

**RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-3
26 JUNE 2016**

The Requester, Dotgay LLC, seeks reconsideration of the Board Governance Committee's (BGC's) denial of the Requester's previous reconsideration request, Request 15-21.

I. Brief Summary.

The Requester submitted a community application for .GAY (Application). Three other applicants submitted standard (meaning, not community-based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Application was community-based, the Requester was invited to and did participate in CPE in October 2014 (First CPE). The Requester's Application did not prevail in the First CPE. The Requester filed a reconsideration request (Request 14-44) with respect to the CPE panel's report finding that the Requester had not prevailed in the First CPE (First CPE Report). The BGC granted reconsideration on Request 14-44 on the grounds that the Economic Intelligence Unit (EIU), the entity that administers the CPE process, had inadvertently failed to verify 54 letters of support for the Application. At the BGC's direction, the EIU then conducted a new CPE of the Application (Second CPE). The Application did not prevail in the Second CPE (Second CPE Report). As a result, the Application remains in contention with the other applications for .GAY. Just like all other contention sets, the .GAY contention set can be resolved by ICANN's last resort auction or by some other arrangement amongst the involved applicants.

The Requester sought reconsideration of the Second CPE Report and ICANN's acceptance of it (Request 15-21). After reviewing all of the relevant material, the BGC denied Request 15-21 (Determination on Request 15-21). The Requester has now submitted Reconsideration Request 16-3 (Request 16-3), challenging the Determination on Request 15-21

contending that the BGC erroneously determined that the EIU had adhered to all applicable policies and procedures in conducting the Second CPE. Request 16-3 is premised upon one, and only one, basis: the Requester argues that the EIU improperly permitted someone other than one of the “evaluators” to send verification emails to the authors of letters of support and opposition to the Application, which the Requester contends contravenes applicable policies and procedures.

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3. In response, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support. The Presentation, however, did not relate to the sole issue raised in Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application. Rather, the Presentation focused on the merits of the Second CPE Report, which is neither the subject of Request 16-3 nor a proper basis for reconsideration.

The Requester’s claims do not support reconsideration. The Requester does not identify any misapplication of policy or procedure by the EIU 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. Instead, the Requester relies on a purely administrative step of the verification process that the EIU took in the course of administering the Second CPE. More specifically, the EIU delegated

the physical sending of verification emails for letters of support/opposition to a member of the EIU's core team to serve as a Verification Coordinator rather than one of the evaluators due to the large number of letters of support/opposition. That protocol did not affect the Requester, materially or adversely, as is required to support reconsideration. To the contrary, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation consistent with the Applicant Guidebook (Guidebook). Additionally, the substantive evaluation of the letters was performed by the evaluators in accordance with Module 4.2.3 of the Guidebook. As such, the BGC recommends that Request 16-3 be denied.

II. Facts.

A. Background Facts.

The Requester submitted a community application for .GAY.¹

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.² Those applications were placed into a contention set with the Requester's Application.

On 23 February 2014, the Requester's Application was invited to participate in CPE. CPE is a method of resolving string contention, described in Module 4.2 of the Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY (First CPE), and its Application was forwarded to the EIU, the CPE administrator, for evaluation.³

¹ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

² See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

³ See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

On 6 October 2014, the CPE panel (First CPE Panel) issued its report on the Requester's Application (First CPE Report).⁴ The First CPE Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in the First CPE.⁵

On 22 October 2014, the Requester submitted Reconsideration Request 14-44 (Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of that Report.⁶

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP (First DIDP Request), seeking documents related to the First CPE Report.⁷ On 31 October 2014, ICANN responded to the First DIDP Request (First DIDP Response).⁸

On 29 November 2014, the Requester submitted a revised Reconsideration Request 14-44 (Revised Request 14-44), seeking reconsideration of the First CPE Report and ICANN's acceptance of it, and of the First DIDP Response.⁹

On 20 January 2015, the BGC determined that reconsideration was warranted with respect to Revised Request 14-44 (Determination on Request 14-44), for the sole reason that the First CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicted an established procedure.¹⁰ The BGC directed that "the CPE Panel's Report shall be set aside, and that new [CPE] evaluators will be appointed to conduct a new CPE

⁴ *Id.*

⁵ See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>.

⁶ <https://www.icann.org/resources/pages/14-44-2014-10-22-en>.

⁷ <https://www.icann.org/resources/pages/20141022-02-2014-10-31-en>.

⁸ See <https://www.icann.org/en/system/files/files/lieben-response-31oct14-en.pdf>.

⁹ See <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

¹⁰ Determination of BGC, Reconsideration Request 14-44, *available at* <https://www.icann.org/en/system/files/files/determination-dotgay-20jan15-en.pdf> at Pg. 31.

for the Application.”¹¹ In addition to directing that new evaluators conduct the second CPE of the Application, the BGC also recommended that the EIU consider including new members of the core team to assess the evaluation results.¹²

In furtherance of the BGC’s Determination on Request 14-44, the EIU administered the Second CPE, appointing two new evaluators as directed by the BGC, and one new core team member as the BGC suggested.

On 8 October 2015, the Second CPE Panel issued the Second CPE Report, finding that the Application did not prevail in the Second CPE.¹³

On 22 October 2015, the Requester submitted Reconsideration Request 15-21, seeking reconsideration of the Second CPE Report and ICANN’s acceptance of it.¹⁴

Also on 22 October 2015, the Requester submitted a request pursuant to ICANN’s DIDP (Second DIDP Request), seeking documents related to the Second CPE Report.¹⁵ On 21 November 2015, ICANN responded to the DIDP Request (Second DIDP Response).¹⁶

On 4 December 2015, the Requester submitted a revised Reconsideration Request 15-21 (Request 15-21), which sought reconsideration of the Second CPE Report and ICANN’s acceptance of it, and of the Second DIDP Response.¹⁷

On 1 February 2016, the BGC issued the Determination on Request 15-21, finding that Request 15-21 should be denied.¹⁸

¹¹ *Id.*

¹² *Id.*

¹³ See <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

¹⁴ <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

¹⁵ See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁶ See <https://www.icann.org/en/system/files/files/didp-20151022-1-lieben-response-supporting-docs-21nov15-en.pdf>.

¹⁷ See generally <https://www.icann.org/resources/pages/reconsideration-15-21-dotgay-2015-10-26-en>.

The Requester submitted Request 16-3 on 17 February 2016.¹⁹ Request 16-3 challenges the Determination on Request 15-21 on the sole basis that the person at the EIU who sent verification emails to the authors of letters of support and opposition to the Application was not a CPE “evaluator.”²⁰

The Requester sought an opportunity to make a presentation to the BGC regarding Request 16-3.²¹ In response, Pursuant to Article IV, Section 2.12 of ICANN’s Bylaws, the BGC invited the Requester to make a presentation at the 15 May 2016 BGC meeting, and indicated that any such presentation should be limited to providing additional information that is relevant to the evaluation of Request 16-3 and not already covered in the submitted written materials. The Requester made its presentation to the BGC on 15 May 2016 (Presentation), and submitted a written summary of the arguments raised in its Presentation, along with other background materials and letters of support.²² The Requester, however, did not address the sole issue that is the basis for Request 16-3 as to whether reconsideration of the Determination on Request 15-21 is warranted because someone at the EIU other than one of the “evaluators” sent verification emails to the authors of letters of support and opposition to the Application.²³ Instead, the

(continued...)

¹⁸ Determination on Request 15-21, *available at* <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

¹⁹ *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>. ICANN has also reviewed and considered several letters sent in support of Request 16-3, including one from Transgender Equality Uganda and one from Trans-Fuzja. (*See* <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.) In addition, ICANN also reviewed and considered two letters from CenterLink that the Requester submitted along with its Presentation materials, indicating CenterLink’s support of the Requester’s Application. (*See id.*)

²⁰ *See generally* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

²¹ Request, § 8.7, Pg. 8.

²² *See* <https://www.icann.org/resources/board-material/agenda-oec-2016-05-15-en>.

²³ *See* <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

Presentation addressed the merits of the Second CPE Report, which is not the subject of Request 16-3 and is not a proper basis for reconsideration.²⁴ ²⁵

B. Relief Requested.

The Requester asks that ICANN:

1. “[A]cknowledge receipt of this Reconsideration Request;”
2. “[D]etermine that the [Determination on Request 15-21] is to be set aside;”
3. “[I]nvite Requester to participate to a hearing in order to clarify its arguments set out herein and in the previous two Reconsideration Requests submitted by Requester;”
and
4. “[D]etermine that, given the circumstances, any and all of its requests set out in § 9 of Requester’s Second Reconsideration Request be awarded, which are incorporated herein by reference.”²⁶

III. The Relevant Standards For Reconsideration Requests And CPE.

A. Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a staff or Board action or inaction in accordance with specified criteria, which include a requirement that the requester has been “materially [and] adversely affected” by the challenged action or inaction.²⁷ The Requester here

²⁴ *Id.*

²⁵ The BGC also notes that it received and considered the 24 June 2016 letter from dotgay LLC, which can be found at <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dotgay-to-icann-bgc-24jun16-en.pdf>.

²⁶ Request, § 9, Pgs. 8-9.

²⁷ Bylaws, Art. IV, § 2. Article IV, §§ 2.1-2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been materially and adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or

challenges both staff and Board action.²⁸

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it is asserted that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.²⁹ In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the EIU violated any established policy or procedure.

A Board action may be subject to reconsideration where it was undertaken “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, where it was “taken as a result of the Board’s reliance on false or inaccurate material information.”³⁰ Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

B. Community Priority Evaluation.

(continued...)

(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.

²⁸ While the Requester indicated that it challenged staff action (see Request, § 2, Pg. 1), the crux of Reconsideration Request 16-3 is a challenge to the BGC’s Determination on Request 15-21, and as such, challenges both Board and staff action.

²⁹ See BGC Recommendation on Reconsideration Request 13-5, *available at*

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13- en.doc>.

³⁰ Bylaws, Art. IV, § 2.

The standards governing CPE are set forth in Module 4.2 of the Guidebook. The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook's CPE provisions³¹ and summarizing those provisions.³² In addition, the EIU has published supplementary guidelines (CPE Guidelines) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.³³

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.³⁴ CPE is performed by an independent panel composed of two evaluators who are appointed by the EIU.³⁵ A CPE panel's role is to determine whether the community-based application fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

IV. Analysis And Rationale.

The Requester seeks reconsideration of the Determination on Request 15-21, arguing that the BGC should have "confirm[ed]" that the EIU did not follow applicable policies and

³¹ The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, *available at* <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

³² CPE Panel Process Document, *available at* <https://newgtlds.icann.org/en/applicants/cpe>.

³³ CPE Guidelines, *available at* <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

³⁴ Guidebook, § 4.2.

³⁵ *Id.* at § 4.2.2.

procedures in conducting the Second CPE.³⁶ Specifically, the Requester claims that the EIU violated the CPE Panel Process Document because the person who sent verification emails to the authors of letters of support and opposition to the Application was a member of the core team (serving as a Verification Coordinator) and was not one of the two “evaluators” assigned to conduct the CPE.³⁷ However, the Requester fails to identify any conduct by the EIU that contradicts an established policy or procedure in a manner that materially and adversely affected the Requester.³⁸ The process of verifying letters is an administrative task.³⁹ Regardless of which person physically sent the verification emails, the results of the verification were communicated to both of the evaluators and the entire core team in order to permit a full and complete evaluation in accordance with Module 4.2.3 of the Guidebook, which included an evaluator’s substantive evaluation of the letters in compliance with the CPE Panel Process Document.

Moreover, the Requester does not identify any material information the BGC did not consider in reaching the Determination on Request 15-21, or any reliance upon false or inaccurate information.⁴⁰ The act of sending a verification email is not material, so long as the evaluators performed their task of evaluating the letters of support and opposition. There is no claim that the evaluators did not conduct the actual evaluation. As such, the Determination on Request 15-21 properly confirmed that reconsideration was not warranted based on the EIU’s decision to delegate the sending of verification emails to a Verification Coordinator, and thus the Determination on Request 15-21 does not itself warrant reconsideration.⁴¹

³⁶ Request, § 8.6, Pg. 7.

³⁷ *Id.*, § 8.4, Pgs. 5-6.

³⁸ See Bylaws, Art. IV, §§ 2.1-2.

³⁹ See <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 2.

⁴⁰ See Bylaws, Art. IV, § 2.

⁴¹ While Request 16-3 generally is styled as a request for the BGC to reconsider the Determination on Request 15-21, the Requester also argues that the “EIU ha[s] not respected the policies and processes” governing CPE. Request, § 8.6, Pg. 7.

A. The EIU’s Letter Verification Process Did Not Violate Applicable Policies And Procedures In A Manner That Materially Or Adversely Affected The Requester.

The Requester’s claims arise entirely out the CPE Panel Process Document’s provisions that an “evaluator” verifies letters of support and opposition to an application undergoing CPE, which the Requester claims did not occur here.⁴² In other words, the Requester argues that reconsideration is warranted because the EIU did not adhere to the CPE Panel Process Document insofar as the person who physically sent the emails verifying the letters of support and opposition was not an “evaluator” but, instead, was another EIU employee.⁴³ However, the EIU’s decision to delegate this administrative task to an employee cannot support reconsideration, because it did not affect the substance of the Second CPE in any fashion and did not change the fact that the evaluators conducted the actual evaluation of the letters.

To start, the Determination on Request 15-21 already addressed this argument.⁴⁴ The Determination on Request 15-21 acknowledged that the verification emails were sent by a person “responsible for communicating with the authors of support and opposition letters regarding verification in the ordinary course of his work for the EIU.”⁴⁵ The Determination on Request 15-21 also explained that the CPE Panel Process Document mandates that one of the two evaluators

⁴² CPE Panel Process Document at Pg. 5; Request, § 8.4, Pg. 5-6. Request 16-3 also contains a sentence arguing that the EIU appointed one of the same evaluators to conduct the Second CPE as performed the First CPE. Request, § 8.1, Pg. 3. The powerpoint to which the Requester referred during its Presentation also fleetingly touched upon this issue. (See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>, at Pg. 13.) However, other than in passing reference, Request 16-3 does not argue that reconsideration is warranted because the same evaluator conducted the Second CPE. Instead, that argument appears to be a vestige from the Requester’s Request 15-21, which raised that argument. (See Request 15-21, § 8.2, Pg. 5, available at <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf>.) As explained in the Determination on Request 15-21, that argument fails to support reconsideration because it is factually inaccurate; ICANN has confirmed that the EIU appointed two new evaluators to conduct the Second CPE and added a new core team member for the administration of the Second CPE. (Determination on Request 15-21 at Pgs. 28-29.)

⁴³ See Request, § 8.1, Pg. 3.

⁴⁴ Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁵ *Id.*, Pgs. 28-29.

be “responsible for the letter verification process.”⁴⁶ Here, the CPE Panel members delegated the physical sending of the verification emails to a Verification Coordinator.⁴⁷ This procedure is in accord with the CPE Panel Process Document’s provision that a letter is verified when its author “send[s] an email *to the EIU* acknowledging that the letter is authentic.”⁴⁸ While the CPE Panel Process Document indicates that an “evaluator” will contact letter authors,⁴⁹ there is no policy or procedure that forbids the EIU from delegating the administrative task of sending the verification email to someone other than the actual “evaluator,” as the Determination on Request 15-21 correctly noted.

Moreover, the Requester has not demonstrated how it was materially or adversely affected by the EIU’s decision to delegate this administrative function to an administrative employee. On that ground alone, no reconsideration is warranted.⁵⁰ The identity of the person physically sending the verification emails did not have any impact upon the results of the verification or the results of the Second CPE as a whole; the verification results were communicated to both of the evaluators and the entire core team to permit a full and complete evaluation in accordance with the Guidebook, which included an evaluator’s substantive evaluation of the verified letters in compliance with the CPE Panel Process Document.⁵¹ Nor is there anything inherently nefarious to the EIU’s decision in this regard; much as a company executive might delegate to her assistant the physical sending of emails sent on her behalf, the EIU evaluators assign the Verification Coordinator the task of physically sending the verification emails. In short, the Requester has not indicated how it was affected by the decision to delegate

⁴⁶ See CPE Panel Process Document at Pg. 5; Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁷ Determination on Request 15-21 at Pg. 29, fn. 102.

⁴⁸ CPE Panel Process Document at Pg. 5 (emphasis added).

⁴⁹ *Id.*

⁵⁰ Bylaws, Art. IV, §§ 2.1-2

⁵¹ Guidebook § 4.2.3; CPE Panel Process Document at Pg. 5.

the sending of the verification emails to a Verification Coordinator, much less how it was materially or adversely affected, as is required to support a reconsideration request.⁵²

Nonetheless, “[i]n an effort to provide greater transparency on an administrative aspect of the Community Priority Evaluation (CPE) process,” the EIU has provided “additional information regarding verification of letters of support and opposition” (EIU Correspondence).⁵³ The EIU Correspondence confirms that “the two evaluators assigned to assess a specific application review the letter(s) of support and opposition. For every letter of support/opposition received, both of the evaluators assess the letter(s) as described in the Guidebook, section 4.2.3 Criterion 4: Community Endorsement.”⁵⁴ As such, the EIU Correspondence confirms that the EIU complied with the CPE Panel Process Document’s instruction that an evaluator “assesses both the relevance of the organization and the validity of the documentation.”⁵⁵ The EIU Correspondence further explains that:

[t]he process of verification of letter(s) is an administrative task. . . . [F]or evaluations involving large numbers of letters of support or opposition, the EIU 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.⁵⁶

The need for a Verification Coordinator arose when an “administrative issue[] related to the verification of letters of support” occurred, namely certain entities submitted letters of support or opposition to multiple applications.⁵⁷ Because different evaluators were assigned to conduct CPE with respect to the various applications, those entities began to receive verification

⁵² See Bylaws, Art. IV, §§ 2.1-2.

⁵³ EIU Correspondence, *available at* <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>, at Pg. 1.

⁵⁴ *Id.*

⁵⁵ CPE Panel Process Document at Pg. 5.

⁵⁶ EIU Correspondence at Pg. 2.

⁵⁷ *Id.*

emails from different people within the EIU.⁵⁸ The EIU “received complaints from the authors of the letters, who requested that they be contacted by a single individual,” thus the EIU assigned the Verification Coordinator the administrative task of sending all verification emails.⁵⁹ As the EIU Correspondence emphasizes, “the results of the verification [a]re communicated to both of the evaluators” and it is the evaluators who score the applications.⁶⁰

In sum, the EIU Correspondence confirms that the Verification Coordinator sends the verification emails purely for administrative ease, and that the Requester was not affected (let alone materially or adversely) by the delegation of this administrative task from the evaluator to the Verification Coordinator. As such, the Requester has not identified any conduct on the part of the EIU that warrants reconsideration.

B. The Requester Has Not Shown That The Determination on Request 15-21 Was The Result Of The BGC Failing To Consider Material Information, Or Considering False Or Inaccurate Information.

The Requester argues that reconsideration of the Determination on Request 15-21 is warranted because *either*: (1) “the BGC should . . . have confirmed[] that the CPE process, as set out in the Applicant Guidebook and the CPE Panel Process Document, has not been followed because the verification of the letters has not been performed by an independent evaluator”; *or* (2) the CPE Panel Process Document sets forth “a process that is more stringent than the one set forth in the Applicant Guidebook, which does not require the independent evaluator [to] perform such verification of support and objection.”⁶¹ Reconsideration is not warranted on either ground, because the Requester has not shown that the BGC failed to consider material information or

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at Pg. 1.

⁶¹ Request, § 8.6, Pg. 8.

relied on false or inaccurate information with respect to either issue. The Requester has not shown that either basis for reconsideration it poses actually took place.

First, as explained *supra*, the EIU substantively adhered to the CPE Panel Process Document and the Guidebook in administering the Second CPE, including with respect to the letter verification process. The Requester has not identified any material information the BGC failed to consider, or any false or inaccurate information it relied upon in reaching the Determination on Request 15-21 that no reconsideration was warranted with respect to the fact that an EIU administrative employee sent the verification emails during the Second CPE. As such, no reconsideration of the Determination on Request 15-21 is warranted.⁶²

Second, the Requester argues that the BGC “erred in confirming that ‘none of the CPE Materials comprise an addition or change to the terms of the Guidebook.’”⁶³ As an initial matter, as the Determination on Request 15-21 explained, any challenge to the CPE materials (including the CPE Panel Process Document) is time-barred.⁶⁴ The Requester argues that through its reconsideration requests and the Determination on Request 15-21, it has discovered that the CPE Panel Process Document “introduces a concept that has not been included in the . . . Guidebook, which only refers to ‘evaluators’.”⁶⁵ However, the CPE Panel Process Document does not in fact comprise an addition or change to the terms of the Guidebook. The Guidebook provides that “[c]ommunity priority evaluations for each eligible contention set will be performed by a community priority panel appointed by ICANN to review these applications.”⁶⁶ The CPE Panel Process Document is a five-page document explaining that the EIU has been selected to

⁶² See Bylaws, Art. IV, § 2.

⁶³ Request, § 8.6, Pg. 8 (quoting Determination on Request 15-21 at Pg. 12).

⁶⁴ Determination on Request 15-21 at Pgs. 11-12.

⁶⁵ Request, § 8.5, Pg. 7.

⁶⁶ Guidebook § 4.2.2.

implement the Guidebook's CPE provisions⁶⁷ and summarizing those provisions.⁶⁸ The fact that someone other than an evaluator physically sends verification emails to authors of letters of support or opposition does not mean anyone other than a "community priority panel" has "review[ed]" the Application, as the Guidebook instructs.⁶⁹

In sum, the Requester has not demonstrated that the Determination on Request 15-21 reflects a failure on the part of the BGC to consider material information, or that the BGC considered false or inaccurate information, in concluding either that the EIU substantively complied with the CPE Panel Process Document, or that the CPE Panel Process Document adheres to the Guidebook. Therefore, the BGC thinks that no reconsideration of the Determination on Request 15-21 is warranted.

V. Recommendation.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration. The BGC therefore recommends that Request 16-3 be denied. If the Requester believes that it has been treated unfairly in the process, it is free to ask the Ombudsman to review this matter.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 18 March 2016. However, the Requester sought, was

⁶⁷ The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues, was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. See ICANN Call For Expressions Of Interest (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, available at <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

⁶⁸ CPE Panel Process Document.

⁶⁹ Guidebook, § 4.2.2.

invited to, and did make a Presentation to the BGC regarding Request 16-3 on 15 May 2016.⁷⁰

The timing of the Presentation delayed the BGC's consideration of Request 16-3. The first practical opportunity to address Request 16-3 after receiving the Presentation was 26 June 2016.

⁷⁰ See <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.