

dotgay LLC Reconsideration Request (“RR”)

1. Requestor Information

Requestor:

Name: dotgay LLC

Address: Contact Information Redacted

Email: Jamie Baxter, Contact Information Redacted

Requestor is represented by:

Counsel: Arif Hyder Ali

Address: Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

dotgay LLC (the “Requestor”) seeks reconsideration of ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 (collectively, the “Resolutions”), which accepted FTI Consulting, Inc.’s (“FTI”) three reports on its independent evaluation of the community priority evaluation process (collectively, the “CPE Process Review Reports”).¹

¹ Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

On 15 March 2018, the ICANN Board adopted four resolutions related to the independent review of the community priority evaluation (“CPE”) process.² The Resolutions held that the ICANN Board (1) “acknowledges and accepts the findings set forth in the three CPE Process Review Reports” (Resolution 2018.03.15.08);³ (2) “concludes that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary” (Resolution 2018.03.15.09);⁴ (3) “declares that the CPE Process Review has been completed” (Resolution 2018.03.15.10);⁵ and (4) “directs the Board Accountability Mechanisms Committee [(“BAMC”)] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review” (Resolution 2018.03.15.11).⁶

4. Date of action/inaction:

ICANN acted on 15 March 2018 by adopting the Resolutions.

5. On what date did you become aware of action or that action would not be taken?

Requestor became aware of the action on 15 March 2018, when the ICANN Board adopted

² The ICANN Board directed its “President and CEO, or his designee(s), to undertake an independent review” of the CPE process. Exhibit 02, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>. FTI conducted its review as part of this directive.

³ Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>. ICANN’s “CPE Process Review was conducted by [FTI] ... and consisted of three parts” that were discussed in three separate reports. Exhibit 03, ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>. The first report involves “reviewing the process by which the ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider” (“Scope 1 Report”). *Id.* The second report involves “an evaluation of whether the CPE criteria were applied consistently throughout each CPE report” (“Scope 2 Report”). *Id.* And the third report consists of “a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests” (“Scope 3 Report”). *Id.*

⁴ Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

⁵ *Id.*

⁶ *Id.*

the Resolutions during a public meeting of the ICANN Board.⁷

6. Describe how you believe you are materially affected by the action or inaction:

Requestor is materially and adversely affected by ICANN’s decision to adopt the Resolutions. As described further in **Section 8** below, Requestor is the community applicant for the .GAY gTLD and therefore participated in the CPE process.⁸ Requestor seeks reconsideration of the Board Governance Committee’s (“BGC”) decision to affirm the second .GAY CPE. Requestor’s Reconsideration Request 16-3 (“RR 16-3”) raises several significant concerns about the evaluation—such as the discriminatory and inconsistent application of the CPE criteria.⁹ FTI’s independent review of the CPE process, which includes a review of Requestor’s own CPE, serves as contrary evidence to the discrimination and inconsistency arguments in RR 16-3.¹⁰ However, unlike the expert opinions supporting RR 16-3, the CPE Process Review Reports are based on a flawed methodology and insufficient substantive analysis.¹¹ Despite being aware of these problems with the CPE Process Review Reports,¹² the ICANN Board nonetheless fully

⁷ See Exhibit 04, “ICANN Board Meeting,” ICANN|61 (last visited 3 Apr. 2018), <https://61.schedule.icann.org/meetings/647631>.

⁸ See Exhibit 05, “Community Priority Evaluation Report for .GAY” (6 Oct. 2014), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>; see also Exhibit 06, “Community Priority Evaluation Report for .GAY” (8 Oct. 2015), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

⁹ See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (seeking reconsideration of the determination on Reconsideration Request 15-21); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (requesting reconsideration of the second .GAY CPE).

¹⁰ Exhibit 09, Community Priority Evaluation Process Review Update (2 June 2017), <https://www.icann.org/news/announcement-4-2017-06-02-en>. The review determined that “the CPE Provider consistently applied the CPE criteria throughout all Community Priority Evaluations.” Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 57, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

¹¹ Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), p. 9, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

¹² See *id.*; Exhibit 12, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

“acknowledge[d] and accept[ed]” them.¹³ It then directed the BAMC to “move forward with consideration of the remaining Reconsideration Requests relating to the CPE process,” which includes RR 16-3, in light of the Board’s decision regarding the CPE Process Review Reports.¹⁴ The BAMC’s consequential reliance on the fallacious CPE Process Review Reports will directly affect its consideration of RR 16-3 and, therefore, will directly and materially affect Requestor.

The BAMC simply cannot proceed with evaluating RR 16-3 based on the Resolutions because the ICANN Board not only rubber-stamped a set of flawed reports but also violated ICANN’s Bylaws. The ICANN Board must act “consistent with procedure designed to ensure fairness, including implementing procedures to ... encourage fact-based policy development work”¹⁵ The CPE Process Review Reports are based on an incomplete and unreliable universe of documents biased in favor of ICANN, as explained in **Section 8.3** below. The ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness, part of which requires ICANN to encourage fact-based work.

Furthermore, pursuant to its Bylaws, the ICANN Board must “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values.”¹⁶ It has failed to comply with this obligation in the following ways:

1. The ICANN Board has violated its commitment to “[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[.]” It has not acted for the public benefit by accepting the conclusions of reports that rubber-stamp an evaluation process for community applicants that legal

¹³ Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

¹⁴ Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en>.

¹⁵ Exhibit 13, ICANN Bylaws (22 July 2017), Article 1, Section, 1.2(a)(iv), <https://www.icann.org/resources/pages/governance/bylaws-en/>.

¹⁶ *Id.* at Article 1, Section, 1.2.

experts, including human rights organizations, and ICANN itself has recognized as problematic—as seen in **Section 8.2** below.

2. The ICANN Board has violated its commitment to “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] promote well-informed decisions based on expert advice.”¹⁷ As explained in **Section 8.2** below, the ICANN Board is aware of *several* independent experts that concluded the Economist Intelligence Unit (“EIU”) discriminatorily applied the CPE criteria and that determined the CPE Process Review Reports themselves were significantly deficient. Yet, instead, the ICANN Board supported the conclusions of *one* evaluator that employed a blatantly flawed review methodology and ignored all evidence contrary to its own conclusions.
3. The ICANN Board has violated its commitment to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment.”¹⁸ Any neutral, objective, and fair examination of the CPE Process Review Reports would conclude that they are deficient, as explained in Requestor’s past submissions to the ICANN Board.¹⁹ The ICANN Board has thus made a decision in contravention of the aforementioned principles by accepting FTI’s CPE Process Review Reports.
4. The ICANN Board has violated its core value to “[o]perat[e] with efficiency and excellence.”²⁰ It is evident that the knowing acceptance of a deficient independent evaluation does not constitute operating with any degree of excellence.

The ICANN Board’s decision to adopt the Resolutions, therefore, violates ICANN’s Bylaws because it knowingly adopted the flawed CPE Process Review Reports.

¹⁷ *Id.* at Article 3, Section, 3.1.

¹⁸ *Id.* at Article 1, Section, 1.2(a)(v).

¹⁹ Exhibit 12, Letter from A. Ali on behalf of dotguy to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>; Exhibit 11, Letter from A. Ali on behalf of dotguy to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

²⁰ Exhibit 13, ICANN Bylaws (22 July 2017), Article 1, Section, 1.2(b)(v), <https://www.icann.org/resources/pages/governance/bylaws-en/>.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

ICANN's action materially affects the global gay community because a community-operated .GAY gTLD is necessary to provide for the community's needs. As Professor M.V. Lee Badgett, Professor of Economics at the University of Massachusetts Amherst, explained in her expert legal opinion, the gay community still faces "stigma, discrimination, and violence around the world."²¹ In fact, 71 countries—comprising 37% of the United Nations—still enforce laws criminalizing same-sex behavior.²²

In order to help combat these significant problems, Requestor submitted a community priority application for the .GAY gTLD. Requestor plans to operate the gTLD in order to "create an environment on the Internet that addresses important and primary needs of the Gay Community; safety, visibility, and support."²³ A community-operated .GAY gTLD will (1) provide a safe space on the Internet to "encourage more community members to come out and thrive in the .gay network;" (2) promote the community's visibility because "to be visible is to be counted and to be counted is to be relevant to society and the economy;" and (3) "support the Gay Community with access to trusted resources, as well as with funding."²⁴ Requestor aims to achieve these goals through its operation of the .GAY gTLD; for example, Requestor has already committed to maintain "community resource websites," establish a Registry Advisory Board to ensure that

²¹ Exhibit 14, Letter from A. Ali to ICANN Board, attaching the Expert Opinion of Professor M.V. Lee Badgett (17 Oct. 2016), p. 5, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

²² Exhibit 15, Aengus Carroll and Lucas Ramón Mendos, "State-Sponsored Homophobia, A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition," ILGA (May 2017), p. 37, https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

²³ Exhibit 16, "New gTLD Application Submitted to ICANN by: dotgay llc," ICANN (13 June 2012), pp. 7-8.

²⁴ *Id.* at p. 8.

the .GAY gTLD “reflects the true needs of the community,” and “broaden its access to all members of the Global Gay Community.”²⁵

As explained in **Section 6** above, the ICANN Board’s adoption of the Resolution materially and adversely affects Requestor’s community priority application for the .GAY gTLD. Through RR 16-3, Requestor is contesting the EIU’s discriminatory and inconsistent application of the CPE criteria to the second .GAY CPE—which denied community status to Requestor’s application.²⁶ The ICANN Board’s acceptance of the procedurally and substantively defective CPE Process Review Reports, as explained in **Section 8.3** below, will consequentially permit the BAMC to use the reports as a basis for affirming the EIU’s second .GAY CPE. By accepting the second .GAY CPE, and therefore denying Requestor community priority status, ICANN “would generate economic and social costs [for the global gay community] by creating a barrier to the development of a vibrant and successful gay economic community.”²⁷ Without community oversight, the .GAY gTLD “would become highly attractive for organizations and government agencies that are hostile to equality for LGBTIA people,”²⁸ creating social and economic costs that “would add to the existing stigma and discrimination faced by LGBTIA people around the world.”²⁹ The ICANN Board’s action thus adversely affects the entire community for which Requestor has submitted its community priority application: the global gay community.

²⁵ Exhibit 17, dotgay LLC, Specification 11 Public Interest Commitments (19 Feb. 2013), pp. 1-3, <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/444?t:ac=444>.

²⁶ See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (seeking reconsideration of the determination on Reconsideration Request 15-21); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (requesting reconsideration of the second .GAY CPE).

²⁷ Exhibit 14, Letter from A. Ali to ICANN Board, attaching the Expert Opinion of Professor M.V. Lee Badgett (17 Oct. 2016), p. 5, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

²⁸ *Id.* at p. 7.

²⁹ *Id.* at p. 8.

8. Detail of Staff/Board Action/Inaction – Required Information

8.1 Requestor’s Participation in the CPE Process

Requestor submitted a community priority application for the .GAY gTLD as part of ICANN’s New gTLD Program, intending to create a safe space on the Internet for members of the gay community to communicate, engage in economic activity, and promote social change.³⁰ In order to qualify for community priority status, Requestor’s application must pass the CPE by meeting certain CPE criteria. The EIU evaluated Requestor’s application pursuant to the CPE criteria in early 2014 and determined that Requestor did not prevail as a community applicant – having only received 10 of 16 points.³¹

In response, Requestor, supported by multiple community organizations, filed a reconsideration request with the BGC, seeking to have its application re-evaluated by the EIU.³² Among other problems with the CPE process, Requestor explained to the BGC that the EIU improperly interpreted and inconsistently applied CPE criteria.³³ The BGC granted the request because the EIU did not follow procedure during the CPE process. As a result, Requestor’s application was re-evaluated by the EIU.

Although the EIU again evaluated Requestor’s community priority application, it awarded the application the same score based on the same arguments.³⁴ Hence, as with the first .GAY CPE, the EIU inconsistently and discriminatorily applied the CPE criteria to Requestor’s application. For example, the EIU made the following inconsistency errors when evaluating the CPE criteria:

³⁰ *See id.*

³¹ Exhibit 05, Community Priority Evaluation Report for .GAY (6 Oct. 2014), p. 6 <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>. In order to obtain community priority status, Requestor needed to obtain a score of 14 points. *Id.*

³² *See* Exhibit 18, Revised Reconsideration Request 14-44 (29 Nov. 2014), <https://www.icann.org/en/system/files/files/request-dotgay-redacted-29nov14-en.pdf>.

³³ *Id.* at pp. 3-4.

³⁴ *See* Exhibit 06, Community Priority Evaluation Report for .GAY (8 Oct. 2015), <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

- The EIU inconsistently applied the CPE criteria, as set forth in the New gTLD Applicant Guidebook (“AGB”) and the CPE Guidelines, in regards to the nexus criteria. The EIU awarded .GAY zero points because it found that a “small part of the applicant’s defined community is not identified by the applied-for string.”³⁵ Yet, the EIU awarded points for the nexus criteria in the .HOTEL, .SPA, and .RADIO CPEs—all of which included entities that are not automatically associated with the gTLDs.³⁶
- The EIU inconsistently interpreted the support criteria. Requestor received only one point because, although it had significant support from the community and its organizations, it did not have support from a single organization recognized as representing the entire community. No such organization exists. The EIU, though, awarded full points to .HOTEL and .RADIO’s community applications even though their communities also have no single representative organization.³⁷

As a result of the problems with its second .GAY CPE, Requestor began the reconsideration request process.³⁸ This process resulted in RR 16-3, which is now pending before the BAMC.³⁹

8.2 Concerns with the CPE Process

Both participants and observers of ICANN’s New gTLD Program have recognized that the CPE process is flawed. Several of them have publically expressed their concerns, particularly (1) other community priority applicants, (2) legal experts, and (3) ICANN itself.

³⁵ Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), pp. 20-24, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

³⁶ *Id.* at pp. 39-41; Exhibit 19, Eve 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), pp. 49-50, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

³⁷ *Id.* at p. 50.

³⁸ *See* Exhibit 20, Reconsideration Request 15-21 (22 Oct. 2015), <https://www.icann.org/en/system/files/files/reconsideration-request-redacted-15-21-dotgay-22oct15-en.pdf> (requesting reconsideration of the EIU’s second .GAY CPE); Exhibit 08, Amended Reconsideration Request 15-21 (4 Dec. 2015), <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-amended-request-redacted-05dec15-en.pdf> (amending Reconsideration Request 15-21); Exhibit 21, Determination of the Board Governance Committee (BGC) on Reconsideration Request 15-21 (1 Feb. 2016) <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf> (denying Amended Reconsideration Request 15-21); Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf> (contesting the 1 February 2016 Decision by the BGC on Amended Reconsideration Request 15-21 and asking ICANN to “set aside” the determination).

³⁹ Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en> (“the Board directs the [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review”).

Requestor is not the only participant in the CPE process that has recognized problems with the CPE. The community priority applicants for .MUSIC,⁴⁰ .CPA,⁴¹ and .MERCCK⁴² all submitted requests for reconsideration related to their individual CPEs, having each separately found problems with the CPE process. Significantly, even community priority applicants that passed their CPE have complained about the inherent problems with the CPE. The European Broadcasting Union, which was awarded community priority status for its .RADIO application, found that the CPE process “was far from being impartial and flawless ... [with] numerous and evident inconsistencies.”⁴³

The community priority applicants’ concerns with the CPE process are supported by legal experts. The Council of Europe, a leading human rights organization with an observer status within ICANN’s Governmental Advisory Committee (“GAC”), issued a report by its own experts that determined the EIU inconsistently applied the CPE criteria.⁴⁴ Two independent legal experts further criticize the CPE process. Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, performed an independent review of Requestor’s CPE and found that it (1) shows an “incomplete understanding” of the CPE’s criteria,⁴⁵ (2) contained “interpretive errors,” and (3) contained “errors of inconsistency and discrimination.”⁴⁶ Dr. Jørgen

⁴⁰ See Exhibit 22, Reconsideration Request 16-5 (24 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

⁴¹ See Exhibit 23, Reconsideration Request 16-8 (15 July 2016), <https://www.icann.org/resources/pages/reconsideration-16-8-cpa-australia-request-2016-07-18-en>.

⁴² See Exhibit 24, Reconsideration Request 16-12 (25 Aug. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-request-redacted-25aug16-en.pdf>.

⁴³ Exhibit 25, Letter from the EBU to dotgay LLC (6 Mar. 2018), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>.

⁴⁴ Exhibit 19, Eve 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), pp. 41-57, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

⁴⁵ Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), p. 74, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

⁴⁶ *Id.* at pp. 20-21.

Blomqvist, honorary professor of international copyright at the University of Copenhagen, also concluded that the EIU improperly applied the CPE criteria to community priority applicants as part of the CPE process.⁴⁷

Even ICANN—through its Board of Directors, key participants in ICANN policy-making, and Ombudsman—has recognized that there are problems with the CPE. Cherine Chalaby, member of the ICANN Board, and Mark Carvell, Vice Chair of the GAC, have acknowledged the inconsistencies⁴⁸ and unfairness⁴⁹ in the CPE process. ICANN’s own Ombudsman examined Requestor’s CPE and found that “the EIU process should perhaps in retrospect[] have been much more open to scrutiny.”⁵⁰ Most significantly, in September 2016, the ICANN Board recognized the “certain concerns that some applicants have raised with the CPE process”⁵¹ and “direct[ed] [its] President and CEO, or his designee(s), to undertake an independent review” of the CPE process.⁵² Had the ICANN Board not acknowledged that problems with the CPE process existed, then they would not have initiated an independent review of the CPE process.

8.3 The Independent Review of the CPE Process by FTI

ICANN’s “independent review” of the CPE process, which concluded with the acceptance of the CPE Process Review Reports, is the core issue of this reconsideration request. Despite the

⁴⁷ See Exhibit 26, Expert Legal Opinion by Honorary Professor in International Copyright Dr. Jørgen Blomqvist (17 June 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>.

⁴⁸ Exhibit 27, ICANN, Transcript of Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 (“I personally would comment that I have observed inconsistencies applying the (AGB) scoring criteria for (CPE)’s and ... there was an objective of producing adequate rational for all scoring decisions but I understand from feedback that this has not been achieved in all cases.”).

⁴⁹ *Id.* at p. 12 (“The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. That was not happening.”).

⁵⁰ Exhibit 28, Chris LaHatte, “Dot Gay Report” (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

⁵¹ Exhibit 29, Letter from Christine Willett to Jamie Baxter (16 May 2017), p. 2, <https://www.icann.org/en/system/files/correspondence/willett-to-baxter-et-al-16may17-en.pdf>.

⁵² Exhibit 02, Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

importance of the CPE review, ICANN has been remarkably nontransparent throughout the review process.⁵³ It was not until 2 June 2017 that Requestor learned ICANN hired FTI to conduct an independent review of the CPE process.⁵⁴ ICANN has, and continues to, rebuff all efforts to obtain detailed information about FTI's independent review. The only substantive information available to the public about the independent review is the CPE Process Review Reports themselves, which were not published until 13 December 2017.⁵⁵

Even a cursory examination of the CPE Process Review Reports reveals significant problems with the methodology adopted by FTI. ICANN represented to the Internet community that FTI will be “digging in very deeply” and that there will be “a full look at the community priority evaluation.”⁵⁶ As seen in the CPE Process Review Reports, however, FTI failed to meet ICANN's apparent expectations. For instance, the CPE Process Review Reports contained the following problems:

- **The CPE Process Review Reports relied upon incomplete and unreliable supporting evidence.** FTI only relied upon documents from ICANN as part of its review, since the EIU refused to produce documents and it did not accept submissions from community priority applicants.⁵⁷ FTI further only interviewed individuals associated with ICANN and the EIU, and those interviews were equally deficient. Even though the EIU produced no documents, FTI interviewed only two EIU staff members—and none of the

⁵³ Requestor has previously expressed its concerns regarding the transparency of the independent review. *See* Exhibit 30, Letter from A. Ali to ICANN Board (8 Aug. 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-crocker-08aug17-en.pdf>; Exhibit 31, Reconsideration Request 17-3 (30 June 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-3-dotgay-request-redacted-30jun17-en.pdf>; Exhibit 32, Reconsideration Request 17-4 (25 July 2017), <https://www.icann.org/en/system/files/files/reconsideration-17-4-dotmusic-dotgay-request-redacted-25jul17-en.pdf>; Exhibit 33, Reconsideration Request 18-2 (15 Mar. 2018), <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-request-redacted-15mar18-en.pdf>.

⁵⁴ Exhibit 09, Community Priority Evaluation Process Review Update (2 June 2017), <https://www.icann.org/news/announcement-4-2017-06-02-en>.

⁵⁵ Exhibit 03, ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 Dec. 2017), <https://www.icann.org/news/announcement-2017-12-13-en>.

⁵⁶ Exhibit 34, John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%20-en.pdf.

⁵⁷ *See* Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 6, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

independent evaluators, project coordinators, or project directors.⁵⁸ Accordingly, the CPE Process Review Reports are based only on interviews with the two EIU members, six ICANN staff members, and documents produced by ICANN.⁵⁹ A review based on this limited, one-sided and incomplete universe of documents cannot be considered independent.

- **The CPE Process Review Reports’ conclusions are inconsistent with other independent evaluations of the CPE.** There are a significant number of independent evaluations addressing the CPE; FTI did not address any of them, even though they all directly contradict FTI’s conclusions on the CPE process.⁶⁰ For example, the Independent Review Process Panel in *Dot Registry v. ICANN* determined that “ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports.”⁶¹ FTI, though, concluded that there was “no evidence that ICANN organization attempted to influence the evaluation process, scoring, or conclusions reached by the CPE Provider.”⁶² Furthermore, FTI determined that the CPE “scoring decisions were not the result of any inconsistent or disparate treatment”⁶³ without taking into consideration the expert legal opinions discussed in **Section 8.2** above, which directly contradict FTI’s conclusion and, unlike FTI, were developed after (1) re-evaluating the CPE applications; (2) relying upon the substance of the reference material; and (3) assessing the propriety or reasonableness of the research undertaken by the CPE Provider.⁶⁴

⁵⁸ See *id.* at pp. 7-9, 14-15; Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁵⁹ See Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 3-7, 13-14, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

⁶⁰ *Id.* at p. 3.

⁶¹ Exhibit 43, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 July 2016), ¶ 93, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

⁶² Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 17, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

⁶³ Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 Dec. 2017), p. 21, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁶⁴ See Exhibit 19, Eve 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), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>; see also Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

- **The CPE Process Review Reports are “long on description and conclusory statements and short on actual evaluation.”**⁶⁵ As explained by Professor Eskridge in his Second Expert Opinion, “the approach followed by FTI was a ‘description’ of the CPE [Process Review] Reports, but not an ‘evaluation’ to determine whether the CPE Reports were actually following the applicable guidelines.”⁶⁶ Therefore, “[b]ecause its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as the CPEs.⁶⁷

The ICANN Board was aware of the significant problems with the methodology adopted by FTI and the conclusions reached in the CPE Process Review Reports.⁶⁸ In fact, ICANN Board member Avri Doria even abstained from voting on the Resolutions because she could not accept the flaws with the CPE Process Review Reports:

From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. In scope 2, the analysis of the application of the criteria, while they described a rigorous methodology, the documentation describes their inability to fully apply that methodology. The report indicates that they were not able to obtain all of the required documentation from the CPE provider necessary for the full application of the process they had defined. Any scientific method, when the method cannot be rigorously applied, the results be viewed as, at best, tentative and should be treated with caution. Though FTI Consulting reports that there is no evidence of differential application of criteria, they cannot claim with certainty that there was no differential application in the absence of full and rigorous application of their chosen methodology.

It also appears in the report that only a portion of the evaluators were interviewed. In fact, the report states that FTI consulting [*sic*] only interviewed two of the evaluators from a larger set of evaluators.

⁶⁵ Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), p. 9, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

⁶⁶ *Id.* at p. 23.

⁶⁷ *Id.* at p. 25.

⁶⁸ *See id.*; Exhibit 12, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

This appears to me to be another flaw in the application of their methodology.

Any definitive determination that there was no conclusive differential application of criteria would require a further in-depth study of all CPE applications and would require not only the missing documentation but also require interviewing all of the evaluators and not just the two remaining employees of the evaluation teams.⁶⁹

Yet, despite the obvious procedural and substantive issues with the CPE Process Review Reports, the ICANN Board fully accepted them on 15 March 2018 through the Resolutions.

9. What are you asking ICANN to do now?

Requestor asks ICANN to reconsider and, subsequently, reject its decision to adopt the Resolutions. ICANN cannot acknowledge and accept the CPE Process Review Reports.

10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

Requestor is materially affected by the ICANN Board's decision to pass the Resolutions. As stated in **Section 8** above, Requestor is a community priority applicant for the .GAY gTLD that participated in the CPE process.⁷⁰ The EIU discriminatorily applied the CPE criteria when evaluating Requestor's application.⁷¹ The resulting discriminatory and flawed CPE is currently

⁶⁹ Exhibit 36, "SAN JUAN – ICANN Board Meeting" ICANN (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

⁷⁰ See Exhibit 05, "Community Priority Evaluation Report for .GAY" (6 Oct. 2014), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>; see also Exhibit 06, "Community Priority Evaluation Report for .GAY" (8 Oct. 2015), <https://newgtlds.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>.

⁷¹ See Exhibit 37, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Nov. 2016), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15nov16-en.pdf>; see also Exhibit 38, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the First Expert Opinion of Professor William N. Eskridge, Jr. (13 Sep. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-letter-dechert-llp-to-icann-board-redacted-13sep16-en.pdf>.

before the BAMC for reconsideration as part of RR 16-3.⁷² However, FTI’s independent review of the CPE process claims that there are no problems with the CPE process. Its conclusion, as put forth in the CPE Process Review Reports, is based on a procedurally and substantively deficient independent review of the CPE process.⁷³ And, yet, the ICANN Board has decided to accept the CPE Process Review Reports through the Resolutions and conclude its investigation of the CPE process *despite being aware of the significant problems with FTI’s independent review*.⁷⁴ ICANN’s acceptance of FTI’s flawed independent review will directly affect the BAMC’s consideration of RR 16-3,⁷⁵ and therefore will directly affect Requestor.

And, further, the community that Requestor represents—the gay community—is materially affected by ICANN’s decision to accept reports that whitewash the discriminatory treatment of Requestor’s community application to operate the .GAY gTLD for the gay community.⁷⁶

⁷² Exhibit 01, Adopted Board Resolutions | Regular Meeting of the ICANN Board (15 Mar. 2018), <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en> (“the Board directs the [BAMC] to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review”).

⁷³ See Exhibit 12, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>; Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>; see also Exhibit 36, “SAN JUAN – ICANN Board Meeting” ICANN (15 Mar. 2018), pp. 12-13, <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137> (ICANN Board Member Avri Doria explains that “I cannot accept the report itself. From my study of the documentation provided by FTI Consulting, I am concerned about the rigor of the study and some of its conclusions. ... [T]he documentation describes their inability to fully apply that methodology.”).

⁷⁴ Exhibit 12, Letter from A. Ali on behalf of dotgay to the ICANN Board (15 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>; Exhibit 39, Letter from A. Ali on behalf of dotgay to the ICANN Board (20 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>; Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

⁷⁵ See Exhibit 07, Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>; Exhibit 40, dotgay’s Presentation to the ICANN Board on Reconsideration Request 16-3 (15 May 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-presentation-bgc-15may16-en.pdf>.

⁷⁶ See Exhibit 41, Letter from National LGBT Chamber of Commerce to ICANN Board (1 Mar. 2018), <https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>; Exhibit 42, Letter from SERO to ICANN Board (18 Feb. 2018), <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>.

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

No, Requestor is not bringing this request on behalf of multiple persons or entities.

11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

This is not applicable.

12. Do you have any documents you want to provide to ICANN?

Yes, these documents are attached as Exhibits.

Terms and Conditions for Submission of Reconsideration Requests:

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



Arif Hyder Ali

April 13, 2018

Date