

**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.

The issues relevant to the BAMC's Recommendation concerning Request 16-3 are numerous and lengthy. The Requestor and its supporters have made at least 15 submissions in support of Request 16-3 in the more than two years since the Request was submitted. Additionally, in that time ICANN organization undertook a review of certain aspects of the CPE process (CPE Process Review) during which Request 16-3 was placed on hold, and the Requestor submitted several additional Reconsideration and Document Requests relating to the Second CPE and the CPE Process Review. The BAMC has considered all the arguments and materials submitted to date relating to Request 16-3 and Attachment 1 to this Recommendation sets forth the BAMC's comprehensive evaluation of each of the arguments raised in the more than 15 submissions to date. To assist with the BAMC's discussions and deliberations, this

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>).

document addresses, at a high level, the relevant issues and findings, but leaves the detailed rationale to Attachment 1, which is incorporated herein by reference.

I. Brief Factual Background.

The Requestor submitted a community-based application for the .GAY gTLD (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. Accordingly, the BGC directed the CPE Provider to set aside the First CPE and appoint new CPE Evaluators to conduct a second CPE of the Requestor's Application (Second CPE).⁵

The Second CPE 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 only 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 Application.⁸ The Requestor made an oral presentation to the BGC on 15 May 2016 regarding Request 16-3, which not only focused on the issue raised in Request 16-3 but also re-argued the issues raised in

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>).

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.

Request 15-21 regarding the Second CPE Report.⁹ On 26 June 2016, the BGC recommended that the Board deny Request 16-3, concluding that the Requestor's claim did not support reconsideration.¹⁰

While Request 16-3 was pending, the ICANN Board and BGC directed ICANN org to undertake a review of certain aspects of the CPE process (CPE Process Review). 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.¹¹ The BGC determined that the pending Reconsideration Requests relating to CPEs, including Request 16-3, would be placed on hold until the CPE Process Review was completed.¹²

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 (CPE Process Review Reports).¹³ With respect to Scope 1, FTI concluded that "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."¹⁴

⁹ See <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

¹⁰ BGC Recommendation on Request 16-3 (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>).

¹¹ <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>.

¹² <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

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

¹⁴ 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>).

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.”¹⁵

For Scope 3, 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 conducted by the CPE Provider. Two of the eight CPE reports included citations for referenced research in the reports themselves. For the five of 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 research that was referenced in the Second CPE Report relating to the size of the gay community for sub-criterion 1-B-Extension.¹⁶ FTI did not find the citation to this research in the Second CPE Report or in the working papers underlying the Second CPE. However, FTI did find citation to the research relating to the size of the gay community for sub-criterion 1-B-Extension conducted by the First CPE Panel in the working papers underlying the First CPE Report.¹⁷ FTI observed that based on the similarity between the two evaluations on this issue, FTI found it reasonable to conclude that the research referenced without citation in the Second CPE may have been the same research that was cited in the working papers associated with the First CPE.¹⁸

¹⁵ 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>).

¹⁶ Scope 3 Report, at Pg. 36 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

¹⁷ *Id.* at Pg. 4.

¹⁸ *Id.* at Pg. 36.

On 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11 (the 2018 Resolutions), 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.¹⁹

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.²⁰ The Requestor rejected both invitations from the BAMC.²¹

In issuing this recommendation, the BAMC re-evaluated the claims raised in Request 16-3 and subsequent submissions. 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 when the BGC 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 in the Second CPE that materially or adversely affected the Requestor. Accordingly, the BAMC recommends that the Board deny Request 16-3.

II. Relief Requested

¹⁹ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

²⁰ Attachment 1 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>).

²¹ *Id.*

The only claim raised in Request 16-3 is the Requestor’s assertion that the BGC should have determined in Request 15-21 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.”²² However, for the reasons discussed in Attachment 1, the BAMC will consider the claims asserted in the Requestor’s submissions made subsequent to the submission of Request 16-3 challenging the Second CPE Report in the course of considering this reconsideration request, each of which is discussed below and in Attachment 1.

Among other things set out in full in Attachment 1, the Requestor asks the Board to set aside the BGC’s determination on Request 15-21 and the Second CPE Report, direct a third party other than the CPE Provider to perform a new CPE of the Application (New CPE) at ICANN org’s expense and allow the Requestor to respond to the New CPE before ICANN org decides whether to accept it; or alternatively to reconsider the Second CPE Report and determine that the Application satisfies the requirements for Community Priority.²³

III. 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 Bylaws²⁴ 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:

²² BGC Recommendation on Request 16-3 (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>).

²³ Request 16-3, § 9, at Pg. 8-9; Request 15-21, § 9, at Pg. 24-25.

²⁴ 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). Although the Bylaws have since changed (*see* the Bylaws archive, available at <https://www.icann.org/resources/pages/governance/bylaws-archive-en>, and 22 July 2017 Bylaws, available at <https://www.icann.org/resources/pages/governance/bylaws-en>), the operative version of the Bylaws is the one in effect when Request 16-3 was submitted.

- (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.²⁵

Where, as here, the reconsideration request challenges both Board and staff action or inaction, the operative version of the Bylaws direct the BAMC to review the request and provide a recommendation to the Board.²⁶ 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.²⁷

B. The CPE Criteria and Procedures.

As discussed in further detail in Attachment 1 to this Recommendation, CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.²⁸ The standards and CPE process are defined in Module 4.2 of the Guidebook. Community-based applications that undergo 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 4: Community Endorsement.²⁹ To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points. An

²⁵ ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

²⁶ See ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

²⁷ *Id.*

²⁸ See Guidebook, Module 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>.

²⁹ *Id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

application that prevails in CPE “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”³⁰

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.”³¹

The Requestor challenges the CPE Provider’s application of Criterion 2: Nexus between Proposed String and Community and Criterion 4: Community Endorsement.

IV. 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 opposition³² to a member of the CPE Provider’s core team rather than one of the two “evaluators” assigned to conduct the Second CPE.³³

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.”³⁴

³⁰ *Id.* at Module 4.2.3, Pg. 4-9.

³¹ Guidebook, Module 4, § 4.2.3, at Pg. 4-9.

³² 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 (<https://newgtlds.icann.org/en/applicants/cpe>). The letters of support and opposition are considered under Criterion 4, Community Endorsement. Guidebook Module 4.2.3, at Pgs. 4-17 – 4-19.

³³ Request 16-3 § 8.4, Pg. 5-6.

³⁴ Dotgay PowerPoint presentation at Pg. 13.

The BGC addressed this argument in its Recommendation on Request 16-3,³⁵ which is incorporated herein by reference. In short, the BGC concluded that the fact that the CPE Provider’s administrative protocol was conducted by a member of the CPE Provider’s core team rather than the evaluators did not materially or adversely affect the Requestor.³⁶ As discussed in Attachment 1, which is incorporated herein by reference, 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. The Requestor 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 such, the Requestor fails to meet the standards of a reconsideration request.³⁷ Accordingly, the BAMC adopts the reasoning set forth in the BGC’s Recommendation on Request 16-3 and in Section VI.A of Attachment 1 and concludes that reconsideration is not warranted based on the CPE Provider’s

³⁵ On 26 June 2016, the BGC issued a Recommendation on Request 16-3, recommending that the Board deny the Request because the CPE Provider’s verification process did not violate applicable policies and procedures, and did not materially or adversely affect the Requestor. (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>). Before the Board could consider the BGC’s Recommendation on Request 16-3, the Requestor asked the Board to consider (in connection with Request 16-3): (1) former ICANN Ombudsman Chris LaHatte’s investigative report concerning Case No. 16-00177 regarding the Application; (2) the “Expert Opinion of Prof. William N. Eskridge, Jr., in Support of dotgay’s Community Priority Application”; and (3) the “Expert Opinion of Prof. M.V. Lee Badgett, in Support of dotgay’s Community Priority Application No: 1-1713-23699.” (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-25aug16-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>; <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>). While the Board was considering the Requestor’s additional materials, the BGC placed Request 16-3 on hold pending completion of the CPE Process Review. (<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.)

³⁶ See BGC Recommendation on Request 16-3, at Pgs. 11-14, (<https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>). See also ICANN Bylaws, 11 February 2016, Art. IV § 2.2.

³⁷ ICANN Bylaws, 11 February 2016, Art. IV § 2.2 (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 ICANN org Staff or Board action or inaction).

verification process.³⁸ Request 16-3 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,³⁹ the Requestor challenged the CPE Provider’s evaluation of Criterion 2: Nexus between Proposed String and Community and Criterion 4: Community Endorsement in 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.⁴⁰ The BAMC has also independently considered these claims, as they were raised in the Requestor’s subsequent submissions in support of Request 16-3, and finds that the Requestor’s claims do not support reconsideration. For the reasons set forth in Section VI.B of Attachment 1, which is incorporated herein by reference, the Requestor’s arguments amount to disagreement with the CPE Provider’s conclusions; the Requestor does not identify any instances in which the CPE Provider’s application of the criteria was inconsistent with the Applicant Guidebook or contradicted an established policy or procedure.

1. The CPE Provider’s Application of Criterion 2 was Consistent with

³⁸ See BGC Recommendation on Request 16-3, at Pg. 11-14, available at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-bgc-recommendation-26jun16-en.pdf>.

³⁹ See Appendix 1 to this Recommendation.

⁴⁰ <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.

Applicable Policies and Procedures.

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.”⁴¹ It is measured by two sub-criterion: Sub-criterion 2-A-Nexus; and Sub-criterion 2-B-Uniqueness.⁴² 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.

The Requestor challenges the CPE Provider’s analysis of sub-criterion 2-A-Nexus, for which it received zero of three possible points.⁴³ 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.”⁴⁴ For a score of two, the applied-for string should “closely describe the community or the community members, without overreaching substantially beyond the community.”⁴⁵ Zero points are awarded if the string “does not fulfill the requirements for a score of 2.”⁴⁶ It is not possible to obtain a score of one for this sub-criterion. Here, 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.⁴⁷ The Requestor does not challenge sub-criterion 2-B-Uniqueness. None of the Requestor’s arguments support reconsideration.

⁴¹ See Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁴² *Id.* at Pgs. 4-12-4-13.

⁴³ See Dotgay Second CPE Report, Pgs. 1, 5-8, available at <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.* at Pg. 4-12.

⁴⁶ *Id.*

⁴⁷ *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.

- 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).

As discussed in detail in Section VI.B.1 of Attachment 1, which is incorporated herein by reference, the CPE Provider determined that the applied-for string 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.”⁴⁸

While the Requestor disagrees with the CPE Provider’s conclusions, the BAMC finds that the Requestor has not demonstrated that the CPE Provider failed to follow the CPE procedures or guidelines. The Requestor’s disagreement with the CPE Provider’s substantive conclusions is not grounds for reconsideration. Contrary to the Requestor’s claims, as discussed further in Attachment 1, the Second CPE Report demonstrates that the CPE Provider applied sub-criterion 2-A consistently with the Guidebook. 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.”⁴⁹

- 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 identified in the Application, without Overreaching Substantially Beyond the Community (Two Points Test of Sub-criterion 2-A).

The CPE Provider determined that the applied-for string failed the two points test of sub-criterion 2-A because the term “gay” is not used to identify certain groups within the community defined in the Application such as transgender, intersex, and/or ally individuals or

⁴⁸ Second CPE Report., Pg. 5.

⁴⁹ 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>).

communities.”⁵⁰ 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.”⁵¹

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.”⁵² “Identify” means that “the applied-for string *closely* describes the community or the community members, without over-reaching substantially beyond the community.”⁵³

The CPE Provider concluded that the applied-for string, “GAY” only identifies part of the Application’s defined community.⁵⁴ Therefore, under the Guidebook’s definition of “identify,” the applied-for string does not “closely describe” the community as it is defined in the Application. Because the CPE Provider determined that applied-for string did not closely describe the community as it is defined in the Application, it therefore could not meet the requirement for “identify.” Therefore, the second component of the “identify” definition, i.e., whether the string “over-reach[es] substantially beyond the community,” was not implicated and the CPE Provider was not required to apply the “over-reach” test to the defined community. The Requestor asserts that the Guidebook is *only* concerned with whether the applied-for string is “much broader than the community defined in the application” and not whether the string is narrower than the community, so the CPE Provider improperly created an “under-reach” test

⁵⁰ Second CPE Report, Pg. 7.

⁵¹ *Id.* at Pg. 7.

⁵² Guidebook, Module 4.2.3, at Pg. 4-12.

⁵³ *Id.* at Pg. 4-13.

⁵⁴ Second CPE Report, at Pg. 5.

(inconsistent with the Guidebook) when it determined that the applied-for string did not “closely describe” the community because the string only identifies part of the Application’s defined community.⁵⁵ The Guidebook’s definition of “identify” includes two constraints on the relationship between the applied-for string and the community defined in the application; the applied-for string must: (1) “closely describe the community or the community members,” (2) “without over-reaching substantially beyond the community.”⁵⁶ The Requestor’s argument conflates the “closely describe” requirement with the requirement that the applied-for string not substantially over-reach the community defined in the Application.⁵⁷ As further explained in Section VI.B.1 of Attachment 1, 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 do not support reconsideration.

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

The Requestor argues that the CPE Provider improperly discriminated against it, in violation of 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, but it *did* apply that requirement to dotgay’s Application for sub-criterion 2-A.⁵⁸ As discussed in Section VI.B.1 of Attachment 1 and incorporated herein by reference, the CPE Provider’s determinations in the identified applications were the result of different circumstances from those in dotgay’s Application, and do not support reconsideration.

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

⁵⁵ Second Eskridge Op. ¶ 48, Pg. 22; *id.* ¶ 45, Pg. 20.

⁵⁶ Guidebook, Module 4, § 4.2.3, at Pg. 4-13.

⁵⁷ See Attachment 1, Section VI.B.1.b.

⁵⁸ Dotgay presentation summary, 17 May 2016, at Pg. 4; dotgay PowerPoint presentation at Pg. 7.

Criterion 4 evaluates community support for and/or opposition to an application. It is measured by two sub-criterion: Sub-criterion 4-A-Support and Sub-criterion 4-B-Opposition. 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 in Section VI.B.2 of Attachment 1 and incorporated herein by reference, 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.

C. 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 community objection determination from the International Chamber of Commerce 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).⁵⁹

Initially, the BAMC notes that pursuant to the Bylaws in effect when the Requestor submitted Request 16-3, reconsideration is not available for an action of ICANN staff or its agents that a requestor believes was taken without consideration of material information.⁶⁰ Accordingly, this argument does not support reconsideration.

⁵⁹ Second Eskridge Op. ¶ 88, at Pg. 41, citing Scope 3 Report at Pg. 38, n.117.

⁶⁰ *See id.*

Moreover, 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.⁶¹ Concerning the Wikipedia entry, 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. For the additional reasons discussed in Section VI.D of Attachment 1 and incorporated herein by reference, the BAMC finds that this argument does not support reconsideration.

D. 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, which have already been addressed by the BAMC and the Board in Reconsideration Request 18-4;⁶² and (3) concerns that, although couched as violations of the Commitments and Core Values, are in fact requests that, if granted, would *result* in violations of the Commitments or Core Values, such as requests for special (i.e., discriminatory) treatment. Accordingly, and as discussed further in Section VI.E of Attachment 1 and incorporated herein by reference, none of the Requestor’s arguments in this regard warrant reconsideration.

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

⁶¹ 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.

⁶² See BAMC Recommendation on Request 18-4 (<https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-bamc-recommendation-14jun18-en.pdf>). See also Board Action on Request 18-4 (<https://www.icann.org/resources/pages/reconsideration-18-4-dotgay-request-2018-04-17-en>).

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 Request 18-4,⁶³ which the Board adopted on 18 July 2018.⁶⁴ The rationales set forth by the BAMC and the Board in its determination of Request 18-4 are incorporated herein by reference.

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

The Requestor's demand that ICANN org disclose all documents related to the CPE Process Review is not required by the 2018 Resolutions or otherwise.⁶⁵ Nor is ICANN org obligated to 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 them (once the above described conditions are met). The additional reasoning in Section VI.G of Attachment 1 is incorporated herein by reference.

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, as discussed in Section VI.G of Attachment 1 and incorporated herein by reference.

G. The Scope 3 CPE Process Review Report Does Not Support Reconsideration.

As discussed in more detail in Section VI.E.1, the Scope 3 Report indicated that neither the Second CPE Report nor the CPE Provider's working papers for the Second CPE Report

⁶³ BAMC Recommendation on Request 18-4.

⁶⁴ Board Action on Request 18-4.

⁶⁵ Transition Process (<https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>).

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.”⁶⁶ FTI found it reasonable to conclude that these statements may have referenced research cited in sub-criterion 1-B-Extension in the working papers associated with the First CPE.⁶⁷

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 because the Requestor received four out of four points under sub-criterion 1-B-Extension.⁶⁸ 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,⁶⁹ the Requestor was not materially adversely affected because the Requestor received the maximum possible score under sub-criterion 1-B.⁷⁰

V. 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

⁶⁶ 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>).

⁶⁷ *Id.* at Pg. 34.

⁶⁸ Second CPE Report, at Pg. 1, 4.

⁶⁹ 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>).

⁷⁰ Guidelines, Module 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).

concludes that the BGC's determination on Request 15-21 was based on complete and accurate information, and therefore should not be reconsidered. Accordingly, for the reasons set forth in Attachment 1 and incorporated herein, 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 to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.⁷¹ 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.

⁷¹ See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.