoE Report, at Pg. 51.

¹⁷⁵ Further, the CPE Provider concluded that the .HOTEL community applicant had "documented support from *the* recognized community institution(s)/member organization(s) . . . These groups constitute *the* recognized institutions to represent the community, and represent a majority of the overall community." .HOTEL CPE Report at Pg. 6 (emphasis added) (<https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

Requestor had documented support from institutions or organizations representing “a majority of the community”—finding only that the Requestor had documented support from “many groups with relevance,” representing “a wide array” of support.¹⁷⁶ Accordingly, consistent with the Guidebook, the CPE Provider awarded the Requestor’s Application one point rather than two points for this sub-criterion. The Scope 2 Report provides additional confirmation that the CPE Provider’s application of sub-criterion 4-A in the Second CPE Report was consistent with the Guidebook and with other CPE reports.¹⁷⁷ Accordingly, these arguments do not support reconsideration.

Next, the Requestor challenges the CPE Provider’s finding that ILGA did not represent the defined community. The Requestor argues that the CPE Provider required “formal recognition beyond membership giving authority to an organization to represent the community members.” According to the Requestor, this is a more stringent standard than the Guidebook’s definition of “recognized institutions or organizations” as organizations that, “through membership or otherwise, are clearly recognized by the community members as representative of the community.”¹⁷⁸ In support, the Requestor relies on an expert determination from a community objection proceeding that was filed by ILGA (the ICC Determination) concerning the string “.LGBT.”¹⁷⁹ In that community objection proceeding, the expert panel, the International Chamber of Commerce (ICC), found that ILGA is “an established institution associated with a

Accordingly, the .HOTEL applicant *did* have support from organization(s) representing the *entire* community, contrary to the Requestor’s claim.

¹⁷⁶ Second CPE, at Pg. 11.

¹⁷⁷ Scope 2 Report, Pg. 51-54 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

¹⁷⁸ Dotgay presentation summary, 17 May 2016, at Pg. 7; Dotgay PowerPoint presentation, at Pg. 5.

¹⁷⁹ ICC Determination, ILGA v. Afiliias, Nov. 16, 2013, ¶ 1, at Pg. 4

(<https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf>).

clearly delineated community,” and “a globally recognized institution [that] existed much prior to the new gTLD proceedings.”¹⁸⁰

The Requestor also notes that the Council of Europe’s 4 November 2016 Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective” (CoE Report) asserted that

[i]t would seem that the [CPE Provider] prefers to award full points on 4A [Support] for applicants who are acting on behalf of member organisations. . . . If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY . . . it appears that the [CPE Provider] has accepted professional membership bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised.’ This is despite the fact that that Guidebook does not limit recognition by a community to membership by that community.¹⁸¹

For the reasons discussed below, these arguments do not support reconsideration.

As an initial matter, the Guidebook sets forth no requirement that the CPE Provider consider community objection determinations. CPE is an entirely different process than the community objection process. The community objection process is one of the New gTLD Program’s dispute resolution procedures. This dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts.¹⁸² In contrast, CPE is a string contention resolution mechanism that only occurs after an application has *successfully completed* all previous stages of the evaluation including the dispute resolution processes.¹⁸³ The dispute resolution and string contention

¹⁸⁰ ICC Determination, *ILGA v. Afiliats*, Nov. 16, 2013, ¶¶ 13-14, at Pg. 6 (<https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf>).

¹⁸¹ 15 Nov. 2016 letter from A. Ali to ICANN Board at 8, quoting CoE Report, at Pg. 51-52.

¹⁸² See Guidebook, Module 3 § 3.2, at Pg. 3-4.

¹⁸³ See *id.* at Module 4, § 4.2, Pg. 4-7.

procedures were developed independently of each other with distinct purposes in mind. The Guidebook contains no instruction or even suggestion that the CPE Provider must consider statements made in objection proceedings or determinations, especially those made in objection proceedings regarding a different string. Given that no established policy or procedure requires the CPE Provider to consider expert determinations issued to resolve community objections, no reconsideration would be warranted if the CPE Provider had not done so.

Second, the CPE Provider *was* aware of the ICC Determination. ICANN org ensured that the CPE Provider was provided with all relevant materials, including materials related to Revised Request 14-44. Indeed, ICANN org provided the CPE Provider with the following instructions:

Our intention was to impress upon the panel and evaluators the reconsideration request materials should be used to inform the evaluation, but it should not be part of the application. The materials should merely be considered relevant, much in the same way that an objection determination may also be considered relevant and inform the panel's understanding of the community. Here the materials may also inform the panel on the "landscape" of the proposed TLD, community, and the applicant.¹⁸⁴

Revised Request 14-44 makes the same verbatim argument regarding the relevance of the ICC Determination that is asserted in this Request 16-3, and also attached the ICC Determination as an exhibit to Revised Request 14-44, all of which were provided to the CPE Provider for the Second CPE.¹⁸⁵

Finally, the CPE Provider recognized that ILGA was established and associated with the defined community. However, the CPE Provider concluded that although

ILGA is sufficient to meet the Guidebook's requirement for an 'entity mainly dedicated to the community' under Delineation (1-

¹⁸⁴ See Email from ICANN staff to CPE Provider, dated 25 February 2015, produced in response to the Requester's DIDP Request, and see <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁸⁵ See 21 October 2015 DIDP Response at Pg. 10 (<https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>); Request 14-44 at Pg. 13 (<https://www.icann.org/en/system/files/files/request-dotgay-redacted-29nov14-en.pdf>); Request, § 8.7, Pg. 14.

A), it does not meet the standard of a ‘recognized’ organization. The Guidebook specifies that ‘recognized means that an organization must be ‘clearly recognized by the community members as representative of the community.’ . . . ‘[R]ecognition demands not only this unilateral dedication of an organization to the community, but a reciprocal recognition on the part of community members of the organization’s authority to represent them. *There is no single such organization recognized by all of the defined community’s members as the representative of the defined community in its entirety.*¹⁸⁶

The Requestor has not offered any evidence showing that the defined community recognizes ILGA as the (or a) representative of the defined community in its entirety. As the CPE Provider explained, ILGA’s status as “associated with” and “dedicated to” the community—which is sufficient to satisfy certain requirements of Criterion 1-Community Establishment—does not necessarily render it a representative of the community as a whole, as required for two points under sub-criterion 4-A-Support. Accordingly, there is no evidence to support reconsideration of the CPE Provider’s determination that ILGA did not represent the defined community.

Additionally, the Requestor believes that it 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 around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.¹⁸⁷

To the extent this is an accurate statement, it demonstrates that the CPE Provider *did* follow the Guidebook when it awarded the Requestor only partial credit for support based on a lack of global support.

The Requestor asserts that the CPE Provider’s application of sub-criterion 4-A violated ICANN’s commitment to non-discrimination. First, the Requestor claims that the CPE Provider

¹⁸⁶ Second CPE Report, at Pg. 11 (emphasis added).

¹⁸⁷ 15 Nov. 2016 letter from A. Ali to ICANN Board at 7, quoting CoE Report, at Pg. 51.

determined that a “a community may have more than one [representative] organization” in other CPE applications, and therefore it should have determined that the Requestor “had []sufficiently representative support” based on ILGA’s support for the Application.¹⁸⁸ As explained above, the CPE Provider did not conclude that ILGA’s support was insufficient to fully satisfy the Support requirement because ILGA was not the *only* representative organization for the defined community; the CPE Provider concluded that ILGA’s support was insufficient to fully satisfy the requirement because ILGA was not *a* representative organization in the first instance, even though it is dedicated to the community as a whole.

Second, the Requestor points to the 17 May 2016 statement of Renato Sabbadini to the Board¹⁸⁹:

[N]o transgender organization has opposed being part of the gay community. Much to the contrary, they have also supported the dot gay application. . . . Suggesting that some from our community do not have the right or authority to be linked to the term gay when they so choose is disrespectful at best.¹⁹⁰

This argument does not support reconsideration.

The CPE Provider did not conclude or suggest that no transgender organization or individual has the right or authority to be linked to the term “gay.” Instead, the CPE Provider noted that even in expressing their support, many groups that included transgender members referred to the community as the “LGBT” or “LGBTIQ” community, not the “gay” community. That other transgender organizations do use the word “gay” to describe the community does not change this fact. By holding the dotgay Application to the same standards by which all other

¹⁸⁸ dotgay PowerPoint presentation at Pg. 7.

¹⁸⁹ Renato Sabbadini was the Executive Director of ILGA. He “was deeply involved in the Dotgay community application” and made a statement to the Board in support of Request 16-3. Summary of dotgay’s 17 May 2016 presentation to the Board, at Pg. 2-3 (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-17may16-en.pdf>).

¹⁹⁰ Statement of Renato Sabbadini, 17 May 2016 (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-statement-bgc-17may16-en.pdf>).

CPE applications measured, the CPE Provider effectuated ICANN’s commitment to non-discrimination: it treated the dotgay Application the same way that it treated all other applications it considered. Further, and at bottom, this is a dispute with the outcome of the CPE process that does not attach to the CPE Provider’s application of the Guidebook or ICANN’s Articles of Incorporation or Bylaws, and therefore cannot support reconsideration.¹⁹¹

b. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 4-B-Opposition.

To obtain two points for sub-criterion 4-B, there must be “no opposition of relevance” to the application.¹⁹² One point is awarded if there is “relevant opposition from one group of non-negligible size.”¹⁹³ Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.¹⁹⁴ The CPE Provider concluded that one opponent of the dotgay Application was “a local organization in the United States whose mission, membership, and activities make it relevant to the community as defined in the application,” and was of non-negligible size. Accordingly, the CPE Provider determined that the Requestor was entitled to one of two possible points under this sub-criterion.¹⁹⁵

The Requestor makes three claims concerning sub-criterion 4-B: (1) the Requestor asserts that CPE Provider should not have concluded that the opponent, the Portland, Oregon-based Q Center is a “group of non-negligible size;”¹⁹⁶ (2) the Q Center’s opposition should not

¹⁹¹ The BAMC additionally notes that, as explained in the Guidebook, “a finding by the [CPE Provider] that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.” Guidebook, Module 4, § 4.2.3, at Pg. 4-9.

¹⁹² *Id.* at Pg. 4-17.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at Pgs. 4-18 and 4-19.

¹⁹⁵ Second CPE Report, at Pg. 11.

¹⁹⁶ *See* Second Eskridge Op. ¶ 82, Pg. 37.

have been considered relevant because the Q Center is a member of a larger organization that submitted a letter of support for the dotgay Application;¹⁹⁷ and (3) the Q Center's opposition should not have been considered relevant because it was submitted for an inappropriate purpose.¹⁹⁸

With respect to the first argument, the Requestor offers no evidence in support of its claim that the Q Center is not a "group of non-negligible size."¹⁹⁹ Nor does the Requestor provide any evidence to demonstrate that the CPE Provider's evaluation and conclusion regarding the Q Center violated the CPE process. Moreover, CPE Process Review Scope 2 Report confirms that the CPE Provider's application of sub-criterion 4-B in the Second CPE Report was consistent with the Guidebook.²⁰⁰

The Requestor also argues that the CPE Provider discriminated against it by concluding that the Q Center was an organization of non-negligible size because the CPE Provider found, in the .RADIO CPE, that the International Radio Emergency Support Coalition was not an organization of non-negligible size.²⁰¹ However, the Requestor has provided no evidence to support this discrimination claim. Neither the Second CPE Report nor the .RADIO CPE Report indicate the actual size of the organizations referenced,²⁰² but the Q Center's website states that it is "the largest LGBTQ community center in the Pacific Northwest" and it hosts 30 support and

¹⁹⁷ Dotgay presentation summary, 17 May 2016, at Pg. 8; dotgay PowerPoint presentation, at Pg. 5.

¹⁹⁸ See Guidebook, Module 4, § 4.2.3, Pg. 4-19 ("Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.").

¹⁹⁹ See Second Eskridge Op. ¶ 82, Pg. 37.

²⁰⁰ Scope 2 Report, Pg. 54-56 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

²⁰¹ dotgay PowerPoint presentation at Pg. 7.

²⁰² In fact, the .RADIO CPE Report does not indicate the name of the organizations that filed letters of opposition. See .RADIO CPE Report at Pg. 7 (<https://newgtlds.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

activity groups,²⁰³ and its public tax filings indicate that the Q Center held over \$1.4 million in assets in 2014.²⁰⁴

The Requestor claims that the CPE Provider should not have deducted a point for sub-criterion 4-B based on the Q Center’s letter of opposition because the Q Center is a member of CenterLink, a larger organization that endorsed the dotgay Application.²⁰⁵ This argument does not support reconsideration because nothing in the Guidebook or other CPE materials requires members or affiliates of an umbrella organization to take the same position as the umbrella group, nor does a parent group’s position (of support or otherwise) bind a member or affiliate, if the affiliate makes clear it does not share that position.

As for the Requestor’s argument that the Q Center’s opposition should not be considered relevant because it was submitted for an inappropriate purpose, the BAMC finds that this argument does not warrant reconsideration.²⁰⁶ The Requestor claims that: (1) the Q Center had an “organizational meltdown” around the time it submitted its letter of opposition,²⁰⁷ (2) one of the articles the CPE Provider reviewed during CPE “should have alerted the [CPE Provider] Panel to . . . charges of racism and transphobia that were being made against the Q Center[, which is] a small local group riven with strife and charged with race and trans exclusions,”²⁰⁸ and (3) the Q Center’s opposition “came from the influence” of a “standard applicant for the same string.”²⁰⁹

²⁰³ <http://www.pdxqcenter.org/>; <http://www.pdxqcenter.org/programs/> (visited 18 January 2019).

²⁰⁴ <http://www.pdxqcenter.org/wp-content/uploads/2012/12/2014-Q-Center-990.pdf>.

²⁰⁵ Dotgay presentation summary, 17 May 2016, at Pg. 8; dotgay PowerPoint presentation, at Pg. 5.

²⁰⁶ See Guidebook, Module 4, § 4.2.3, Pg. 4-19 (“Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”).

²⁰⁷ Second Eskridge Op., ¶ 83, Pg. 38.

²⁰⁸ *Id.*, ¶ 84, Pg. 39.

²⁰⁹ Dotgay presentation summary, 17 May 2016, at Pg. 8; dotgay PowerPoint presentation, at Pg. 5.

With respect to the first argument, nothing in the Guidebook indicates that the fact that the Q Center may have been in organizational disarray when it submitted its letter of support supports a finding that the Q Center’s opposition was “clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction.”²¹⁰ The Requestor has identified no evidence that the Q Center’s opposition *was* spurious. Therefore, this assertion does not support reconsideration.

Concerning the second argument, although charges of racism and transphobia are certainly concerning, the Requestor does not assert that the charges have been confirmed. Further, in addition to the referenced article, the CPE Provider considered the Q Center’s own website, which states that “[t]he center provides a safe space to support and celebrate LGBTQ diversity, equity, visibility and community building.”²¹¹ Ultimately, there is not enough evidence for the BAMC to conclude that the CPE Provider should have determined that the Q Center’s opposition was submitted for an improper purpose and should have been deemed not relevant. Reconsideration is not warranted.

Finally, the Requestor bases its third argument on mere suspicion (noting that the Q Center is located in the same city as the standard applicant).²¹² Without any actual evidence or other support, the Requestor’s speculation cannot support reconsideration.

C. The CPE Process Does Not Double-Count and Has Not Substantively Changed Since the Publication of the Guidebook.

²¹⁰ Guidebook, Module 4, § 4.2.3, at Pgs. 4-18 and 4-19.

²¹¹ <http://www.pdxqcenter.org/about/>.

²¹² Dotgay presentation summary, 17 May 2016, at Pg. 8 (“[T]he Q Center is based in the city of Portland, which is the hometown of a standard applicant for the same string, and its opposition came from the influence of the applicant and therefore was filed to obstruct this community application.”).

Citing the CoE Report, the Requestor argues that the CPE Provider “appears to double count awareness and recognition of the community amongst its members twice.”²¹³ The CoE Report clarifies that the CPE Provider counts awareness and recognition once in sub-criterion 1-A-“Delineation,” and once in sub-criterion 1-B“-Extension.”²¹⁴ This practice is consistent with the Guidebook, which states that in developing the CPE criteria, the “utmost care has been taken to avoid any ‘double-counting’ – any negative aspect found in assessing an application for one *criterion* should only be counted there and should not affect the assessment for other *criteria*.”²¹⁵

Double counting did not occur here. There are only four criteria set out for CPE (Community Establishment; Nexus between Proposed String and Community; Registration Policies; and Community Endorsement). Double counting only occurs when a single negative aspect is used to determine scores in more than one of the four criteria. Thus, the Guidebook does *not* prohibit counting a negative aspect multiple times *within* one criterion. Accordingly, because sub-criterion 1-A and sub-criterion 1-B are both contained in criterion 1, “Community Establishment,” counting awareness and recognition once in each sub-criterion does not violate the Guidebook’s prohibition on double-counting.

The Requestor also cites the CoE Report for the assertion that the CPE Provider “changed its own process as it went along.”²¹⁶ But in the next sentence, the CoE Report states that this information “was confirmed to us by ICANN staff who said that the [CPE Provider] did work to improve their process over time, *but that this did not affect the process as described in the [Guidebook]*.”²¹⁷ Accordingly, the Requestor’s own source material indicates that any changes

²¹³ 15 Nov. 2016 letter from A. Ali to ICANN Board at 6, citing CoE Report, at Pg. 49.

²¹⁴ CoE Report, at Pg. 49.

²¹⁵ Guidebook, Module 4, § 4.2.3, at Pgs. 4-9, 4-10 (emphasis added).

²¹⁶ 15 Nov. 2016 letter from A. Ali to ICANN Board at 7, citing CoE Report, at Pg. 51.

²¹⁷ CoE Report, at Pg. 51 (emphasis added).

to the CPE Provider's process did not affect the CPE Provider's faithful application of the Guidebook process, and does not support reconsideration.

D. The CPE Provider Did Not Fail to Consider Material Information.

The Requestor believes that the CPE Provider failed to consider two pieces of material information available to it during the Second CPE: (1) the ICC Determination in *Afilias v. ILGA*, which concluded that the name of the string .GAY matched the Requestor's definition of the defined community, and, based in part on the Requestor's community application for .GAY, overruled ILGA's opposition to Afilias' application for the gTLD .LGBT; and (2) information in the Wikipedia entry for "LGBT Community" (which the CPE Provider consulted) indicating that the "LGBT community . . . [is] also referred to as the gay community" (which the CPE Provider did not mention in the Second CPE Report).²¹⁸

Initially, the BAMC notes that pursuant to the Bylaws in effect when the Requestor submitted Request 16-3, reconsideration was only available "of . . . :

- (a) One or more Staff actions or inactions that contradict established ICANN policy(ies);
- (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.²¹⁹

²¹⁸ Second Eskridge Op. ¶ 88, at Pg. 41, citing Scope 3 Report at Pg. 38, n.117.

²¹⁹ ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

Accordingly, reconsideration is *not* available for an action of ICANN staff or its agents that a requestor believes was taken without consideration of material information.²²⁰ Accordingly, this argument does not support reconsideration.

Moreover, as discussed above, ICANN org transmitted to the CPE Provider all materials related to Revised Request 14-44, including the ICC Determination, in advance of the Second CPE, and the CPE Provider was therefore aware of the ICC Determination when it issued the Second CPE Report.²²¹

Concerning the Wikipedia entry, as the Requestor notes, the CPE Provider *did* consider the entry in the course of its evaluation of the dotgay Application—that is why the URL appeared in the working papers. However, unlike printed reference materials, Wikipedia entries are not static.²²² Wikipedia explains that “[a]nyone with Internet access can write and make changes to Wikipedia articles,” and “Wikipedia is continually created and updated.”²²³ As of the BAMC’s review of Request 16-3, the Wikipedia entry for “LGBT community” cited in the Scope 3 Report and in the CPE Provider’s working papers,²²⁴ includes the language that the Requestor cites.²²⁵

But the fact that the entry includes this language *today* does not demonstrate that the subject language was necessarily present several years ago in 2015 when the CPE Provider

²²⁰ *See id.*

²²¹ *See* 21 October 2015 DIDP Response at Pg. 10 (<https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>); Request 14-44 at Pg. 13

(<https://www.icann.org/en/system/files/files/request-dotgay-redacted-29nov14-en.pdf>); Request, § 8.7, Pg. 14.

²²² *See* Scope 3 Report at Pg. 15 n.40 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

²²³ <https://en.wikipedia.org/wiki/Wikipedia:About>.

²²⁴ Scope 3 Report at Pg. 38, n.117 (citing https://en.wikipedia.org/wiki/LGBT_community)

(<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

²²⁵ *See* https://en.wikipedia.org/wiki/LGBT_community (visited 4 December 2018).

accessed the webpage, because the page could have been edited any time between when the CPE Provider consulted it and when the Requestor and the BAMC accessed it. For example, four of the first six citations on the page indicate that they were retrieved in 2016 or later—they would not have been part of the Wikipedia entry in 2015 when the CPE Provider accessed it.²²⁶ Accordingly, the BAMC cannot conclude that the language in the entry was available to the CPE Provider at the time it issued the Second CPE Report.²²⁷ Therefore, the Requestor’s argument does not support reconsideration.

The BAMC rejects the Requestor’s assertion that the fact that the CPE Provider and FTI did not reference the Wikipedia entry in their written reports proves that ICANN org, the CPE Provider or FTI intentionally discriminated against the gay community.²²⁸ As explained above, the referenced language may not have been part of the Wikipedia page when the CPE Provider consulted it. Further, as FTI explained in the Scope 3 Report, FTI did not consider the substance of *any* of the reference material in the CPE reports and working papers, except to determine whether URLs to websites were “active links” at the time that FTI conducted its investigation.²²⁹

E. The Second CPE Report is Consistent with ICANN Org’s Commitments & Core Values.

The Requestor makes several arguments concerning ICANN org’s Commitments and Core Values. At bottom, however, they amount to either: (1) general complaints about ICANN org’s oversight of the CPE Provider, which lack the specificity necessary for the BAMC to evaluate and respond to them; (2) concerns that were addressed by the CPE Process Review; and (3) concerns that, although couched as violations of the Commitments and Core Values, are in

²²⁶ See *id.*, “References.”

²²⁷ See ICANN Bylaws, 11 February 2016, Art. IV § 2.2(b).

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

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

²²⁹ Scope 3 Report, at Pg. 7 & 7 n.19 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

fact requests that, if granted, would *result* in violations of the Commitments or Core Values, such as requests for special (i.e., discriminatory) treatment.

1. Fairness and Transparency.

The Requestor invokes ICANN’s Commitments to Fairness and Transparency²³⁰ to challenge the outcome of the dotgay Application on a number of grounds. These Commitments do not support reconsideration.

First, the Requestor adopts the former Ombudsman’s belief that the BGC (now the BAMC) has not addressed the Requestor’s arguments concerning the CPE Provider’s inconsistent application of the CPE criteria to different applicants.²³¹ This was the purpose of Scope 2 of the CPE Process Review, and additionally the BAMC has considered this issue as it applies to the dotgay Application in this Request. FTI concluded in the Scope 2 Report—and the Board acknowledged the conclusion—that the CPE Provider applied the CPE criteria consistently across the CPE reports.²³² Accordingly, to the extent the Requestor is asking the BAMC to consider this issue, the BAMC has now done so and has determined that reconsideration is not warranted.

Second, the Requestor cites former ICANN Ombudsman Chris LaHatte’s “Dot Gay Report,” which discussed the Second CPE Report; in that report, the former Ombudsman asserts that “it has always been open to ICANN to reject a[CPE Report], especially when public interest considerations are involved,” and recommends that ICANN org “take a bold approach and demonstrate to the ICANN community . . . that ICANN has a commitment to principles of

²³⁰ ICANN Bylaws, 11 February 2016, Art. I § 1.2(a)(v); Art. III § 3.1.

²³¹ Ombudsman’s Report at 2.

²³² Scope 2 Report, at Pg. 3 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

international law” by rejecting the Second CPE Report.²³³ The Requestor (and the Ombudsman, whose opinion the Requestor adopts) provides no specificity as to this claim, and as stated it is too general for the BAMC to evaluate. Further, the Requestor does not use this assertion to claim that ICANN org or the CPE Provider violated the Guidebook, Articles of Incorporation, or Bylaws. Reconsideration is not warranted.

Third, the Requestor asserts that the CPE Provider did not “disclose any due diligence, including any research, it may have conducted when evaluating the dotgay Application nor did ICANN provide documents from the [the CPE Provider] in response to Dotgay’s DIDP Requests,”²³⁴ in violation of its commitment to transparency. The CPE Provider’s research materials have now been identified in the Scope 3 Report.

According to the Scope 3 Report, neither the Second CPE Report nor the CPE Provider’s working papers for the Second CPE Report provided a citation in support of the CPE Provider’s statement, in its analysis of sub-criterion 1-B-Extension, that the CPE Provider had “verified the applicant’s estimates of the defined community’s size and compared it with other estimates.”²³⁵ FTI found it reasonable to conclude that these references to verifying the Requestor’s estimates of the community’s size and comparing the estimate “with other estimates” in the Second CPE Report may have been the same research cited in sub-criterion 1-B-Extension in the working papers associated with the First CPE.²³⁶ The Requestor has not raised this issue in support of Request 16-3, but the BAMC has considered it in the course of its diligence on this Request. The BAMC acknowledges FTI’s findings and concludes that they do not support reconsideration

²³³ Ombudsman’s Report at 3;

²³⁴ Dotgay PowerPoint presentation at Pg. 12, 27.

²³⁵ Scope 3 Report, at Pg. 33-34 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

²³⁶ *Id.* at Pg. 34.

because the Requestor received four out of a possible four points for Criterion 1, Community Establishment, including two out of a possible two points for sub-criterion 1-B-Extension.²³⁷ Accordingly, even if the Second CPE Report used research cited in the working papers associated with the First CPE to confirm that the community was of considerable size,²³⁸ the Requestor was not materially adversely affected, as the Requestor received the maximum possible score under sub-criterion 1-B-Extension.²³⁹ Accordingly, reconsideration is not warranted on this ground.

As to the DIDP Request, the Requestor is incorrect that ICANN org provided no documents from the CPE Provider in response to DIDP Request No. 20151022-1. In response to that DIDP Request, ICANN org disclosed

the email notifications to the [CPE Provider] with instructions to begin the CPE of dotgay LLC's application for the .GAY TLD that was provided to the [the CPE Provider] in 2014 relating to dotgay's application and the email notification to begin re-evaluation in 2015 that was initiated pursuant to the Board Governance Committee's Determination on Reconsideration Request 14-44.²⁴⁰

The provided emails include correspondence *from* the CPE Provider to ICANN org.²⁴¹ Further, the DIDP response provided links to public documents from the CPE Provider, including the CPE results, the CPE Panel Process Document, and the EIU Contract and Statement of Work

²³⁷ Second CPE Report, at Pg. 1, 4.

²³⁸ Scope 3 Report, at Pg. 34 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

²³⁹ Guidelines, Module 4, § 4.2.3, at Pg. 4-11 (delineation); ICANN Bylaws, 11 February 2016, art. IV, §§ 2.1, 2.2 (any person *adversely affected* by Board or Staff action or inaction may bring a Request for Reconsideration).

²⁴⁰ DIDP Request No. 20151022-1, at Pg. 6 (<https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>).

²⁴¹ *See id.* at Pg. 15-19.

Information.²⁴² ICANN org’s response to the DIDP Request explained that other materials requested were subject to the DIDP’s Defined Conditions of Non-Disclosure.

Fourth, the Requestor complains that the CPE Provider “asked only one clarifying question . . . and thus denied Dotgay the opportunity to address [CPE Provider] misunderstandings and mistakes.”²⁴³ The CPE Provider was not required to ask clarifying questions under the Guidebook, nor was it required to preview its decision to the applicant to give the applicant an opportunity to rebut it. Accordingly, this argument does not support reconsideration.

Fifth, the Requestor argues that “ICANN’s refusal to disclose the names of the evaluators based on a confidentiality provision is not consistent with ICANN’s and the [CPE Provider’s] transparency obligations.”²⁴⁴ This argument does not support reconsideration.

As the Amazon EU S.A.R.L. Independent Review Process Panel noted in June of 2017:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.²⁴⁵

ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that

[S]ituations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand,

²⁴² ICANN Response to DIDP Request No. 20151022-1, at Pg. 4 (<https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>).

²⁴³ Dotgay PowerPoint presentation at Pg. 13.

²⁴⁴ Dotgay PowerPoint presentation at Pg. 13.

²⁴⁵ *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3 (<https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>).

and to determine, if necessary, an appropriate and defensible balance among competing values²⁴⁶

As the Board explained in its action on Request 18-2, a critical competing Core Value is ICANN org’s Core Value of operating with efficiency and excellence²⁴⁷ by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. The BAMC adopts and incorporates by reference the Board’s discussion of this issue in its action on Request 18-2.²⁴⁸

Finally, the Requestor has repeatedly argued that even if the Requestor did not technically satisfy CPE, ICANN org should have granted Community Priority in the name of fairness and fostering diversity.²⁴⁹ These arguments do not support reconsideration. ICANN org is committed to promoting the global public interest in the operational stability of the Internet, but accomplishing that goal requires that it establish and follow policies and procedures. The policies themselves increase the transparency of the decision-making process and prevent arbitrary and potentially discriminatory decisions. Suggesting that the CPE Provider (or ICANN

²⁴⁶ ICANN Bylaws, 11 February 2016, Art. I, Section 2.

²⁴⁷ *Id.*, at Art. 1, Section 1.2(b)(v)

²⁴⁸ <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.c>.

²⁴⁹ See 15 Nov. 2016 letter from A. Ali to ICANN Board at 9-10, quoting CoE Report, at Pg. 31, 69-70 (The CPE Provider’s “literal” and “restrictive interpretation, to make sure [it] did not go beyond [its] mandate,” “does not appear to fit the role of the [CPE Provider] nor ICANN’s mandate to promote the global public interest in the operational stability of the Internet.” “[T]he BGC has ‘a very narrow view of its own jurisdiction in considering reconsideration requests . . . it has always been open to ICANN to reject [a CPE Provider] recommendation, especially when public interest considerations are involved.”); ICC Determination, *ILGA v. Afilias*, Nov. 16, 2013, ¶ 23, at Pg. 8 (“ILGA has shown a likelihood of material detriment to the legitimate interests of the gay community if there is no gTLD designed to serve the gay community and to operate under appropriate principles that grant safety and financial rewards for the gay community.”); Ombudsman’s Report at Pg. 3 (“[E]ven if the [CPE Provider’s] evaluation did not achieve the appropriate number of points, . . . the [gay] community is real, does need protection and should be supported.”); 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 (“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.”); Badgett Opinion, at Pg. 1 (Without community oversight, “the platform would be highly attractive for organizations and government agencies that are hostile to equality for LGBTQIA people,” and “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.”).

org) circumvent those policies and procedures in cases that, in the Requestor's opinion, deserve special treatment, undermines rather than bolsters the operational stability of the Internet.

ICANN org is committed to diversity, operational stability, and non-discrimination, but it is not responsible for guaranteeing a gTLD designed to serve each and every interest group; it is committed to creating a process for evaluating and providing community priority, and it applied that here. The Requestor's opinion does not demonstrate violation of that process, and does not support reconsideration.

2. Respect for Human Rights and Non-Discrimination.

The Requestor argues that "ICANN has been plagued with allegations that its procedures and mechanisms for [Community-Based Applicants] that could prioritise their applications over standard applicants have an inherent bias against communities," and asserts that such prioritization violates the basic human right to non-discrimination.²⁵⁰

ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. . . . [T]he accountability mechanisms which are available to [Community-Based Applicants] who have gone through the CPE process are limited to looking only at the [CPE Provider's] processes insofar as they comply with the [Guidebook]. The lack of transparency around the way in which the [CPE Provider] works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.²⁵¹

Additionally, the Requestor believes that limiting appeal mechanisms to ICANN org accountability mechanisms "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."²⁵²

²⁵⁰ 15 Nov. 2016 letter from A. Ali to ICANN Board at 5, quoting CoE Report, at Pg. 26.

²⁵¹ *Id.* at 9-10, quoting CoE Report, at Pg. 64.

²⁵² *Id.* at 4-5, citing CoE Report, at Pg. 25.

As a preliminary matter, the Requestor (and all gTLD applicants) waived its right to bring claims concerning the New gTLD delegation process in a judicial forum when it submitted the dotgay Application.²⁵³ Therefore, even if the Requestor had a “right” to judicial dispute resolution (which it did not), it waived it and agreed not to bring suit concerning the dotgay Application when it submitted the dotgay Application.

Additionally, the Bylaws in effect when the Requestor filed Request 16-3 do not reference human rights.²⁵⁴ Nonetheless, ICANN org *did* take human rights considerations, including due process, into account when it designed the accountability mechanisms. ICANN org’s accountability mechanisms—that is, the Reconsideration Request and Independent Review processes—*do* consider the CPE Provider’s compliance with the Guidebook and with ICANN org’s Articles of Incorporation and Bylaws. They consider whether the CPE Provider complied with its processes (as the Requestor acknowledges), which requires the adjudicator (the BAMC, Board, or an Independent Panel) to consider the outcome in addition to the process. Accordingly, even if the accountability mechanisms are not identical in *form* to judicial review, they provide affected parties like the Requestor with avenues for redress of purported wrongs, just as governmental judicial systems do. This is not grounds for reconsideration.

F. The 2018 Resolutions Are Consistent With ICANN’s Mission, Commitments, Core Values and Established ICANN Policy(ies).

²⁵³ Guidebook, Module 6, § 6.6, at Pg. 6-4. The Requestor “agree[d] not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the [dotgay A]pplication, and irrevocably waive[d] any right to sue or proceed in court or any other judicial fora on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the [dotgay] Application.” *Id.* The CoE Report acknowledged this waiver and noted that the European Court of Human Rights “has decided that [the] right of access to court . . . can be waived in favour of arbitration via an agreement” when the arbitration serves as a “surrogate” for court adjudication. CoE Report, at Pg. 25-26.

²⁵⁴ See ICANN Bylaws, 11 February 2016.

The Requestor's criticisms of the conclusion of the CPE Process Review focus on the transparency, methodology, and scope of the CPE Process Review. None support reconsideration. The BAMC notes that it addressed many of the Requestor's concerns in its Recommendation on Request 18-4,²⁵⁵ which the Board adopted on 18 July 2018.²⁵⁶ The rationales set forth by the BAMC, and the Board in its determination of Request 18-4, are incorporated herein by reference.

G. The Requestor's Procedural Demands are Outside the Scope of Request 16-3.

The Requestor's rejection of the BAMC's invitations to submit additional materials and to make a telephonic oral presentation, and its demands that ICANN org disclose all documents related to the CPE Process Reviews are not required by the 2018 Resolutions and the Transition Process.²⁵⁷ First, the 2018 Resolutions did not direct ICANN org to disclose all the documents related that CPE Process Review requested by the Requestor in DIDP Request 20180115-1. The Board resolved that issue when it denied the Requestor's reconsideration request challenging ICANN org's response to DIDP Request 20180115-1.²⁵⁸ Rather, the 2018 Resolutions directed the BAMC to move forward with the consideration of the pending Reconsideration Request on CPE in accordance with the Transition Process.²⁵⁹

Second, the Transition Process document was developed to reduce the impact on any requestors of pending Reconsideration Requests that were submitted prior to the transfer of the

²⁵⁵ BAMC Recommendation on Request 18-4 (<https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-bamc-recommendation-14jun18-en.pdf>).

²⁵⁶ Board Action on Request 18-4 (<https://www.icann.org/resources/pages/reconsideration-18-4-dotgay-request-2018-04-17-en>).

²⁵⁷ Transition Process (<https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>).

²⁵⁸ Board Action on Request 18-2 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.c>).

²⁵⁹ 2018 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>).

Reconsideration responsibilities to the BAMC.²⁶⁰ In that regard, the Transition Process ensures the complete transfer of documentation that was submitted to the BGC to the BAMC, which has been completed. Further, the Transition Process document states that the BAMC should allow all requestors with pending Reconsideration Requests relating to the CPE Process to make an oral presentation to the BAMC, including those requestors who previously presented to the BGC, such as the Requestor, which the BAMC has done.²⁶¹ There is nothing in the Bylaws or Articles of Incorporation requiring the Board or the BAMC to do more.

For the same reasons stated above, the Requestor’s demand that the BAMC “must” provide the Requestor with a list of specific concerns about Request 16-3 following the Requestor’s supplemental submission and to schedule an in person presentation to address the (once the above described conditions are met) is inconsistent with the 2018 Resolutions and the Transition Process.²⁶² Consistent with the Bylaws, which permit the BAMC to “request additional information or clarifications from the requestor,”²⁶³ the BAMC *has* offered the Requestor the opportunity to make a telephonic presentation to it concerning Request 16-3 and the CPE Process Review, during which the BAMC could have asked questions or raised concerns, if it had any.²⁶⁴ The Requestor “reject[ed]” the BAMC’s offer.²⁶⁵

²⁶⁰ Transition Process, Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>).

²⁶¹ *See id.*

²⁶² 2018 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>); Transition Process (<https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>)

²⁶³ ICANN Bylaws, 11 February 2016, Art. IV § 2.12.

²⁶⁴ 19 March 2018 email from ICANN organization to the Requestor (<https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-bamc-recommendation-attachment-1-14jun18-en.pdf>).

²⁶⁵ 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>).

With respect to the Requestor's extraordinary demand that ICANN org bear the Requestor's costs and expenses for reviewing any documents ICANN org produces and preparing supplemental submissions to the BAMC concerning those documents, the BAMC rejects this demand for the same reasons discussed above. Further, such an unprecedented request is beyond the scope of Reconsideration Request process. While the Bylaws provides that ICANN org shall bear "the normal administrative costs of the reconsideration process,"²⁶⁶ the Requestor's costs for reviewing documents and preparing a submission to the BAMC is not a normal administrative cost.

VII. Recommendation.

The BAMC has considered the merits of Request 16-3 and the additional arguments raised in the materials the Requestor has submitted to the Board since it submitted Request 16-3, and, based on the foregoing, concludes that ICANN org (and the CPE Provider) acted consistent with the Guidebook and did not violate ICANN's Mission, Commitments and Core Values when the CPE Provider determined that the dotgay Application did not satisfy the requirements for Community Priority and ICANN org accepted the Second CPE Report. Further, the BAMC concludes that the BGC's determination on Request 15-21 was based on complete and accurate information, and therefore should not be reconsidered. Accordingly, the BAMC recommends that the Board deny Request 16-3.

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 goal, the BGC would have to have acted by 18 March 2016. However, the Requestor sought, was invited

²⁶⁶ ICANN Bylaws, 11 February 2016, Art. IV § 2.4.

to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.²⁶⁷ The timing of the Presentation delayed the BGC's consideration of Request 16-3. Subsequently, Request 16-3 was placed on hold pending completion of the CPE Process Review. The Requestor was then provided an opportunity to supplement its arguments in light of the CPE Process Review results, which the Requestor declined. Accordingly, the first opportunity that the BAMC has to make a recommendation on Request 16-3 is 25 January 2019.

²⁶⁷ See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.