

Rebuttal to the BAMC’s Recommendation on Reconsideration Request 16-5

Requestor submits this rebuttal to the BAMC’s Recommendation on Reconsideration Request 16-5 (the “**Recommendation**”).¹

1. Requestor’s Position Regarding the BAMC’s Lack of Proper Invitation

The Recommendation misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-5 (“**Request 16-5**”). It states that Requestor rejected the BAMC’s invitation.² This is inaccurate. The BAMC’s invitation imposed significant constraints on Requestor’s ability to fully address Request 16-5 in light of FTI Consulting, Inc.’s Community Priority Evaluation Process Review (the “**FTI Reports**”). Requestor sought to make unconstrained written submissions and an in-person presentation³ as opposed to a limited written ten-page submission and a telephonic presentation to the BAMC.⁴ Neither ICANN nor the BAMC responded to Requestor until the Recommendation.

2. The BAMC Failed to Comply with the ICANN Bylaws

Pursuant to the ICANN Bylaws, ICANN must (1) “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act;”⁵ (2) “promote well-informed decisions based on expert advice;”⁶ (3) “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment;”⁷ and

¹ See Recommendation of the BAMC Reconsideration Request 16-5 (25 January 2019).

² *Id.* at p. 4.

³ *Id.*; see Reconsideration Request 18-5 Exhibit 36, Letter from A. Ali to C. Chalaby and C. Disspain (23 Mar. 2018), pp. 4-5 (making several requests in response to the BAMC’s invitation); Reconsideration Request 18-5 (14 Apr. 2018).

⁴ See Reconsideration Request 18-5 Exhibit 34, Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process that Were Placed On Hold Pending Completion of the CPE Process Review (15 Feb. 2018); Reconsideration Request 18-5 Exhibit 35, Email from R.M. Wong to ICANN Board (5 Apr. 2018).

⁵ ICANN Bylaws (18 June 2018), Article 1, Section 1.2(a)(iv).

⁶ *Id.*

⁷ *Id.* at Article 1, Section, 1.2(a)(v).

(4) operate “with efficiency and excellence.”⁸ The Bylaws further require that ICANN carry “out its activities in conformity with relevant principles of international law and international conventions.”⁹ The Recommendation violates these obligations and, in doing so, makes several misstatements that Requestor corrects below.

A. Requestor Presented Significant Evidence that ICANN Violated Its Bylaws

Request 16-5 provides sufficient evidence to show that ICANN failed to comply with the ICANN Bylaws. The Recommendation contends that:

Based on its extensive review of all relevant materials, the BAMC finds that ICANN org complied with established policies, Bylaws, and Articles of Incorporation when it accepted the CPE Report, because the CPE Provider did not violate any established policies or procedure in conducting the CPE. The BAMC further finds that the Requestors do not identify any misapplication of policy or procedure by the CPE Provider that materially or adversely affected the Requestors. Accordingly, the BAMC recommends that the Board deny Request 16-5.¹⁰

Requestor gave ICANN evidence to support its claims, such as expert opinions and the Council of Europe’s Report.¹¹ These documents provide evidence supporting Request 16-5 and concerns about the FTI Reports.¹²

Additionally, ICANN has thwarted Requestor from obtaining additional evidence by refusing to disclose documents related to the FTI Reports. This stonewalling by ICANN and refusal to provide documentation is in direct contravention to its commitment to transparency.

⁸ *Id.* at Article 1, Section 1.2(a)(iv).

⁹ *Id.* at Article 1, Section 1.2(a).

¹⁰ *See* Recommendation of the BAMC Reconsideration Request 16-5 (25 January 2019), p. 4.

¹¹ *See, e.g.*, Request for Reconsideration 18-5 Exhibit 5, Letter from Flip Petillion to the BAMC (1 Feb. 2018); Request for Reconsideration 18-5 Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICAN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018); Request for Reconsideration 18-5 Exhibit 12, Expert Legal Opinion by Honorary Professor in International Copyright Dr. Jørgen Blomqvist (18 June 2016); Request for Reconsideration 18-5 Exhibit 13, Even Salomon and Kinanya Pijl, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017).

¹² *See* Request for Reconsideration 18-5 Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 19 (describing Requestor’s submissions as “Evidence”).

ICANN is required to operate “through open and transparent processes.”¹³ ICANN has continually refused to disclose relevant documents that would likely provide additional evidence in support of Requestor’s concerns.¹⁴ Requestor has already shown that ICANN has failed to comply with its commitment to act with transparency in its prior submissions to ICANN.¹⁵

B. The Community Priority Evaluation Provider Misapplied the Evaluation Criteria for Requestor’s .MUSIC Community Application

There are many examples of misapplication of process and established procedures by the Community Priority Evaluation (“CPE”) Provider.

First, the CPE Provider ignored the gTLD Applicant Guidebook’s (“AGB”) procedures in relation to the Community definition, which resulted in consequential errors in CPE grading. These errors alone could have resulted in Requestor passing the CPE. As Figure 1 shows, the CPE is “scored on the community identified in response to *this* question” i.e. Question 20A.

#	Question	Included in public posting	Notes
20	(a) Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to this question. The name of the community does not have to be formally adopted for the application to be designated as community-based.	Y	Descriptions should include: <ul style="list-style-type: none"> • How the community is delineated from Internet users generally. Such descriptions may include, but are not limited to, the following: membership, registration, or licensing processes, operation in a particular industry, use of a language. • How the community is structured and organized. For a community consisting of an <u>alliance of groups</u>, <u>details about the constituent parts are required.</u>

Figure 1: gTLD Applicant Guidebook (4 June 2012), p. A-14.

¹³ ICANN Bylaws (18 June 2018), Article 1, Sections 1.2(a), 1.2(b)(ii) (ICANN must “seek[] and support[] broad, informed participation . . . to ensure that the bottom-up multistakeholder policy development process is used to ascertain the global public interest and that those processes are countable and transparent.”).

¹⁴ See, e.g., Request for Reconsideration 18-5 Exhibit 18, Request No. 20180110-1 (10 Jan. 2018); Request for Reconsideration 18-5 Exhibit 25, Request No. 20170505-1 (5 May 2017); Request for Reconsideration 18-5 Exhibit 28, Request No. 20170610-1 (19 June 2017).

¹⁵ See Request for Reconsideration 18-5 Exhibit 38, Reconsideration Request 18-1 (10 Mar. 2018); Request for Reconsideration 18-5 Exhibit 39, Reconsideration Request 17-4 (25 July 2017); Request for Reconsideration 18-5 Exhibit 40, Reconsideration Request 17-2 (18 June 2017).

As Figure 2 shows, the CPE Provider identified the community in response to Question 20D—*not* Question 20A:

In addition to the above-named member categories, 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 complementor organizations involved in support activities that are aligned with the .MUSIC mission” (Application, 20D).

Figure 2: DotMusic Limited Community Priority Evaluation Report (10 Feb. 2016), p.3.

This is a significant procedural error because the CPE Provider proceeded to grade the rest of the CPE based on an *incorrect* community definition resulting in consequential errors, double counting and inappropriately penalizing Requestor’s score.

Second, as Figure 2 illustrates, the CPE Provider incorporated its own “general definition” derived from Question 20D, when clearly, as Figure 1 shows, the definition must be defined and identified by Question 20A. If this misapplication was not enough, the CPE Provider compounded the error further, replacing the “Community” definition with the “Eligibility” criterion’s NAICS classification categories, as illustrated in Figure 3:

The community defined in the application is “delineated using established NAICS codes that align with the (i) characteristics of the globally recognized, organized Community, and (ii) .MUSIC global rotating multi-stakeholder Advisory Board model of fair representation, irrespective of locale, size or commercial/non-commercial status” (Application, 20A).

Figure 3: DotMusic Limited Community Priority Evaluation Report (10 Feb. 2016), p.2.

Third, Requestor’s key definitions—identified using “parentheses” to assist the CPE Provider in locating key definitions as shown in Figure 4 below—were ignored and replaced by the CPE Provider with incorrect definitions.

20A. Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to this question. The name of the community does not have to be formally adopted for the application to be designated as community-based.

Name of the Community is the Music Community

The name of the community served is the “Music Community” (“Community”). The parentheses below reflect ICANN’s Applicant Guidebook 4.2.3 Criterion Definitions; Delineation; Extension; Nexus; Uniqueness; Eligibility; Name Selection; Content and Use; Enforcement; Support; Opposition. DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria “aligned with the community-based Purpose” and mitigate anti-trust and confidentiality/privacy concerns by protecting the Community of considerable size-extension while ensuring there is no material detriment to Community rights-legitimate interests. Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination, conflict of interest or “likelihood of material detriment to the rights and legitimate interests” of the Community: (i) Qualification criteria as delineated by recognized NAICS codes corresponding to Community member classification music entity types. This classification-based delineation will also be consistent with registrant Premium Channel-membership criteria (“ELIGIBILITY”) (ii) Domain naming conditions (“NAME SELECTION”) (iii) Restrictions relating to domain usage and content (“CONTENT & USE”) (iv) Enforcement mechanisms to uphold Community Establishment and meet Nexus Criteria, consistent with our clear, organized delineation of the Community (“ENFORCEMENT”).

The “COMMUNITY” definition is an (i) an “organized community” and (ii) a “logical alliance” with cohesion “aligned with the community-based Purpose”

The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical alliance of communities of a similar nature (“COMMUNITY”)”, that relate to music: the art of combining sounds rhythmically, melodically or harmonically.

Community Establishment refers to “clear, organized and interrelated criteria to demonstrate Community Establishment aligned with the community-based Purpose”

NAICS codes refer to Eligibility NOT Community Definition

Figure 4: DotMusic Limited’s .MUSIC Application.

Requestor’s definition of the “Community” is an “organized community of individuals, organizations and business, a logical alliance of communities that relate to music” that uses “clear, organized and interrelated criteria to demonstrate Community Establishment ... aligned with the community-based Purpose” (as green underlined in [Figure 4](#)). Requestor also identifies the criteria that relate explicitly to “Eligibility” (as red underlined in [Figure 4](#)). The CPE Provider never acknowledged that Requestor met the precise community definition of a “logical alliance” that possesses “awareness and recognition” among its members, as seen through its Support Letters. As the CPE Guidelines indicate below in [Figure 5](#), a “logical alliance of communities” qualifies for a full grade under Community Establishment just as long as there is awareness and recognition among its members:

With respect to “Delineation” and “Extension,” it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.

[Figure 5: CPE Guidelines, pp. 4-5.](#)

Fourth, another misapplication of a term explicitly defined by Requestor, which was ignored and misapplied by the CPE Provider, concerns the “Name” of the Community under the Nexus Section. The CPE Provider not only misapplied the Community Definition as “a collection of many categories,” but also concluded that “there is no “established name” for the applied-for string to match,” as [Figure 6](#) illustrates below:

Because 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 to match, as required by the AGB for a full score on Nexus.

[Figure 6: DotMusic Limited Community Priority Evaluation Report \(10 Feb. 2016\), p. 5.](#)

The name of the community is not a “collection of many categories” as the CPE Provider indicates. Requestor identified the established name of the community in the *first* sentence to its answer to Question 20A (the “Music Community”), as underlined in [Figure 7](#) below:

20A. Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to this question. The name of the community does not have to be formally adopted for the application to be designated as community-based.

Name of the Community is the Music Community
The name of the community served is the "Music Community"

[Figure 7: DotMusic Limited’s .MUSIC Application.](#)

The BAMC states that the Requestor “argue[s] 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” and that “the CPE Provider expressly relied on DotMusic’s response to Question 20A, and this argument does not support reconsideration.”¹⁶ The “argument” is not whether or not the CPE Provider relied on Requestor’s response to Question 20A, but whether or not the CPE Provider used the proper community definition. This is a procedural issue and not merely a “substantive disagreement.” If the CPE Provider used the proper community definition, then the grading would differ, resulting in a passing score. The CPE Provider did not argue whether or not a logical alliance of music communities that are aligned with an explicit community-based purpose and have submitted support letters have cohesion or not. In contrast, the CPE Provider argued whether or not a “collection of many categories”—which Requestor used to address the Eligibility criterion and *not* the community definition—had cohesion. If the “CPE Provider expressly *relied* on DotMusic’s response to Question 20A” then why did the CPE Provider: (1) not explicitly mention Requestor’s community definition in its CPE; and (2) create its own “general definition” of the community that was derived from Question 20D when the AGB explicitly states the definition should only be derived in Question 20A? The aforementioned points represent a procedural violation, not a substantive disagreement with the CPE Provider. It would

¹⁶ Recommendation of the BAMC Reconsideration Request 16-5 (25 January 2019), p. 14.

only be a substantive disagreement if the CPE Provider transparently and explicitly relied upon and applied the *correct* community definition of a “logical alliance” and made arguments in its favor (or against it). This did not occur.

Even with respect to Nexus, the CPE Provider ignores Requestor’s established name for the community: the “Music Community.” Again, the CPE Provider argues that the community does not exist because the community definition is a “collection of categories.” The misapplication of the community definition has also resulted in consequential grading errors across other CPE sections. This is a procedural violation warranting reconsideration.

C. FTI Consulting, Inc. Produced Methodologically Flawed Reports

The BAMC’s actions violate the ICANN Bylaws because FTI Consulting, Inc. (“**FTI**”) did not adhere to a proper methodology in the FTI Reports.¹⁷ The BAMC violated its Bylaws by failing to make a well-informed decision and failing to fairly apply its documented policies when it adopted these methodologically flawed reports to make its Recommendation.

First, FTI failed to obtain and review “all potentially relevant materials and documentation”¹⁸ as part of its independent review. The ACFE’s Code of Professional Standards requires that FTI “*obtain evidence and information that is **complete, reliable and relevant.***”¹⁹ However, FTI based its independent review of the CPE process on information solely obtained from ICANN and the CPE Provider—the two organizations being reviewed—even though FTI could have obtained a significant amount of additional relevant information from the community applicants.²⁰ This information was therefore not complete.

¹⁷ See Reconsideration Request 18-5 Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).

¹⁸ *Id.*

¹⁹ Reconsideration Request 18-5 Exhibit 41, ACFE Code of Professional Standards Interpretation and Guidance, p. 8 (emphasis added).

²⁰ See Reconsideration Request 18-5 Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

Second, FTI failed to interview all of the relevant individuals with “knowledge pertinent to the subject being investigated”²¹ FTI had the capability to review the community applicants affected by the CPE Provider’s CPEs, but refused to talk with any of the applicants. FTI’s blanket acceptance of declarations made by ICANN and the CPE Provider is a significant problem with the FTI Reports as it does not consider “*the possibility of conjecture, unsubstantiated opinion and bias of witnesses and others*” in accordance with ACFE standards.²² FTI simply accepted that the documents and interview statements were accurate and free of bias—despite being from the organizations under review. Instead of critically examining this evidence, FTI (1) did not question the information from ICANN and the CPE Providers; (2) refused to address the significant amount of contrary findings from third parties; and (3) excluded evidence that provided a contrary viewpoint to ICANN and the CPE Provider by deliberately choosing not to interview applicants.²³ FTI thus based the FTI Reports on a one-sided representation of the CPE process violating ACFE standards.

Third, FTI further did not exercise due professional care in conducting the CPE Process Review. In accordance with ACFE standards, FTI was required to discharge its professional responsibilities with “*diligence, critical analysis and professional skepticism*.”²⁴ FTI failed to achieve this objective because it simply accepted statements and information without further investigation or critical analysis. FTI was **only** concerned with determining whether the “reference[s] to the CPE Panel’s research” were reflected in the actual cited materials, **and not whether the underlying referenced research was true or accurate**.²⁵ FTI clearly failed to

²¹ *Id.* at p. 4.

²² Reconsideration Request 18-5 Exhibit 41, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

²³ Reconsideration Request 18-5 Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

²⁴ Reconsideration Request 18-5 Exhibit 41, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

²⁵ *See id.* at pp. 14-57.

critically analyze the information that it received and rather simply accepted the information as true without exercising any professional skepticism. FTI's interviews with the CPE Provider's personnel confirmed that ICANN did not affect the CPE Provider's CPEs and that the CPE Provider "never changed the scoring or the results based on ICANN organization's comments."²⁶ This conclusion on the actions of the independent evaluators for the CPE is based off of two interviews with CPE Provider personnel that *were not CPE evaluators*. Clearly, FTI's generalizations are unreliable; they are based on claims made by two CPE core team members on the evaluation process under the purview of the independent evaluators. FTI's actions have further rendered the entire CPE Process Reports significantly unreliable. FTI clearly failed to adhere to the methodology that it *chose to adopt* for the FTI Reports. By ignoring these failures in order to use the FTI Reports in the Recommendation, the BAMC violated its Bylaws-imposed obligations.

D. The FTI Reports Are Substantively Flawed

The FTI Reports are substantively flawed because FTI did not *address* any of the independent evaluations. FTI states that it "carefully considered the *claims* raised in Reconsideration Requests and Independent Review Process ... proceedings" and the "*claim* that certain of the CPE criteria were applied inconsistently across the various CPEs."²⁷ These simple declarations do not address the independent authority directly contradicting FTI's conclusions. FTI must have examined the full scope of relevant evidence and then confirmed or rebutted the authorities with adequate analysis. FTI, though, instead chose to ignore their existence rather than directly rebut their conclusions. By failing to consider divergent views on the CPE process, FTI produced a series of substantially flawed reports. FTI simply accepted statements and information

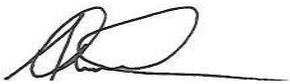
²⁶ Reconsideration Request 18-5 Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 15.

²⁷ Reconsideration Request 18-5 Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 3 (emphasis added).

without further investigation or critical analysis. FTI's immediate acceptance that both the research performed by the CPE Provider and the information it received from ICANN and the CPE Provider were fully true and accurate further emphasizes the lack of any substantive evaluation in its review. The BAMC based its Recommendation on the flawed FTI Reports, which violate its obligation to act for the public benefit, make well-informed decisions based on expert advice, and apply documented policies consistently, neutrally, objectively, and fairly.

3. Conclusion

The BAMC violated ICANN Bylaws by recommending that the ICANN Board deny Request 16-5. In addition to the reasons stated in the Request 16-5, the Board should grant Request 16-5 and reject the FTI Reports because the BAMC (i) improperly relies on the FTI Reports (which are the focus of a still-pending CEP²⁸); (ii) bases its conclusions on unsupported statements about ICANN's communications with the CPE Provider; and (iii) untimely responds to Requestor's procedural requests, such as Requestor's request to make an in-person presentation to the BAMC.



Arif Hyder Ali

Date: 12 February 2019

²⁸ See Active Cooperative Engagement Process Proceedings requested by DotMusic on 14 September 2016, 6 October 2017, 7 November 2017, and 1 August 2018.