

**ATTACHMENT 1 IN SUPPORT OF RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 16-5
25 JANUARY 2019**

The Requestors, DotMusic Limited (DotMusic), the International Federation of Musicians, the International Federation of Arts Councils and Culture Agencies, the Worldwide Independent Network, the Merlin Network, the Independent Music Companies Association, the American Association of Independent Music, the Association of Independent Music, the Content Creators Coalition, the Nashville Songwriters Association International, and ReverbNation (collectively, Requestors), seek reconsideration of the Community Priority Evaluation (CPE) report (CPE Report), of DotMusic’s community-based application for the .MUSIC generic top-level domain (gTLD), and ICANN organization’s acceptance of that Report.¹ Specifically, the Requestors claim that the independent provider that conducted the CPE (CPE Provider) violated established CPE procedures in its evaluation of DotMusic’s application, and that the Board should have either conducted an investigation of the CPE process as a whole or revised the CPE Report in response to certain Independent Review Process (IRP) findings.

I. Brief Summary.

DotMusic submitted a community-based application for .MUSIC (Application), which was placed in a contention set with seven other .MUSIC applications.² DotMusic participated in CPE, but did not prevail.

The Requestors submitted Request 16-5 on 24 February 2016, challenging the CPE Provider’s Report, ICANN org’s acceptance of that Report, and arguing that the Board should

¹ Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

² See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>.

have intervened in or overturned the CPE Report in light of the IRP Panel Declaration in the *Little Birch LLC et al. v. ICANN* and *Despegar Online SRL et al. v. ICANN* (Despegar IRP).³

While Request 16-5 was pending, the ICANN Board and Board Governance Committee (BGC) directed ICANN org 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.⁴ The BGC determined that the pending Reconsideration Requests relating to CPEs, including Request 16-5, would be placed on hold until the CPE Process Review was completed.⁵

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).⁶

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

³ Request 16-5.

⁴ <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>.

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. 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>). Since 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with initial review of reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

⁶ See <https://www.icann.org/news/announcement-2017-12-13-en>.

forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.⁷

Subsequently, the BAMC invited the Requestors to provide a telephonic presentation to the BAMC in support of Request 16-5 and to submit additional written materials in response to the CPE Process Review Reports as it related to Request 16-5.⁸ The Requestors rejected both invitations from the BAMC.⁹

The BAMC carefully evaluated the claims raised in Request 16-5, in the Requestors' 17 September 2016 presentation to the BGC, in the materials that the Requestors submitted to the Board between 14 February 2016 and 5 April 2018, and the findings in the CPE Process Review Reports.¹⁰ Based on its extensive review of all relevant materials, the BAMC finds that the CPE Provider did not violate any established policies or procedure in conducting the CPE. The BAMC further finds that ICANN org did not violate any established policies, Bylaws, and Articles of Incorporation when it accepted the CPE Report. Moreover, the BAMC finds that the Requestors do not identify any misapplication of policy or procedure by the CPE Provider or ICANN org that materially or adversely affected the Requestors. The BAMC also finds that the Requestors have not shown that the Board relied on any false or inaccurate information or disregarded any material information when it responded to the IRP Panel Declaration in the

⁷ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁸ Attachment 1 to BAMC Recommendation on Request 18-5 (<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-1-14jun18-en.pdf>).

⁹ Attachment 2 to BAMC Recommendation on Request 18-5 (<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-2-14jun18-en.pdf>); 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>).

¹⁰ Appendix 2 to this Recommendation identifies the materials submitted by the Requestor that were reviewed by the BAMC, and are incorporated herein by reference. The materials that the BAMC considered include, but are not limited to, the documents listed in Appendix 2.

Despegar IRP (Despegar IRP Declaration). Accordingly, the BAMC recommends that the Board deny Request 16-5.

II. Facts.¹¹

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

1. The CPE Report.

DotMusic submitted a community-based application for .MUSIC, which was placed in a contention set with seven other applications for .MUSIC.¹² As a community-based applicant, DotMusic participated in CPE.¹³ CPE is a method of resolving string contention,¹⁴ described in section 4.2 of the gTLD Applicant Guidebook (Guidebook). To prevail in CPE, an application must receive at least 14 out of 16 points. The Application received 10 points, and therefore did not prevail. As discussed in further detail below, DotMusic received zero out of four possible points for Criterion 1: Community Establishment, three out of four possible points for Criterion 2: Nexus between Proposed String and Community, four out of four possible points for Criterion 3: Registration Policies, and three out of four possible points for Criterion 4: Community Endorsement.¹⁵

2. Request 16-5.

The Requestors submitted Request 16-5 on 24 February 2016.¹⁶ The Requestors asserted that: (1) the CPE Provider should have relied on ICANN org's Governmental Advisory

¹¹ Appendix 1 to the BAMC's Recommendation is a timeline that includes dates and summaries of some of the events relevant to the BAMC's Recommendation on Request 16-5 and this Attachment 1.

¹² <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>;
<https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/29>.

¹³ One other applicant for .MUSIC, .music LLC, applied for Community Priority. *See* <https://newgtlds.icann.org/en/applicants/cpe>. .music LLC did not prevail in CPE. *See* <https://newgtlds.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>.

¹⁴ "String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings." Guidebook § 1.1.2.10.

¹⁵ CPE Report, at Pg. 1.

¹⁶ Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

Committee (GAC) Category 1 and Category 2 Advice to conclude that DotMusic satisfied the CPE criteria; (2) ICANN org should have granted DotMusic community priority because ICANN’s Generic Names Supporting Organization (GNSO) recommended that an application’s assertions of community representation should be “taken on trust”¹⁷; (3) the CPE Provider had a conflict of interest with respect to the Application; (4) ICANN org revised the CPE Report in violation of established policy and procedure;¹⁸ (5) the CPE Report violates principles of due process;¹⁹ (6) ICANN org denied community priority on applications to force more gTLD string contentions to be resolved via ICANN auction at a higher price than a successful community-based applicant would have paid to resolve string contention;²⁰ and (7) the CPE Provider erred in its applications of CPE criterion 1: Community Establishment, sub-criterion 2-A-Nexus, and sub-criterion 4-A-Support.

The Requestors sought an opportunity to make a presentation to the BGC regarding Request 16-5. In response, pursuant to Article IV, Section 2.12 of ICANN’s Bylaws, the BGC invited the Requestors to make a presentation at the 17 September 2016 BGC meeting.²¹ DotMusic’s counsel, Arif Ali, and two consultants, made a presentation to the BGC on behalf of DotMusic²² on 17 September 2016 (2016 Presentation).²³ On 19 September 2016 and 6

¹⁷ *Id.*, § 6, Pg. 3, 6.

¹⁸ Request 16-5, § 6, Pg. 18.

¹⁹ Request 16-5, § 8, at Pg. 16 (marked 15).

²⁰ 15 December 2016 letter from Ali to ICANN, at Pg. 6.

²¹ <https://www.icann.org/resources/board-material/agenda-bgc-2016-09-17-en>.

²² The BAMC has been careful to distinguish, throughout its Recommendation on Request 16-5 and this Attachment 1, between submissions and arguments made by or on behalf of DotMusic, such as the presentation materials, which include DotMusic’s logo and do not reference the other Requestors, and submissions made by or on behalf of all Requestors, such as Request 16-5. Many of the submissions made in support of Request 16-5 were submitted by DotMusic and do not appear to have been made on behalf of the other Requestors. *See, e.g.*, 15 December 2016 letter from Ali to ICANN BGC (“We are writing on behalf of our client, DotMusic Limited”),

<https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>; DotMusic’s Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports,

<https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>.

²³ *See* <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-17sep16-en.pdf>.

December 2016, DotMusic submitted Additional Responses to a question that the BGC raised during the 17 September 2016 presentation.²⁴

B. 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).²⁵ 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 (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).²⁶ 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 16-5, would be on hold until the CPE Process Review was completed.²⁷

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 the CPE Process Review Reports issued by FTI in connection with the CPE Process

²⁴ See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-19sep16-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-06dec16-en.pdf>.

²⁵ ICANN Board Rationale for Resolution 2016.09.17.01 (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>).

²⁶ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

²⁷ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

Review.²⁸

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.²⁹

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.”³⁰

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.”³¹

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.”³² In one case³³ (for which two CPE reports were completed), FTI did not find citations to each reference to research in the working papers underlying the Second CPE Report. FTI concluded that it is possible that the research being referenced in the second CPE report was research cited in the working papers underlying the first CPE Report.³⁴ In all other cases, including in this case, FTI

²⁸ See <https://www.icann.org/news/announcement-2017-12-13-en>.

²⁹ 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>).

³⁰ *Id.*, at Pg. 9, 15.

³¹ 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>).

³² 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>).

³³ That case did not involve the Application. See *id.* at Pg. 36.

³⁴ *Id.* at Pg. 34.

found citations to, or the materials that corresponded with, all research referenced in the CPE reports, in the reports themselves or in the working papers underlying the reports.

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).³⁵ In adopting to the 2018 Resolutions, the Board acknowledged and considered submissions from the Requestors and community stakeholders concerning the CPE Process Review Reports (discussed below).³⁶ In its rationale for the 2018 Resolutions, the Board acknowledged the Requestors' submissions.³⁷ The Board noted that the requestors with pending reconsideration requests relating to CPE

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.³⁸

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),³⁹ and with a Roadmap for the review of the pending

³⁵ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

³⁶ See <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a.rationale>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Available at <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

Reconsideration Requests (Roadmap).⁴⁰ As part of the Transition Process, the BAMC invited the Requestor to “submit additional information relating to Request 16-5, 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 16-5. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-5 and that is not already covered by the written materials.”⁴¹

DotMusic “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.⁴² Instead, DotMusic demanded that the BAMC first disclose the documents requested in DIDP Request 20180110-1 concerning the CPE Process Review, and allow DotMusic to submit additional materials in support of Request 16-5 after reviewing those documents.⁴³ Additionally, DotMusic demanded that the BAMC undertake a substantive review of the CPE Report, taking into consideration all materials that have been submitted in support of the Application.⁴⁴

⁴⁰ 2018 Resolutions. *See also* Roadmap, available at <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

⁴¹ *See* Attachments 1 and 2 to BAMC Recommendation on Request 18-5 (<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-1-14jun18-en.pdf>; <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-2-14jun18-en.pdf>).

⁴² 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>).

⁴³ 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>).

⁴⁴ 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>).

B. DotMusic’s Response to the CPE Process Review.

On 2 February 2018, DotMusic submitted a 66-page letter to the Board and the BAMC, challenging the results of the CPE Process Review Reports.⁴⁵ DotMusic argued that FTI did not “substantive[ly] engage[] with” DotMusic’s concerns about the CPE Report, and that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough.⁴⁶

On 14 April 2018, DotMusic submitted Request 18-5, challenging the 2018 Resolutions.⁴⁷ The Board denied Request 18-5 (consistent with the BAMC’s recommendation) on 18 July 2018.⁴⁸

III. Relief Requested.

The Requestors ask that the CPE Report be overturned by ICANN org, by awarding DotMusic an additional six (6) points (or a passing grade).⁴⁹

IV. Issues Presented.

The issues are as follows:

1. Whether the Despegar IRP Declaration requires the Board to reconsider the CPE Report;
2. Whether the Board’s acceptance of GAC Advice required the CPE Provider to grant the Application community priority;
3. Whether the CPE Provider had a conflict of interest with respect to the Application;

⁴⁵ See 2 February 2018 email from C. Roussos to ICANN Board attaching “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” (DotMusic CPE Process Review Letter) (<https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-cpe-fti-to-icann-board-02feb18-en.pdf>).

⁴⁶ <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>.

⁴⁷ Request 18-5 (<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>).

⁴⁸ <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.f>.

⁴⁹ Request 16-5, § 9, Pg. 21 (emphasis in original).

4. Whether ICANN org made any revisions to the CPE Report, and if so, whether those revisions adhered to established policies or procedures;
5. Whether the CPE Provider adhered to applicable policies and procedures in its application of criterion 1: Community Establishment;
6. Whether the CPE Provider adhered to applicable policies and procedures in its application of sub-criterion 2-A-Nexus; and
7. Whether the CPE Provider adhered to applicable policies and procedures in its application of sub-criterion 4-A-Support.

V. The Relevant Standards for Reconsideration Requests and CPE.

A. Reconsideration Requests.

Article IV, Section 2.1 and 2.2 of ICANN’s Bylaws⁵⁰ 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:

- (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.⁵¹

⁵⁰ The BAMC has considered Request 16-5 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestor submitted Request 16-5). Although the Bylaws have since changed (*see* the Bylaws archive, (<https://www.icann.org/resources/pages/governance/bylaws-archive-en>) and 22 July 2017 Bylaws (<https://www.icann.org/resources/pages/governance/bylaws-en>)), the operative version of the Bylaws is the one in effect when Request 16-5 was submitted.

⁵¹ ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

Where, as here, the reconsideration request challenges both Board and staff action or inaction, the operative version of the Bylaws directs the BAMC⁵² to review the request and provide a recommendation to the Board.⁵³ Denial of a request for reconsideration of ICANN org action or inaction 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.⁵⁴

B. The CPE Criteria and Procedures.

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.⁵⁵ The standards and CPE process are defined in Module 4, Section 4.2.3 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.⁵⁶ To prevail in CPE, an application 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 application that prevails in CPE “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”⁵⁷

CPE will occur only if a community-based applicant elects to participate in CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation

⁵² As noted above, *supra* n.5, 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), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

⁵³ See ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

⁵⁴ *Id.*

⁵⁵ 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>.

⁵⁶ *Id.* at Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁵⁷ *Id.* at Module 4, § 4.2.3, Pg. 4-9.

process.⁵⁸ CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.⁵⁹ 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.⁶⁰

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.”⁶¹

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.⁶² The CPE Guidelines accompany the Guidebook and do not alter the CPE criteria established by the Guidebook.⁶³ Rather, the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process by explaining the methodology that the CPE Provider undertook to evaluate each criterion.⁶⁴ The CPE Provider also published the CPE Panel Process Document explaining that the CPE Provider was selected to implement the Guidebook’s CPE process.⁶⁵

VI. Analysis and Rationale.

A. Request 16-5 Does Not Comply With The Applicable Bylaws.

⁵⁸ Guidebook, Module 4, § 4.2.

⁵⁹ *Id.* Module 4, § 4.2.2.

⁶⁰ *Id.* at Modules 4, §§ 4.2.2 and 4.2.3. at Pgs. 4-8 and 4-9, available at <https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>.

⁶¹ Guidebook, Module 4, § 4.2.3, at Pg. 4-9.

⁶² See CPE Guidelines, available at <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>.

⁶³ *Id.* at Pg. 2.

⁶⁴ See *id.*

⁶⁵ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

As a preliminary matter, the BAMC notes that Requestors have not complied with the Bylaws' length and format requirements for Reconsideration Requests. The relevant Bylaws direct that "Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request."⁶⁶ Request 16-5 includes 25 pages of argument in eleven-point font, with block quotes and certain arguments in ten-point font, contrary to the 12-point font requirement.⁶⁷ Despite this procedural violation, the BAMC has considered the merits of Request 16-5 and all other relevant materials and finds, for the reasons discussed below, that reconsideration is not warranted.

B. The Despegar IRP Declaration Does Not Support Reconsideration.

The Requestors claim that reconsideration is appropriate because the CPE process is purportedly fundamentally flawed. In support, the Requestors rely on the Despegar IRP Declaration,⁶⁸ which the Requestors argue points out issues and concerns that the Panel had with the CPE process. The Requestors contend that the concerns expressed by the Despegar IRP Panel demonstrate that the CPE Provider and ICANN org violated established policies and procedures relating to the evaluation of the Application.⁶⁹ The Requestors seem to assert that the Despegar IRP Declaration requires the Board to either conduct a review of the CPE Process as a whole—which the Board did in the CPE Process Review—or to reject the CPE Report here based on the purported flaws⁷⁰—but as explained below, nothing in the Despegar IRP Declaration or ICANN org's acceptance of it mandates that result.

⁶⁶ ICANN Bylaws, 11 February 2016, Art. IV, § 4.2.7.

⁶⁷ See Request 16-5.

⁶⁸ Request 16-5, § 6, Pg. 19; Despegar IRP Declaration ¶¶ 66-67 (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>).

⁶⁹ Request 16-5, § 6, Pg. 19.

⁷⁰ Request 16-5, § 6, Pg. 19.

The claimants in the Despegar IRP challenged two BGC⁷¹ determinations denying reconsideration requests relating to the CPE reports for .ECO and .HOTEL. The Despegar Panel, however, found that the BGC had acted in accordance with ICANN’s Articles of Incorporation (Articles) and Bylaws in denying the reconsideration requests at issue in that IRP, and confirmed that the BGC’s review of CPE reports in the reconsideration process is “a procedural review of the [reports], not a substantive review.”⁷² In addition, recognizing that the current round of the New gTLD Program was near its end “and there is little or nothing that ICANN can do now,”⁷³ the Despegar Panel recommended that, in the future, a system be put in place to ensure that CPE evaluations are conducted “on a consistent and predictable basis by different individual evaluators” and that ICANN org’s core values “flow through . . . to entities such as the [CPE Provider].”⁷⁴

On 10 March 2016, the Board accepted the Despegar IRP Declaration (2016 Resolution).⁷⁵ The Board “note[d] the [IRP] Panel’s suggestions” and directed ICANN org to “ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations.”⁷⁶ The policy development work for subsequent rounds of the New gTLD Program and other New gTLD Program reviews will “enable ICANN to capture multiple stakeholder experiences in the launch and operation of the Program and apply those lessons

⁷¹ As noted above, *see supra* n.5, 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>).

⁷² Despegar IRP Declaration ¶¶ 66-67.

⁷³ *Id.* ¶ 147

⁷⁴ *Id.* ¶¶ 147, 150 (emphasis added).

⁷⁵ Board Resolutions 2016.03.10.10-11 (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

⁷⁶ *Id.*

learned as the Program moves forward.”⁷⁷ Separately, the CPE Process Review provided additional careful review of the CPE process, with special consideration of the CPE Provider’s evaluations of community applications and ICANN org’s relationship with the CPE Provider.⁷⁸

The issues that have been raised regarding the CPE process in the current new gTLD round are being considered in advance of the next round of new gTLD applications (through the New gTLD Program Reviews). However, nothing about the Despegar IRP Declaration or the Board’s acceptance of it mandates that the CPE process be modified for the Application,⁷⁹ or that the BAMC change its standard of review for reconsideration requests challenging CPE reports. Accordingly, nothing about the Despegar IRP Declaration or the 2016 Resolution requires the BAMC to take any action with respect to the CPE Report beyond determining whether ICANN org and the CPE Provider followed established policy and procedure with respect to that report. As discussed further below, the Requestors identify no violations of established policy or procedure with respect to the CPE Report.

Moreover, to the extent the Requestors are arguing that the Despegar IRP Declaration mandates that the Board undertake a review of the CPE Process as a whole, as described above, the Board *did* undertake such a review: the CPE Process Review. DotMusic challenged the outcome of the CPE Process Review in Request 18-5,⁸⁰ which the Board denied.⁸¹ The Requestors have not identified any material information that the Board failed to consider, or any false or misleading information on which the Board relied, in declining to overturn the CPE Report in light of the Despegar IRP Declaration or otherwise responding to it.

⁷⁷ <https://newgtlds.icann.org/en/reviews>.

⁷⁸ See <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

⁷⁹ Request 16-5, § 8, Pg. 17, 18.

⁸⁰ Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

⁸¹ Board Action on Request 18-5, <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.f>.

C. The Board’s Acceptance of the GAC’s Category 1 and Category 2 Advice Has No Bearing on DotMusic’s Claim for Community Priority.

The Requestors assert that ICANN org should have given “preferential treatment” to the Application in response to the GAC’s Category 1 and 2 Advice.⁸²

On 11 April 2013, the GAC provided its Category 1 and Category 2 Advice regarding certain proposed new gTLD strings. The GAC’s Category 1 Advice suggested that certain types of strings should be subject to additional safeguards. These types of strings included: (a) strings that involve regulated sectors; (b) strings that raise consumer protection concerns; and (c) other sensitive strings. .MUSIC was one of the new gTLDs subject to the GAC’s Category 1 Advice as a string that raises consumer protection concerns – namely, intellectual property concerns.⁸³ The GAC’s Category 2 Advice suggested, among other things, that strings representing generic terms (Generic Term Strings) should not be operated as exclusive access registries unless doing so would “serve a public interest goal.”⁸⁴ .MUSIC also was one of the Generic Term Strings subject to the GAC’s Category 2 Advice.

On 5 February 2014, the Board, via the New gTLD Program Committee (NGPC) accepted the GAC’s Category 1 Advice, requiring additional safeguards for certain strings (including .MUSIC) that raised intellectual property concerns.⁸⁵ On 25 June 2013, the NGPC accepted the GAC’s Category 2 Advice, including the advice regarding Generic Term Strings, and directed ICANN org to defer contracting with applicants for Generic Term Strings “pending a dialogue with the GAC” regarding an appropriate definition of “public interest goal.”⁸⁶ On 2

⁸² Request 16-5, § 8, Pg. 5.

⁸³ See Beijing Communiqué, Annex I, Pg. 9 <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>; see also <https://newgtlds.icann.org/en/applicants/gac-advice/cat2-safeguards>.

⁸⁴ See *id.*, Pg. 11.

⁸⁵ See <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>.

⁸⁶ See <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>; see also ICANN NGPC Paper No. 2013-06-25-2b: GAC Advice in Beijing Communiqué regarding Safeguard Advice Applicable to

July 2013, the NGPC approved revisions to the New gTLD Registry Agreement, including a provision prohibiting registry operators from limiting registrations in the Generic Term Strings exclusively to “a single person or entity and/or that person’s or entity’s ‘Affiliates.’”⁸⁷

Nothing in the NGPC’s acceptance of and response to the GAC’s Category 1 and 2 Advice required ICANN org to give “preferential treatment” to community applications for .MUSIC. The Category 1 and 2 Advice did not even discuss community versus standard applications. Moreover, contrary to what the Requestors assert, .MUSIC was subject to Category 1 Advice because it raised intellectual property concerns, not because it involved a regulated sector.⁸⁸ As such, nothing about the GAC’s Category 1 Advice implied that .MUSIC involved a community with “cohesion.”⁸⁹

Regarding the Category 2 Advice, the GAC stated that the Generic Term Strings, such as .MUSIC, represented generic terms for which exclusive registry access was not appropriate. The GAC’s advice and ICANN org’s acceptance of the Category 2 Advice has no bearing or relationship to community priority.

As provided in the Guidebook and in accordance with established policy and procedure, community priority is established if and only if the community-based application prevails in CPE. Nothing about the GAC’s Category 1 or Category 2 Advice altered this requirement. The Requestors’ argument is not a basis for reconsideration.

D. Nothing in the GNSO’s Recommendations Required that Claims of Community Priority be “Taken on Trust.”

Category 2 Strings, Briefing Materials 1, Pgs. 25-31 (<http://www.icann.org/en/groups/board/documents/briefing-materials-1-25jun13-en.pdf>).

⁸⁷ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d>; *see also* <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-item-1d-02jul13-en.pdf>, Annex I, New gTLD Agreement.)

⁸⁸ Request 16-5, § 8, Pg. 5.

⁸⁹ *Id.*; *see also* Blomqvist Opinion, ¶ 52, at pg. 41.

The Requestors claim that CPE should not have been required at all because, according to the Requestors, ICANN org’s GNSO recommended that an application’s assertions of community representation should be “taken on trust.”⁹⁰ The Requestors misread the language of the GNSO’s recommendations, which in fact clearly required CPE. Specifically, the GNSO recommended:

Where an applicant lays any claim that the TLD is intended to support a particular community such as a *sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions:*

(i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application; and

*(ii) a formal objection process is initiated.*⁹¹

In accordance with this recommendation, the Guidebook provides that “[e]valuation of an applicant’s designation as community-based will occur only in the event of a contention situation that results in a community priority evaluation.”⁹² An applicant for a community-based application must elect to undergo CPE; such applicants choose to do so because only via CPE can they gain priority over other competing applications for the same string.⁹³ Because the Requestors have not demonstrated that ICANN org violated any established policy or procedure in declining to take DotMusic’s claim of community priority “on trust,” the Requestors’ argument does not support reconsideration.

E. The Requestors Have Not Demonstrated Any Conflict of Interest on the Part of the CPE Provider.

The Requestors contend that the CPE Provider had a conflict of interest with respect to

⁹⁰ *Id.*, § 6, Pg. 3, 6.

⁹¹ GNSO Final Report on the Introduction on New Generic Top Level Domains, Recommendation IG H (emphasis added) (<http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>).

⁹² Guidebook Module § 1.2.3.2, at Pg. 1-27.

⁹³ *Id.*

the Application because Eric Schmidt, the executive Chairman of Google from 2001 to 2017, was a member of the Board of Directors of the Economist Group, the CPE Provider's parent company, from November 2013 through December 2015,⁹⁴ and Vint Cerf, Vice President of Google since 2003, "chaired an ICANN strategy Panel in 2013 (when applications were being evaluated)," and Google also submitted an application for .MUSIC.⁹⁵ Section 2.4.3.1 of the Guidebook sets forth the "Conflict of Interest Guidelines for Panelists," which detail the procedures that evaluation panelists must follow to ensure that no conflicts of interest exist.⁹⁶ An "evaluation panelist" is defined as "any individual associated with the review of an application."⁹⁷ The CPE Guidelines specifies that "[a]ll [CPE Provider] evaluators must ensure that no conflicts of interest exist."⁹⁸ Similarly, the CPE Panel Process Document published by the CPE Provider confirms that "[a]ll [CPE Provider] evaluators, including the core team, have ensured that no conflicts of interest exist."⁹⁹ The core team "comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit's Executive Editor and Global Director of Public Policy."¹⁰⁰

In other words, pursuant to the Guidebook, the CPE Panel Process Document and the CPE Guidelines, the CPE Provider was required to confirm that none of the evaluation panelists

⁹⁴ Request 16-5, § 6, Pg. 20. *See also* DotMusic CPE Process Review Letter, at ¶¶ 26(c), 67b, at Pg. 28, 47 (also arguing that Sir Robin Jacob, a Panelist selected by the ICC in the Community Objection proceedings for .MUSIC and .BAND, represented Samsung, "one of Google's multi-billion dollar partners," in a legal case (for additional detail, see Reconsideration Request 16-7, § 8, at Pg. 18 (marked 17) n.68, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-request-redacted-30may16-en.pdf>).

⁹⁵ DotMusic CPE Process Review Letter, at ¶ 26(c), at Pg. 28.

⁹⁶ Guidebook § 2.4.3.1, at Pg. 2-33.

⁹⁷ *Id.*

⁹⁸ CPE Guidelines at Pg. 22, <https://newgtlds.icann.org/en/applicants/cpe>.

⁹⁹ CPE Panel Process Document at Pg. 2, <https://newgtlds.icann.org/en/applicants/cpe>.

¹⁰⁰ *Id.*

or core team members had any conflicts with respect to the community-based applications.¹⁰¹ The Requestors present no evidence that the CPE Provider failed to do so. The Requestors do not allege that Eric Schmidt—a high level executive—was an evaluation panelist or a core team member (he was not), or that he had any influence over, or knowledge of, the CPE Report (or even had any involvement whatsoever with the CPE Provider, which is a single division within the Economist Group). In fact, the CPE Report was issued two months *after* Mr. Schmidt ceased to be a board member.¹⁰² Likewise, DotMusic has not explained how Vint Cerf’s position on an ICANN Strategy Panel concerning the Internet Governance Ecosystem¹⁰³ in 2013, *three years before* the CPE Report was issued, had any effect on the Application.

Furthermore, the sole basis for the Requestors’ bias argument is their contention (based on a sample set of 22 CPE reports) that community applications that were in contention with Google were more likely to fail CPE.¹⁰⁴ That many applications did not prevail in CPE fails to show any procedural violation, however. Any application that prevails in CPE is awarded priority over all other applications therefore, the CPE process intentionally sets a high bar for an application to prevail.¹⁰⁵ As such, that numerous applications did not prevail in CPE does not in any way demonstrate that the CPE Provider failed to follow established procedure and policy in ensuring that the members of the CPE Provider had no conflicts with respect to the

¹⁰¹ Guidebook § 2.4.3.1, at Pg. 2-33; CPE Panel Process Document at Pg. 2, <https://newgtlds.icann.org/en/applicants/cpe>; CPE Guidelines at Pg. 22, <https://newgtlds.icann.org/en/applicants/cpe>.

¹⁰² Mr. Schmidt stepped down in about December 2015 (<https://www.theguardian.com/media/2015/dec/10/economist-appoints-tessa-jowell-to-board-as-googles-eric-schmidt-departs>). The CPE Report was issued on 10 February 2016. (<https://newgtlds.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.)

¹⁰³ See Strategy Panel: ICANN’s Role in the Internet Governance Ecosystem (<https://www.icann.org/en/system/files/files/report-23feb14-en.pdf>).

¹⁰⁴ Request 16-5, § 6, Pg. 20.

¹⁰⁵ See Guidebook Module 4, § 4.2.3, at Pg. 4-9 (“a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application.”).

Application.¹⁰⁶ What is more, the CoE Report on which DotMusic relies for these arguments concluded that “there is no evidence that Google in any way influenced the decisions taken on CPEs.”¹⁰⁷ The Requestors’ argument does not support reconsideration.

F. ICANN Org Is Not Involved in Scoring CPE Criteria.

The Requestors argue that certain communications between ICANN org and the CPE Provider that were disclosed as part of the *Dot Registry v. ICANN* IRP (CPE Communications) demonstrate that ICANN org “materially” revised the CPE Report in violation of established policy and procedure.¹⁰⁸ Contrary to the Requestors’ assertions, nothing in the CPE Communications supports the Requestors’ view that ICANN org revised the CPE Provider’s *scoring* on the Application. The CPE Process Review’s Scope 1 Report confirms 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,” including with respect to the Application.¹⁰⁹ When ICANN org provided input to the CPE Provider, that input did *not* involve challenging the CPE Provider’s conclusions (including scoring determinations), but rather ensuring that the CPE Reports were clear and “that the CPE Provider had engaged in a robust discussion on each CPE criterion in the CPE report.”¹¹⁰ FTI observed that “ICANN organization did not suggest that the CPE Provider make changes in the final scoring or adjust the rational set forth in the CPE report[s].”¹¹¹

¹⁰⁶ The Requestors refer to an exchange with Fadi Chehadé at the public forum. *See* <https://singapore52.icann.org/en/schedule/thu-public-forum/transcript-public-forum-12feb15-en.pdf>, Pgs. 61-62. During that exchange, Mr. Chehadé thanked DotMusic for its comments and asked DotMusic to send ICANN a letter explaining DotMusic’s concerns. DotMusic never did. Nothing about this exchange comprises an “acknowledgement” of any conflict of interest, as the Requestors imply. *See* Request 16-5, § 6, Pg. 20.

¹⁰⁷ CoE Report, at Pg. 47, *cited in* DotMusic CPE Process Review Letter, ¶ 26(c), at Pg. 28.

¹⁰⁸ Request 16-5, § 6, Pg. 18.

¹⁰⁹ FTI Scope 1 Report at Pg. 3 <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

¹¹⁰ *Id.* at Pg. 12.

¹¹¹ *Id.*

The Requestors identify no established policy or procedure (because there is none) preventing ICANN org from communicating with the CPE Provider regarding the language in CPE reports. Nor does anything in the CPE Communications demonstrate, as the Requestors argue, that the CPE Provider lacked the necessary expertise to conduct CPEs. As such, the Requestors have not stated a basis for reconsideration in this regard.

G. The CPE Report did not Implicate Due Process Rights.

The Requestors assert that the CPE Provider and ICANN org failed to “follow due process” in the DotMusic CPE Report.¹¹² This argument does not warrant reconsideration. For the reasons discussed below, the Requestors have not demonstrated any failure by the CPE Provider to follow the established policy and procedures for CPE as set forth in the Guidebook.

The BAMC notes that the Bylaws in effect when the Requestors filed Request 16-5 do not reference due process.¹¹³

At bottom, the Requestors are suggesting that there should have been a formal appeal process for decisions by ICANN org’s third party service providers, including the CPE Provider, Legal Rights Objection Panel, and String Confusion Panels. The methods for challenging determinations in the course of the gTLD contention resolution process are set forth in the Guidebook, which was developed after more than 18 months of extensive discussions with a wide variety of stakeholder groups, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community, culminating in the Board’s June 2008 decision to adopt the community-developed New gTLD policy.¹¹⁴ Numerous

¹¹² Request 16-5, § 8, at Pg. 16 (marked 15).

¹¹³ See ICANN Bylaws, 11 February 2016.

¹¹⁴ Guidebook, Preamble.

drafts of the Guidebook itself were released for public comment, and revised in light of meaningful community input.¹¹⁵ The time for challenging the Guidebook has long passed.¹¹⁶

Moreover, the Guidebook provides a path for challenging the results of the CPE process: Module 6 of the Guidebook states that applicants, including DotMusic, “may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application.”¹¹⁷ The Requestors have exercised this right by invoking the Reconsideration process repeatedly,¹¹⁸ including with Request 16-5.

Because the CPE Provider’s application of the CPE criteria to the Application was consistent with the Guidebook, ICANN org’s acceptance of the CPE Report was also consistent with applicable policies and procedures, and did not implicate any “due process” violation. Nor does the fact that there was no option to appeal the substance of evaluation results implicate any due process violation.

H. DotMusic’s Claim Concerning Revenues from Auctions Does Not Support Reconsideration.

Relying on the CoE Report, DotMusic argues that there is a “fundamental conflict between ICANN’s stated policy on community priority and the potential revenues that can be earned through the auction process.”¹¹⁹ DotMusic has not provided any evidence (because none

¹¹⁵ *Id.*

¹¹⁶ See <https://newgtlds.icann.org/en/applicants/agb>, indicating current version of guidebook is dated 4 June 2012. Under the Guidelines in effect in June 2012, Reconsideration Requests were due within thirty days after publication of Board actions or within thirty days after a Requestor became aware of or should reasonably have become aware of challenged Staff action. ICANN Bylaws, 16 March 2012, Art. IV, § 2.5 (<https://www.icann.org/resources/pages/bylaws-2012-12-21-en#IV>).

¹¹⁷ Guidebook, Module 6, § 6, at Pg. 6-4.

¹¹⁸ See Request 14-28, <https://www.icann.org/en/system/files/files/request-dotmusic-07jun14-en.pdf>; Request 16-7, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-request-redacted-30may16-en.pdf>; Request 17-2, <https://www.icann.org/en/system/files/files/reconsideration-17-2-dotmusic-request-redacted-18jun17-en.pdf>; Request 17-4, <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>; Request 18-1, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>; Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

¹¹⁹ 15 December 2016 letter from Ali to ICANN, at Pg. 6.

exists) to support the accusation that ICANN org’s acceptance of the CPE Report was motivated by some sort of financial incentive. Further, DotMusic has not shown that any applicable ICANN policy or procedure was violated. This argument does not support reconsideration.

I. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of the CPE Criteria.

The Requestors object to the CPE Provider’s decision to award only 10 of the possible 16 points to the Application. However, the Requestors do not demonstrate that the CPE Provider violated any established policy or procedure in scoring the Application.

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

The Application received zero points for Criterion 1. Criterion 1 evaluates “the community as explicitly identified and defined according to statements in the application.”¹²⁰ It is measured by two sub-criterion: Sub-criterion 1-A-Delineation; and Sub-criterion 1-B-Extension.¹²¹ Sub-criterion 1-A-Delineation; and Sub-criterion 1-B-Extension are each worth a maximum of two points, for a total of four points. The Requestors challenge the CPE Provider’s analysis of both sub-criteria.

a. **The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 1-A-Delineation.**

The Application received zero out of two points for sub-criterion 1-A. To obtain two points for Delineation, the community as defined in the Application must be clearly delineated, organized, and pre-existing.¹²² For a score of 1, the community must still be clearly delineated and pre-existing, but it is not organized.¹²³ A clear and straight-forward membership definition

¹²⁰ Guidebook, Module 4, § 4.2.3, at Pg. 4-10, 4-11.

¹²¹ *Id.*

¹²² *Id.* at Pg. 4-10.

¹²³ *Id.*

will score higher than an unclear, dispersed, or unbound definition.¹²⁴ The Guidebook explains that “community” implies “more of cohesion than a mere commonality of interest,” and instructs that

there should be: (a) an awareness and recognition of a community of its members; (b) some understanding of the community’s existence prior to September 2007 [pre-existence] . . .; and (c) extended tenure or longevity—no transience—into the future.¹²⁵

In order for a community to satisfy the clearly delineated test, two conditions must be fulfilled: (i) there must be a clear, straightforward membership definition; and (ii) there must be awareness and recognition of a community (as defined by the applicant) among its members.¹²⁶

The CPE Provider found that the Application satisfied the first requirement by setting forth a clear and straightforward membership definition. The CPE Provider determined:

The applicant thereby bounds community membership by way of well-defined categories. Therefore the Panel has determined that the applicant provides a clear and straightforward membership definition. The various categories relating to the creation, production, and distribution of music as well as the several other related entities that contribute to these music-related operations are clearly delineated as per AGB guidelines for the first criterion of Delineation.¹²⁷

However, the CPE Provider found that second requirement was not satisfied because the community as defined did not have awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the [Guidebook] calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries). While the Panel

¹²⁴ *Id.* at Pg. 4-11.

¹²⁵ *Id.*

¹²⁶ CPE Report, at Pgs. 1-2.

¹²⁷ *Id.* at Pg. 3.

acknowledges that many of these individuals would share a “commonality of interest” in music, according to the [Guidebook] this is not sufficient to demonstrate the requisite awareness and recognition of a community among its members. While individuals within some of the member categories may show cohesion within a category or across a subset of the member categories, the number of individuals included in the defined community that do not show such cohesion is considerable enough that the community defined as a whole cannot be said to have the cohesion required by the [Guidebook]. The Panel therefore determined that there is insufficient awareness and recognition of a community among the proposed community members, and that they do not therefore cohere as a community as required by the [Guidebook]. The defined community as a whole, in all its member categories, does not meet the [Guidebook’s] requirement for community awareness and recognition. Therefore, the Panel determined that the community as defined in the application satisfies one of the two conditions to fulfill the requirements for delineation, and therefore does not receive credit for delineation.¹²⁸

In order for the CPE Provider to find that the community is organized, it must conclude that there is at least one entity mainly dedicated to the community and there must be documented evidence of community activities.¹²⁹ The CPE Provider found that the Application did not satisfy either of the requirements for organized because

the community as defined in application is dispersed geographically and across a wide array of music-related activities including all the categories listed in the previous section, such as creation, production, and distribution, among others. The applicant has made reference to, and has documented support from, several organizations that are a dedicated subset of the defined community. However, based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.... According to the [Guidebook], "organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” An “organized” community, according to

¹²⁸ *Id.*

¹²⁹ Guidebook, Module 4, § 4.2.3, at Pg. 4-11.

the [Guidebook], is one that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes individuals and organizations in all of the more than 40 member categories included by the application. Based on information provided in the application materials and the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories explicitly defined.¹³⁰

With respect to the pre-existence requirement, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members. The CPE Provider found that “since the [musical] organizations [identified by DotMusic] and their members do not themselves form a cohesive community as defined in the [Guidebook], they cannot be considered to be a community that was active as such prior to 2007.”¹³¹

i. The CPE Provider Adhered to Applicable Policies and Procedures in its Consideration of Community Definition.

The Requestors first argue that the CPE Provider relied on the incorrect community definition—i.e., not the community definition DotMusic provided in response to Question 20A of the Application.¹³² In fact, in describing the “community as defined in the application,” the CPE Report specifically quotes from DotMusic’s response to Question 20A:

The community defined in the application is “delineated using established NAICS codes[, codes used to classify business establishments,] that align with the (i) characteristics of the globally recognized, organized Community, and (ii) .MUSIC global rotating multistakeholder Advisory Board model of fair representation, irrespective of locale, size or commercial/noncommercial status.”¹³³

The CPE Provider thus expressly relied on DotMusic’s response to Question 20A, and the

¹³⁰ CPE Report, at Pg. 3.

¹³¹ *Id.*

¹³² Request 16-5, § 6, Pg. 13; DotMusic CPE Process Review Letter, ¶ 42, Pg. 38.

¹³³ CPE Report, Pg. 2 (quoting Application, Response to Question 20A).

Application was plainly “scored based on the community identified in response to this question.”

The CPE Report does refer to the DotMusic’s response to Question 20D of the Application, but this does not support reconsideration. In particular, after citing DotMusic’s response to Question 20A, the CPE Report further noted that:

the applicant also includes in its application a more general definition of its community: “all constituents involved in music creation, production, and distribution, including government culture agencies and arts councils and other complement[a]r[y] organizations involved in support activities that are involved with the .MUSIC mission.”¹³⁴

The Requestors identify no policy or procedure (because there is none) that would prevent the CPE Provider from considering all statements made in the Application. And, in any event, the CPE Provider’s consideration of DotMusic’s response to Question 20D did not adversely affect the score that the Application received on the first criterion—immediately following its reference to Question 20D the CPE Provider notes that DotMusic “thereby bounds community membership by way of well-defined categories” and “provides a clear and straightforward membership definition.”¹³⁵

DotMusic also argues that because the CPE Report did not explicitly reference the portion of DotMusic’s definition, in Question 20A, which states that the “Community is a strictly delineated and organized community of individuals, organizations, and business[es], a ‘logical alliance[’] of communities of a similar nature . . . that relate to music,”¹³⁶ the CPE Provider did not consider the correct community definition.¹³⁷ DotMusic asserts that because it “explicitly us[ed] similar . . . language” to the language in the Guidebook, which states that “a community

¹³⁴ *Id.*, Pg. 3 (quoting Application, Response to Question 20D).

¹³⁵ *Id.*

¹³⁶ DotMusic gTLD Application, Question 20A, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>.

¹³⁷ DotMusic CPE Process Review Letter, ¶ 42, at Pg. 38.

can consist of . . . a logical alliance of communities,”¹³⁸ the CPE Provider should have determined that the Application satisfied Criterion 1.¹³⁹ This argument fails for two reasons.

First, the Guidebook notes that “a logical alliance of communities” is “viable” as a community, “*provided the requisite awareness and recognition of the community is at hand among the members.*”¹⁴⁰ As discussed above, here the CPE Provider *did not* find the requisite awareness and recognition among the members of the overarching community. Accordingly, as the Guidebook directs, it awarded zero points on both “Delineation” and “Extension.”¹⁴¹

Second, DotMusic’s argument rests on the assumption that the CPE Provider should have awarded full points on Criterion 1 because the Application stated that it satisfied the requirements for Criterion 1. This is incorrect. If DotMusic’s argument were correct, then every entity seeking community priority could simply state that it had satisfied each of the four criteria, and the CPE Provider would be required to award a passing score to every applicant, eliminating the entire purpose of the CPE process.¹⁴² This argument does not support reconsideration.

- ii. The CPE Provider Adhered to Applicable Policies and Procedures in its Consideration of the Community’s Cohesion.

The Requestors argue that the CPE Provider erred in finding that the community defined in the Application did not demonstrate the requisite cohesion.¹⁴³ Ultimately, the Requestors disagree with the CPE Provider’s determination that a community including individuals and entities as varied as musicians, libraries, lawyers, public relations agencies, accountants, and

¹³⁸ Guidebook, Module 4, § 4.2.3, at Pg. 4-12.

¹³⁹ DotMusic CPE Process Review Letter, ¶ 44, at Pg. 39.

¹⁴⁰ Guidebook, Module 4, § 4.2.3, at Pg. 4-12 (emphasis added).

¹⁴¹ *Id.*

¹⁴² See Guidebook, Module 4, § 4.2.3, at Pg. 4-9 (CPE was designed with “very stringent requirements” because “a qualified community application eliminates all directly contending standard applications, regardless of how qualified the latter may be.”).

¹⁴³ Request 16-5, § 6, Pgs. 10-11 (.OSAKA, .ECO, .SPA); DotMusic CPE Process Review Letter, ¶ 52, at Pg. 41-42.

those who consume music¹⁴⁴ does not demonstrate the requisite cohesion, even if all participate in music-related activities or have some connection to the music industry. This substantive disagreement is not a basis for reconsideration.

The Requestors also compare the CPE Report to CPE reports for the .OSAKA, .ECO, .SPA, .RADIO, .HOTEL, and .GAY applications that underwent CPE, arguing that because the CPE Provider found that the communities as defined in those applications did have the requisite cohesion, a similar result should have been reached with respect to the Application.¹⁴⁵ Relatedly, DotMusic argued in its presentation to the BGC that the CPE Provider “[i]ntroduced a new ‘cohesion plus’ test for establishing ‘awareness and recognition’ among members” in the CPE Report, which it did not apply to the applications for .HOTEL, .OSAKA, and .RADIO.¹⁴⁶ As an initial matter, the CPE results for other, entirely unrelated applications (for entirely different strings, and involving entirely different community definitions), do not demonstrate that the CPE Provider failed to properly establish the first CPE criterion with respect to the community as defined in the Application.¹⁴⁷

Moreover, the CPE Provider applied the same, correct, standard for analyzing awareness and recognition to the Application and the other referenced applications. DotMusic does not agree with the CPE Provider’s conclusion that cohesion within “some of the member categories,” does “not show [that] such cohesion is considerable enough that the community defined as a whole can[] be said to have the cohesion required by the [Guidebook].”¹⁴⁸ Contrary to

¹⁴⁴ CPE Report, Pg. 2 (quoting community definition provided by the Requestors in response to Question 20A).

¹⁴⁵ *Id.*, § 6, Pgs. 10-12.

¹⁴⁶ 17 September 2016 DotMusic presentation to BGC, at slide 4.

¹⁴⁷ The Requestors also refer the BGC to “expert” letters DotMusic submitted to the CPE Provider, which purport to explain why the Application meets the requirements for community priority. Request, § 3, Pg. 1; *see also id.*, Ex. 40. However, these letters simply demonstrate the views of those individuals regarding the scoring of the Application. They do not constitute evidence that the CPE Provider failed to adhere to established policy and procedure in scoring the Application.

¹⁴⁸ 17 September 2016 DotMusic presentation to BGC, at slide 4.

DotMusic’s assertion, the CPE Provider did not find cohesion among the defined *community’s* “members.”¹⁴⁹ Instead, the CPE Provider noted that certain of the more than 40 categories of community members that DotMusic identified in its definition of the community “may show cohesion within a category or across a subset of the member categories,” but that cohesion *did not extend to* the entire community or enough of the community to satisfy the cohesion requirement.¹⁵⁰ Accordingly, the CPE Provider did not require *more than* cohesion as DotMusic suggests; it instead required, consistent with the Guidebook, that the Applicant demonstrate in its Application cohesion across the community as a whole—including across a logical alliance of communities such as the one presented in the Application.¹⁵¹

This is the same standard used in the CPE applications that the Requestors and DotMusic cite. In the .OSAKA CPE Report, the CPE Provider concluded that the community defined in the application had awareness and recognition among its members “because of the clear association with the Osaka geographical area.”¹⁵² The CPE Provider did not find that the cohesion or awareness and recognition in the .OSAKA application was limited to certain subgroups within the community defined in the application, unlike the CPE Provider’s finding in the DotMusic CPE Report.¹⁵³ DotMusic argues that the community definition in the .OSAKA application, i.e., individuals “who are within the Osaka geographical area as well as those who self[-]identify as having a tie to Osaka, or the culture of Osaka,”¹⁵⁴ is comparable to DotMusic’s definition of its community, i.e., a “logical alliance” of individuals “related to music (i.e. has a

¹⁴⁹ *Id.*

¹⁵⁰ CPE Report, at Pg. 3.

¹⁵¹ Guidebook, Module 4, § 4.2.3, at Pg. 4-12.

¹⁵² .OSAKA CPE Report, at Pg. 2 (<https://newgtlds.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

¹⁵³ *Compare* .OSAKA CPE Report, at Pg. 2, with CPE Report, at Pg. 2.

¹⁵⁴ .OSAKA CPE Report, at Pg. 2.

tie).”¹⁵⁵ This argument ignores the geographic bounds of the .OSAKA community, which the CPE Provider found determinative in that application. Accordingly, the arguments do not support reconsideration here.

In the .ECO CPE Report, the CPE Provider concluded that the community defined in the application included “four types of members, whose cohesion and awareness is founded in their demonstrable involvement in environmental activities and who ‘demonstrate active commitment, practice and reporting.’”¹⁵⁶ The CPE Provider went on to note that although the involvement might vary among the four categories, “each individual or entity has a clear, public and demonstrable involvement in environmental activities,” and the “interdependence and active commitment to shared goals among the various membership types are indicative of the ‘cohesion’ that the [Guidebook] requires.”¹⁵⁷ By contrast, the CPE Provider did not find evidence of a similar “demonstrable involvement” in activities across all or even the majority of the more than 40 member categories listed in the Application.¹⁵⁸

In the .SPA CPE Report, the CPE Provider determined that the community defined in the application had “awareness and recognition among its members” because the community “consists of entities that are in the spa industry, and as participants in this clearly defined industry, they have an awareness and recognition of their inclusion in the industry community.”¹⁵⁹ DotMusic argues that the Spa community included a “secondary community that does not relate directly to the string,” but the CPE Provider nonetheless found cohesion among the overarching community’s members.¹⁶⁰ The CPE Provider made no reference to a “secondary community” in

¹⁵⁵ DotMusic CPE Process Review Letter, ¶ 52, at Pg. 42.

¹⁵⁶ .ECO CPE Report, at Pg. 2 (<https://newgtlds.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>).

¹⁵⁷ *Id.* at Pg. 2-3.

¹⁵⁸ CPE Report, at Pg. 2.

¹⁵⁹ .SPA CPE Report, at Pg. 2 (<https://newgtlds.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁶⁰ DotMusic CPE Process Review Letter, ¶ 52, at Pg. 42.

the .SPA CPE Report, although the CPE Provider noted, in its consideration of sub-criterion 2-A “Nexus,” that the “community as defined by the application also includes entities which are not spas or spa associations, such as distributors and providers of spa-related products and services.”¹⁶¹ As noted above, the community defined in the .SPA application consisted of entities *in the spa industry*. DotMusic does not argue that distributors and providers of spa-related products are not in the spa industry, or would not have awareness and recognition of its inclusion in the spa industry.¹⁶² Accordingly, the inclusion of this subgroup in the Spa community definition does not undermine the CPE Provider’s finding of cohesion. Further, unlike the definition in the .SPA application, DotMusic’s definition of its community was not limited to members of the music industry. Instead, DotMusic defined its community to include members of the music industry *plus* other subgroups, such as “music fans.”¹⁶³ This comparison does not support reconsideration.

In the CPE reports for .RADIO and .HOTEL, the CPE Provider concluded (similar to its conclusion in the CPE report for .SPA), that members of the community of “individuals and entities that are in the radio industry” or “associate[ed] with the hotel industry and the provision of specific hotel services” had awareness and recognition (i.e., cohesion).¹⁶⁴ As noted above, DotMusic’s community is not limited to members of the music industry, rendering the .RADIO and .HOTEL CPE reports distinguishable from the DotMusic CPE Report. These comparisons do not support reconsideration.

In the CPE report for .GAY, the CPE Provider found awareness and recognition among

¹⁶¹ .SPA CPE Report at Pd. 4-5.

¹⁶² See DotMusic CPE Process Review Letter, ¶ 52, at Pg. 42.

¹⁶³ CPE Report, Pg. 2 (quoting community definition provided by the Requestors in response to Question 20A).

¹⁶⁴ .RADIO CPE Report at Pg. 2, available at <https://newgtlds.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>; .HOTEL CPE Report at Pg. 2, available at <https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

the members of the community defined in the application because of “an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies,” and additionally, many members of the communities make their awareness and recognition of the community “more explicit, such as by membership in organizations, participation in events, and advocacy for the rights of [other members of the community].”¹⁶⁵ DotMusic argues that, “[i]n contradiction . . . the [CPE Provider] determined DotMusic’s ‘logical alliance’ operating under a regulated sector that is united by copyright lacked any ‘cohesion’ of belonging to a community.”¹⁶⁶ Assuming DotMusic is correct that its community is “united by copyright,” DotMusic provides no explanation as to how an alliance of groups “united by copyright” (a legal concept designed to protect intellectual and commercial interests) is analogous to the community of individuals “who have come out as having non-normative sexual orientations or gender identities, or as their allies,” especially in light of the cohesion of members of the community defined in the .GAY CPE application “around areas of discrimination, whether in the workplace, marketplace, the media, or other areas” (an issue touching on intimate personal identity and human rights).¹⁶⁷ DotMusic’s attempt to compare its Application to the .GAY CPE application does not support reconsideration.

DotMusic argues that because each of the community’s member organizations wrote a letter endorsing the Application, “it cannot be debated that they had no awareness of the community defined and that they unite under the mission and purpose of the string that was

¹⁶⁵ .GAY CPE Report (re-evaluation), Pg. 2, available at <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

¹⁶⁶ DotMusic CPE Process Review Letter, ¶ 52, at Pg. 41-42.

¹⁶⁷ See .GAY CPE Report (re-evaluation), Pg. 2.

described in DotMusic’s application.”¹⁶⁸ This assertion does not support reconsideration; the letters of endorsement relate to, and the CPE Provider took them into consideration in, sub-criterion 4-A, “Support.” They do not relate to community members’ actual cohesion *across* all of the member organizations.

DotMusic also argues that the CPE Provider “applied the ‘commonality of interest’ test, not the ‘cohesion’ test in .HOTEL, .OSAKA, and .RADIO,” to determine “awareness and recognition,” but “conceded that there is a ‘commonality of interest’ among members” of DotMusic’s community and required more cohesion there.¹⁶⁹ First, as explained above, the CPE reports that DotMusic identifies are distinguishable from the DotMusic CPE Report, and the CPE Provider did not conclude in any of those reports that the community defined in the application lacked cohesion but had awareness and recognition. By contrast, the CPE Provider *did* find in DotMusic’s case that the community lacked cohesion, and therefore the CPE Provider concluded that it lacked awareness and recognition. Further, the Guidebook explicitly requires “more . . . than a mere commonality of interest” to demonstrate awareness and recognition.¹⁷⁰ Accordingly, the CPE Provider appropriately required, in all of these CPE applications, that the applicants demonstrate that the communities defined in the applications had more than “a mere commonality of interest” before it found awareness and recognition. The Scope 2 Report further confirms this conclusion, as FTI that the CPE Provider applied sub-criterion 1-A, Delineation, consistently in all CPEs, including the DotMusic CPE and the .HOTEL, .OSAKA, .GAY, .ECO, .SPA and .RADIO CPEs.¹⁷¹ DotMusic’s argument does not support reconsideration.

¹⁶⁸ DotMusic CPE Process Review Letter, ¶ 44, at Pg. 39.

¹⁶⁹ 17 September 2016 DotMusic presentation to BGC, at slides 5-6.

¹⁷⁰ Guidebook, Module 4, § 4.2.3, at Pg. 4-11.

¹⁷¹ Scope 2 Report, Pg. 22-31 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

Finally, DotMusic argues that the CPE Provider did not “explain how DotMusic’s evidence was insufficient to show cohesion.”¹⁷² DotMusic asserts that this contravenes ICANN org’s commitment to “Act Fairly and Openly.”¹⁷³ The CPE Provider explained why the evidence did not show cohesion when it explained that the only evidence DotMusic offered concerning cohesion reflected cohesion within a single category or “a subset of the member categories,” the evidence did not show cohesion across the full community.¹⁷⁴ This argument does not support reconsideration.

iii. The CPE Provider Adhered to Applicable Policies and Procedures in its Consideration of Organizations Connected to the Community.

The Requestors argue that the Panel “failed to consider many globally-recognized organizations that are mainly dedicated to the music community.”¹⁷⁵ The Requestors specifically point to the International Federation of Musicians (FIM), which represents musicians, and the International Federation of the Phonographic Industry (IFPI), an organization that represents the recording industry worldwide.¹⁷⁶ In fact, the CPE Provider specifically noted that while the Application had “made reference to . . . several organizations that are a dedicated subset of the defined community,” there was not an “entity that encompasses and organizes individuals and organizations in all of the more than 40 member categories included by the application.”¹⁷⁷ As discussed, these categories included musicians and members of the recording industry, but also lawyers, accountants, public relations agencies, and music fans. The Requestors’ disagreement with the CPE Provider’s determination does not demonstrate that the CPE Provider misapplied

¹⁷² 17 September 2016 DotMusic presentation to BGC, at slide 7.

¹⁷³ *Id.*

¹⁷⁴ CPE Report, at Pg. 3.

¹⁷⁵ Request 16-5, § 6, Pg. 6. *See also* DotMusic CPE Process Review Letter, ¶ 45, at Pg. 39.

¹⁷⁶ *Id.*, § 6, Pgs. 6-7.

¹⁷⁷ CPE Report, Pg. 3.

the CPE criterion and is not a basis for reconsideration.

DotMusic also argues that because the CPE Provider concluded that at least one entity was dedicated to the community defined in the .HOTEL application, the CPE Provider should have concluded that at least one entity was dedicated to the community defined in DotMusic's application.¹⁷⁸ In the .HOTEL CPE Report, the CPE Provider concluded that there were "several entities that are mainly dedicated to the community," including the International Hotel & Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA), and China Hotel Association (CHA), "among others."¹⁷⁹ The CPE Provider then cited evidence from the .HOTEL application indicating that the IH&RA represents "the hotel industry worldwide," is "recognized by the United Nations as the voice of the private sector globally," and its "members represent more than 300,000 hotels and thereby the majority of hotels worldwide."¹⁸⁰

DotMusic asserts that because the CPE Provider also listed HOTREC, the AH&LA, and the CHA in its discussion of entities mainly dedicated to the community, and those entities are geographically limited (and the community defined in the .HOTEL application is not), the CPE Provider determined that, with respect to the .HOTEL application, it was not necessary that the entities represent the *entire* community.¹⁸¹ Therefore, the argument goes, the CPE Provider should have concluded that the FIM and IFPI were mainly dedicated to DotMusic's community even though they were not dedicated to the entire community.¹⁸² This argument overlooks the CPE Provider's focus on the IH&RA in its discussion of entities mainly dedicated to the

¹⁷⁸ DotMusic CPE Process Review Letter, ¶ 49, at Pg. 40.

¹⁷⁹ .HOTEL CPE Report, at Pg. 2.

¹⁸⁰ *Id.*, quoting .HOTEL application.

¹⁸¹ DotMusic CPE Process Review Letter, ¶ 49, at Pg. 40.

¹⁸² *Id.*

.HOTEL community—DotMusic has not shown or even argued that the CPE Provider would have reached the same conclusion in the .HOTEL CPE report in the absence of the IH&RA, which the CPE Provider concluded was mainly dedicated to the entire community defined in the .HOTEL application. Nor has DotMusic identified an equivalent entity that represents the global music community as defined, including all of the member categories in the Application. Accordingly, DotMusic has not shown that the CPE Provider applied a different standard for the Organization requirement in the .HOTEL CPE report than it applied in the DotMusic CPE Report. The Scope 2 Report also confirms this conclusion, as FTI found that the CPE Provider applied the “Organization” element of sub-criterion 1-A, Delineation, consistently in all CPEs, including the DotMusic CPE and the .HOTEL CPE.¹⁸³ Reconsideration is not warranted.

DotMusic has also argued that the CPE Provider did not disclose the research it relied on to conclude that “there is no entity mainly dedicated to the community as defined by the applicant in all its geographic reach and range of categories,”¹⁸⁴ in violation of its obligation to “Act Fairly and Openly,” and “to provide ‘conclusions that are compelling and defensible’ and ‘to document the way in which it has done so in each case.’”¹⁸⁵ Nothing in the Guidebook specifically required the CPE Provider to disclose every resource it considered in the course of its evaluation of the Application. Moreover, the Scope 3 Report *did* disclose the information DotMusic seeks. That report lists all of the references concerning sub-criterion 1-A, Delineation, that were not otherwise cited in the CPE Report.¹⁸⁶

- b. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 1-B-Extension.

¹⁸³ Scope 2 Report, Pg. 27-29 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

¹⁸⁴ CPE Report, Pg. 3

¹⁸⁵ 17 September 2016 DotMusic presentation to BGC, at slide 7 (citation not provided for internal quotations).

¹⁸⁶ Scope 3 Report, at Pg. 50-51 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

The Application received zero out of a possible two points for sub-criterion 1-B. The Requestors assert that the CPE Provider should have awarded the Application two points for sub-criterion 1-B.¹⁸⁷ To obtain two points for Extension, the community must be of considerable size and longevity. For a score of 1, the community must *either* be of considerable size *or* have longevity, but not both.¹⁸⁸ The Guidebook notes that Extension “relates to the dimensions of the community,” and that with

respect to . . . “Extension,” it should be noted that a community can consist of . . . a logical alliance of communities . . . provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both “Delineation” and “Extension.”¹⁸⁹

The CPE Provider determined that the Application did not satisfy either the one- or two-points test for sub-criterion 1-B because, while the community defined in the Application was “of considerable size,” it, again, did not “show evidence of ‘cohesion’ among its members.”¹⁹⁰ The CPE Provider also found that the relevant community as defined in the Application did not demonstrate longevity because the proposed community was “construed to obtain a sought-after generic word as a gTLD.”¹⁹¹

DotMusic asserts that the CPE Provider should have concluded that the community defined in the Application met the size and longevity requirements because the community includes “millions of constituents” and FIM and the IFPI were founded in 1948 and 1933, respectively.¹⁹² The Guidebook, however, states that an application should receive 0 points on “Extension” if the community defined in the application lacks “the requisite awareness and

¹⁸⁷ DotMusic CPE Process Review Letter, ¶ 50, at Pg. 40-41.

¹⁸⁸ Guidebook, Module 4, § 4.2.3, at Pg. 4-10.

¹⁸⁹ *Id.*

¹⁹⁰ CPE Report, Pg. 4.

¹⁹¹ *Id.*

¹⁹² DotMusic CPE Process Review Letter, ¶ 50, at Pg. 40-41.

recognition of the community . . . among the members.”¹⁹³ Because the CPE Provider concluded that the community defined in the Application lacked awareness and recognition, it was required to award zero points for sub-criterion 1-B, Extension. Accordingly, the CPE Provider acted consistent with the Guidebook and the Requestors’ argument does not support reconsideration.

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

Citing the CoE Report, DotMusic argues that the CPE Provider “appears to double count awareness and recognition of the community amongst its members twice.”¹⁹⁴ 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.”¹⁹⁵ 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*.”¹⁹⁶

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 more than once *within* one criterion. Accordingly, because sub-criterion 1-A and sub-criterion 1-B are both contained in criterion 1, “Community

¹⁹³ Guidebook, Module 4, § 4.2.3, at Pg. 4-12.

¹⁹⁴ 15 December 2016 letter from Ali to ICANN at Pg. 2-3

(<https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>).

¹⁹⁵ CoE Report, at Pg. 49.

¹⁹⁶ Guidebook, Module 4, § 4.2.3, at Pgs. 4-9, 4-10 (emphasis added).

Establishment,” counting awareness and recognition once in each sub-criterion does not violate the Guidebook’s prohibition on double-counting.

DotMusic also cites the CoE Report for the assertion that the CPE Provider “changed its own process as it went along.”¹⁹⁷ But in the next sentence, the CoE Report states that this information “was confirmed to us by ICANN staff who said that the panels did work to improve their process over time, *but that this did not affect the process as described in the [Guidebook].*”¹⁹⁸ Accordingly, DotMusic’s own source material indicates that any changes to the CPE Provider’s process did not affect the CPE Provider’s faithful application of the Guidebook process, and do not support reconsideration.

2. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-A-Nexus.

The Application received three out of a possible four points for Criterion 2. Criterion 2 evaluates “the relevance of the string to the specific community that it claims to represent,” and is measured by two sub-criterion: 2-A-Nexus; and 2-B-Uniqueness.¹⁹⁹ 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.”²⁰⁰ For a score of two, the applied-for string should closely describe the community or the community members, without overreaching substantially beyond the community.²⁰¹ Zero points are awarded if the string “does not fulfill the requirements for a score of 2.”²⁰² It is not possible to obtain a

¹⁹⁷ 15 December 2016 letter from Ali to ICANN at Pg. 4-5.

¹⁹⁸ CoE Report, at Pg. 51 (emphasis added).

¹⁹⁹ Guidebook, Module 4, § 4.2.3, at Pg. 4-12, 4-13.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

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.²⁰³ An application that does not qualify for two or three points for sub-criterion 2-A will not qualify for a score of one for sub-criterion 2-B.²⁰⁴

The Requestors challenge the CPE Provider's analysis of sub-criterion 2-A-Nexus, for which DotMusic received two of three possible points. DotMusic received one out of one point under sub-criterion 2-B-Uniqueness, and the Requestors do not challenge the CPE Provider's findings concerning that sub-criterion.²⁰⁵ The Requestors have 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 Adhered to Applicable Policies and Procedures in its Consideration of Entities Serving the Community As Defined in the Application.

The community as defined in the Application is "delineated using established [North American Industry Classification System (NAICS)] codes" relating to music.²⁰⁶ The CPE Provider determined that this community "include[d] some entities that are only tangentially related to music, such as accountants and lawyers," but had "limited the subset of such professionals included in the community."²⁰⁷ As such, the CPE Provider determined that the applied-for string, .MUSIC, "d[id] identify the individuals and organizations included in the applicant's defined community member categories."²⁰⁸ However, the CPE Provider also

²⁰³ *Id.* at Pg. 4-13.

²⁰⁴ *Id.* at Pg. 4-14.

²⁰⁵ Request 16-5.

²⁰⁶ CPE Report, Pg. 2.

²⁰⁷ CPE Report, Pg. 5.

²⁰⁸ *Id.*

determined that

the community defined in the application is a collection of many categories of individuals and organizations, and because there is no single entity that serves all of these categories in all their geographic breadth, there is no ‘established name’ for the applied-for string, as required by the [Guidebook] for a full score on [sub-criterion 2-A].²⁰⁹

Therefore, the CPE Provider awarded the Application two out of three points, as appropriate where a string “identifies the community,” but does not qualify for full points.²¹⁰

The Requestors disagree the CPE Provider’s determination that there is no “established name” for the community identified in the Application.²¹¹ However, reading the CPE Provider’s statement in its entirety, it is clear that the CPE Provider was of the view that because of the diffuse nature of the community as defined in the Application, that community did not entirely “match” the name “music,” as would be required for a full score on the nexus element. In the Requestors’ view, its defined community does in fact “match” the name “music.” This reflects a substantive disagreement with the determination of the CPE Provider, and is not evidence that the CPE Provider misapplied the second CPE criterion. As such, it is not a basis for reconsideration.

- b. The CPE Provider’s Application of Sub-Criterion 2-A in the Application is Consistent With its Application of sub-criterion 2-A in Other CPE Applications.

DotMusic also argues that the CPE Provider’s application of sub-criterion 2-A in the CPE Report is inconsistent with its application of the same sub-criterion in the .SPA CPE, because the CPE Provider awarded three of three possible points for sub-criterion 2-A-Nexus, to the

²⁰⁹ *Id.*

²¹⁰ CPE Guidelines, Pg. 7.

²¹¹ Request 16-5, § 6, Pg. 15. *See also* Blomqvist Opinion, ¶¶ 65-68 at Pg. 46-47; Burgess Opinion, ¶¶ 26-29, at Pg. 24-26.

applicant for .SPA, even though “the .SPA community admits that they did not completely represent the entire community” and the community included “a secondary community that was not directly related to spas.”²¹² In the .SPA CPE Report, the CPE Provider determined that

the associations of spas, including those cited by the application, as well as the individual establishments that are operated by members of the community as defined by the application, are also “commonly known by others” both in and outside of the community by the applied-for string “SPA”, as required by the [Guidebook]. . . . This common usage of the applied-for string closely aligns with the community as defined in the application. The community as defined by the application also includes entities which are not spas or spa associations, such as distributors and providers of spa-related products and services. As described by the applicant, these affiliated services align closely with core spa services, and nothing in the application suggests that these entities are a non-essential component of the spa community. Furthermore, this category of the spa community is also included in the membership of organizations such as the International Spa Association. This subset of the community, along with the principal spa community, therefore, meets the requirement for “match” with regard to Nexus.²¹³

Reading the .SPA CPE Provider’s statement as a whole, it is clear that the CPE Provider did not conclude that the community defined in the .SPA application included “a secondary community that was not directly related to spas,” as DotMusic asserts. Instead, the CPE Provider determined that the community “includes entities which are not spas or spa associations,” but *are* directly related to spas, as they are “distributors and providers of spa-related products and services,” which were “*essential component[s]* of the spa community.”²¹⁴ By contrast, the CPE Provider concluded that the community defined in the Application included groups that were “only tangentially related to music.”²¹⁵ The .SPA CPE Report does not support reconsideration.

²¹² DotMusic CPE Process Review Letter, ¶¶ 56-57, at Pg. 43-44.

²¹³ .SPA CPE Report at Pg. 4-5, available at <https://newgtlds.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf> (internal citations omitted).

²¹⁴ *Id.* (emphasis added).

²¹⁵ CPE Report, at Pg. 5.

DotMusic has therefore not identified any inconsistency in the CPE Provider's application of sub-criterion 2-A. Further, the Scope 2 Report confirmed that the CPE Provider applied sub-criterion 2-A, Nexus, consistently in all CPEs, including the DotMusic CPE and the .SPA CPE.²¹⁶ Accordingly, reconsideration is not warranted.

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

The Application received three points for Criterion 4. Criterion 4 evaluates support for and/or opposition to an application.²¹⁷ It measured by two sub-criterion: sub-criterion 4-A-Support; and sub-criterion 4-B-Opposition.²¹⁸ Sub-criterion 4-A and sub-criterion 2-B are each worth a maximum of two points, for a total of four points.²¹⁹

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.²²⁰ "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.²²¹ 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.²²² To be taken into account as relevant support, such documentation must contain a description of the

²¹⁶ Scope 2 Report, Pg. 36-41, *available at* <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

²¹⁷ Guidebook, § 4.2.3; *see also* Request, § 6, Pgs. 14-15.

²¹⁸ Guidebook, Module 4, § 4.2.3, at Pg. 4-17.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at Pgs. 4-17-4-18.

²²² *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.²²³

To obtain two points for sub-criterion 4-B-Opposition, there must be “no opposition of relevance” to the application.²²⁴ One point is awarded if there is “relevant opposition from one group of non-negligible size.”²²⁵ Zero points are awarded if there is “relevant opposition from two or more groups of non-negligible size.”²²⁶

The Requestors challenge the CPE Provider’s application of sub-criterion 4-A-Support. The Requestors do not challenge the CPE Provider’s findings concerning sub-criterion 4-B-Opposition.²²⁷

The CPE Provider determined that the 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.”²²⁸ Additionally, the CPE Provider concluded that, although DotMusic had “documented support from many groups with relevance,” none were the “recognized community institution” because the CPE Provider had “not found evidence that such organization exists.”²²⁹

The Requestors object to the fact that in explaining its scoring, the CPE Provider described a “recognized community institution” as one that is “recognized by all of the defined community’s members as representative of the defined community in its *entirety*.”²³⁰ The Requestors claim that the .HOTEL and .RADIO CPE Reports applied a lower standard, because

²²³ *Id.*

²²⁴ *Id.* at Pg. 4-17.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Request 16-5.

²²⁸ CPE Report, at Pg. 8.

²²⁹ *Id.*

²³⁰ Request 16-5, § 6, Pgs. 8-9 (emphasis added).

the CPE Provider there referred to the organizations that supported that applicants as “representing a *majority* of the overall community as defined by the applicant.”²³¹ Relatedly, DotMusic argues that in the .HOTEL CPE Report, the CPE Provider concluded that the AH&LA and CHA “constitute the recognized institutions to represent the community.”²³² DotMusic believes that “[i]f the [AH&LA and CHA] would suffice as recognized organizations mainly dedicated to hotels,” then the CPE Provider should have concluded that the FIM and IFPI are recognized organizations mainly dedicated to the community defined in DotMusic’s application.²³³ These arguments do not support reconsideration.

Ultimately, the Requestors disagree with the CPE Provider’s determination that the institutions supporting the Application, while relevant, were not the “recognized community institutions” under sub-criterion 4-A because none represented the whole of the community as defined by DotMusic. As discussed above with reference to the first criterion, this argument represents a substantive disagreement with the CPE Provider and is not a basis for reconsideration.

The fact that the CPE Provider chose to describe a “recognized community institution” in slightly different but substantively identical terms in other CPEs does not demonstrate that the CPE Provider here deviated from established policy and procedure in scoring this criterion. In fact, the CPE Provider in both instances defined a “recognized community institution” as one that is “clearly recognized by the community as representative of that community”—the definition used in the CPE Guidelines.²³⁴ Indeed, the Requestors argue the Oxford dictionary

²³¹ *Id.*, § 8, Pgs. 8-9 citing .HOTEL CPE Report at 6 (emphasis added). *See also* DotMusic CPE Process Review Letter, ¶¶ 61-62, at Pg. 44-45.

²³² DotMusic CPE Process Review Letter, ¶ 61, at Pg. 45.

²³³ *Id.* ¶ 62, at Pg. 45.

²³⁴ CPE Guidelines at 17; CPE Report at Pg. 8; .HOTEL CPE Report at Pg. 6, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

defines “representative” as meaning “typical,” and suitable to “speak on behalf of a wider group”²³⁵ but the CPE Provider here essentially applied that definition in determining that no organization among the applicant’s supporters “demonstrates the *kind of structure* required to be a ‘recognized’ organization, per the [Guidebook] guidelines.”²³⁶ Moreover, the .HOTEL CPE panel’s determination to award the applicant two points for the support criterion was not based merely on a finding that the “majority” of the community was represented, but instead its determination that the organizations that supported the applicant “constitute[d] the recognized institutions to represent the community.”²³⁷

DotMusic also asserts that the CPE Provider should have awarded it full points for support because the CPE Provider awarded full points to the .RADIO community applicant even though it only had support from “organizations representing a majority of the community,” including “support from a broad range of recognized community institutions/member organizations, which represented different segments of the community.”²³⁸ DotMusic believes that it also had support from “recognized community organizations that represented a majority of the overall community defined by DotMusic.”²³⁹

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.”²⁴⁰ Accordingly, consistent with the Guidebook, the CPE Provider awarded those applicants two points each under this sub-criterion. By contrast, the CPE Provider *did not* conclude that the Requestor had documented support from

²³⁵ Request 16-5, § 6, Pg. 9.

²³⁶ CPE Report at Pg. 8.

²³⁷ .HOTEL CPE Report at Pg. 6.

²³⁸ DotMusic CPE Process Review Letter, ¶ 63, at Pg. 45.

²³⁹ *Id.*

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

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.²⁴¹ Consistent with the Guidebook, because it had determined that: (1) there was no single organization recognized by all members of the defined community as representative of the defined community in its entirety; and (2) DotMusic’s documented support did not reflect support from a “majority of the community,” the CPE Provider did not award two points for this sub-criterion. Further, the Scope 2 Report confirms that the CPE Provider complied with applicable policies and procedures, as FTI found that the CPE Provider applied sub-criterion 4-A, Support, consistently in all CPEs, including the DotMusic CPE and the .HOTEL and .RADIO CPEs.²⁴² Accordingly, these arguments do not support reconsideration.

Additionally, DotMusic is incorrect in its assertion that the CPE Provider concluded that the AH&LA (an American association) and CHA (a Chinese association) “constitute the recognized institutions to represent the [Hotel] community” with respect to sub-criterion 4-A. In its discussion of sub-criterion 4-A, the CPE Provider stated that “the applicant possesses documented support from the recognized community institution(s)/ member organizations(s). . . . These groups constitute the recognized institutions to represent the community, and represent a majority of the overall community as defined by the applicant.”²⁴³ The CPE Provider did not identify the AH&LA or the CHA as the organizations it was referencing. DotMusic has set forth no evidence that the CPE Provider was referring to the geographically-limited organizations that DotMusic focuses on in the .HOTEL CPE Report.

²⁴¹ CPE Report, at Pg. 8.

²⁴² 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>).

²⁴³ *Id.*

In short, the CPE Provider here applied the very definition the Requestors point to in the CPE Guidelines, namely whether the organizations supporting the application are “clearly recognized by the community members as representative of that community.”²⁴⁴

Finally, DotMusic argues that the “CPE [Provider] should have investigated all of DotMusic’s supporters to determine whether the criteria set forth in the [Guidebook] was fulfilled. Support letters were sent by thousands of entities,” but “the CPE panel only researched a few of these organisations according to the findings of the FTI Report.”²⁴⁵ DotMusic identifies no requirement in the Guidebook—as there is none—that requires the CPE Provider to “investigate” each supporter. The CPE Provider acknowledged the “wide array” of supporters for the Application, and noted that DotMusic had “documented support from many groups with relevance,” awarding one of two points.²⁴⁶ The Scope 3 Report confirms that the CPE Provider sent verification emails to all of the entities that submitted letters of support, consistent with the CPE Panel Process Document.²⁴⁷ In the course of that verification process, the CPE Provider “assesse[d] . . . the relevance of [each] organization” that submitted a letter of support.²⁴⁸ Accordingly, the CPE Provider *did* investigate each of DotMusic’s supporters, consistent with CPE procedures, and DotMusic’s argument does not support reconsideration.

J. The Board’s Conclusion of the CPE Process Review was Consistent with Applicable Policies and Procedures.

The Requestors’ 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 Requestors’ concerns in its

²⁴⁴ Request 16-5, § 8, Pgs. 8-9; *see* CPE Guidelines at Pg. 17.

²⁴⁵ DotMusic CPE Process Review Letter, ¶¶ 101-02, at Pg. 60-61.

²⁴⁶ CPE Report, at Pg. 8.

²⁴⁷ Scope 3 Report, at Pg. 51 n.185; CPE Panel Process Document, at Pg. 5 (<https://newgtlds.icann.org/en/applicants/cpe>).

²⁴⁸ CPE Panel Process Document, at Pg. 5.

Recommendation on Request 18-5,²⁴⁹ which the Board adopted on 18 July 2018.²⁵⁰ The rationales set forth by the BAMC, and the Board in its determination on Request 18-5, are incorporated herein by reference.

K. DotMusic’s Procedural Demands are Outside the Scope of Request 16-5.

DotMusic’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.²⁵¹ First, the 2018 Resolutions did not direct ICANN org to disclose all the documents related that CPE Process Review requested by DotMusic in DIDP Request 20180110-1. The Board resolved that issue when it denied DotMusic’s reconsideration request challenging ICANN org’s response to DIDP Request 20180110-1.²⁵² 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.²⁵³

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 Reconsideration responsibilities to the BAMC.²⁵⁴ 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

²⁴⁹ Recommendation on Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-14jun18-en.pdf>.

²⁵⁰ Board action on request 18-5, <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.f>.

²⁵¹ Transition Process (<https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>).

²⁵² Board Action on Request 18-1 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.b>).

²⁵³ 2018 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>).

²⁵⁴ Transition Process, Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>).

oral presentation to the BAMC, including those requestors that previously presented to the BGC, such as the Requestor, which the BAMC has done.²⁵⁵ 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, DotMusic’s demand that the BAMC “must” provide DotMusic with a list of specific concerns about Request 16-5 following the Requestor’s supplemental submission and to schedule an in person presentation to address them (once the above-described conditions are met)²⁵⁶ is inconsistent with the 2018 Resolutions and the Transition Process.²⁵⁷ Consistent with the Bylaws, which permit the BAMC to “request additional information or clarifications from the requestor,”²⁵⁸ the BAMC *has* offered the Requestors the opportunity to make a telephonic presentation to it concerning Request 16-5 and the CPE Process Review, during which the BAMC could have asked questions or raised concerns, if it had any.²⁵⁹ DotMusic “reject[ed]” the BAMC’s offer, and the other requestors did not respond to the BAMC’s invitation.²⁶⁰

With respect to DotMusic’s extraordinary demand that ICANN org bear DotMusic’s costs and expenses for reviewing any documents ICANN 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 process. While the Bylaws provide that ICANN org shall bear “the normal

²⁵⁵ *See id.*

²⁵⁶ <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-2-14jun18-en.pdf>.

²⁵⁷ 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>)

²⁵⁸ ICANN Bylaws, 11 February 2016, Art. IV § 2.12.

²⁵⁹ 19 March 2018 email from ICANN organization to the Requestors

<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-1-14jun18-en.pdf> f.

²⁶⁰ 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5,

administrative costs of the reconsideration process,”²⁶¹ DotMusic’s costs for reviewing documents and preparing a submission to the BAMC is not a normal administrative cost. If it were, ICANN org would have to bear every requestor’s costs for preparing their reconsideration requests, which simply is not contemplated in the Bylaws, nor is it tenable.

Finally, the BAMC notes that it has carefully reviewed and considered all of the materials that the Requestors have submitted since 2016. Its evaluation of these materials is incorporated in the extensive discussion on the preceding pages of this Recommendation. The BAMC has also provided the Requestors an opportunity to “be heard [concerning the CPE Process Review Reports] as it relates to [the] pending reconsideration requests,” which DotMusic sought on 16 January 2018,²⁶² but declined to accept the opportunity when offered in March 2018.²⁶³

For all of the reasons discussed above, reconsideration is not warranted.

II. Recommendation.

The BAMC has considered the merits of Request 16-5 and, based on the foregoing, concludes that ICANN org acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments and Core Values when it accepted the CPE Report, and the Board’s response to the Despegar IRP Determination does not merit reconsideration. Accordingly, the BAMC recommends that the Board deny Request 16-5.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws applicable to Request 16-5 provides that the BAMC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical.

²⁶¹ ICANN Bylaws, 11 February 2016, Art. IV § 2.4.

²⁶² <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

²⁶³ 23 March 2018 Letter from Ali on behalf of dotgay LLC and DotMusic to ICANN (<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>).

To satisfy the thirty-day deadline, the BAMC would have to have acted by 26 March 2016. However, Request 16-5 was placed on hold pending completion of the CPE Process Review. The Requestors were then provided an opportunity to supplement their arguments in light of the CPE Process Review results, and to make a telephonic presentation to the BAMC prior to its recommendation. The Requestors rejected both invitations. Accordingly, the first opportunity that the BAMC has to consider Request 16-5 is 25 January 2019.