

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-5
14 JUNE 2018**

The Requestor, DotMusic Limited, seeks reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (collectively, the Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.¹ Specifically, the Requestor claims that, “(1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s Bylaws.”²

I. Brief Summary.

The Requestor submitted a community-based application for the .MUSIC generic top-level domain (gTLD) (Application or DotMusic Application), which was placed in a contention set with other .MUSIC applications. The Requestor participated in CPE, but did not prevail. The Requestor challenged the CPE Provider’s evaluation of its Application in Reconsideration Request 16-5, which is pending.³

While Request 16-5 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.⁴ The Board Governance Committee (BGC) thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) a compilation of the research relied

¹ Request 18-5, § 3, at Pg. 1-2, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

² *Id.*, § 6, at Pg. 3.

³ See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>.

⁴ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.⁵ The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-5, would be placed on hold until the CPE Process Review was completed.⁶

On 13 December 2017, ICANN organization published three reports on the CPE Process Review (CPE Process Review Reports).⁷

On 15 March 2018, the Board passed the Resolutions, which 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 Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.⁸

On 14 April 2018, the Requestor submitted Request 18-5, which challenges the Resolutions.⁹ The Requestor claims that “ (1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s Bylaws.”¹⁰

⁵ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁶ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, *see* <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁷ *See* <https://www.icann.org/news/announcement-2017-12-13-en>.

⁸ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁹ Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

¹⁰ Request 18-5, § 6, at Pg. 3.

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-5 to the Ombudsman for consideration, and the Ombudsman recused himself.¹¹

The BAMC has considered Request 18-5 and all relevant materials and recommends that the Board deny Request 18-5 because the Board considered all material information when it adopted the Resolutions, which are consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in the Resolutions, the Board has considered the CPE Process Review Reports.¹² The CPE Process Review Reports identify the materials considered by FTI.¹³ Additionally, as noted in the rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions.¹⁴

II. Facts.

A. The CPE Provider's Evaluation of .MUSIC.

The Requestor submitted a community-based application for .MUSIC, which was placed in a contention set with other .MUSIC applications. On 29 July 2015, the Requestor's Application was invited and the Requestor accepted to participate in CPE.¹⁵

On 10 February 2016, the CPE panel issued a CPE report, concluding that the Application did not prevail in CPE.¹⁶ On 24 February 2016, the Requestor filed Request 16-5,

¹¹ ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(1)(iii); *see also* Ombudsman action Regarding Request 18-5, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-ombudsman-action-21may18-en.pdf>.

¹² <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹³ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁴ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁵ CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. *See* Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

¹⁶ *Id.*; *see also* CPE Report at 1, <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

seeking reconsideration of the CPE determination and approval of the Requestor's community application.¹⁷

B. The CPE Process Review.

While Request 16-5 was still pending, ICANN's Board, as part of the Board's oversight of the New gTLD Program, 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 New gTLD Program (Scope 1).¹⁸

Subsequently, the BGC determined that, in addition to Scope 1, the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research existed for evaluations that were the subject of pending reconsideration requests (Scope 3).¹⁹ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-5, would be on hold until the CPE Process Review was completed.²⁰

On 13 December 2017, ICANN org published CPE Process Review Reports issued by FTI.²¹

With respect to Scope 1, FTI concluded:

¹⁷ Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

¹⁸ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

¹⁹ *Id.*

²⁰ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

²¹ See <https://www.icann.org/news/announcement-2017-12-13-en>.

there is no evidence that ICANN organization 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.²²

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.”²³

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.”²⁴ FTI observed that all eight of the relevant CPE reports (the reports at issue in the Reconsideration Requests that were placed on hold) referenced research. Two of the eight included citations for each reference to research. Of the remaining six, while the reports themselves did not include citations to each reference to research, in five of the six instances, including in the Requestor’s case, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports.²⁵ Accordingly, FTI determined that it was “reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.”²⁶

On 15 March 2018, as detailed above, the Board adopted the Resolutions.²⁷ The Board

²² 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>.

²³ Scope 2 Report, at Pg. 3, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

²⁴ 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>.

²⁵ *Id.*, at Pg. 4, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

²⁶ *Id.* at Pg. 42-44.

²⁷ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>. One Board member, Avri Doria, abstained from voting on the Resolutions due to concerns “about the rigor of the study and some of its conclusions.” San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>. Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting. *Id.*

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),²⁸ and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).²⁹ The Roadmap provides, in relevant part, that

Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions . . . , materials presented in the oral presentations . . . , any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.³⁰

The Board noted that the requestors with pending reconsideration requests

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.³¹

C. The Requestor's Response to the CPE Process Review.

On 16 January 2018, the Requestor submitted a letter to the Board, claiming that the CPE Process Review lacked transparency or independence, and was not sufficiently thorough.³² In this letter, the Requestor asked the Board to take no action with respect to the conclusions

²⁸ <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

²⁹ Resolutions. *See also* Roadmap, <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

³⁰ Roadmap, at Pg. 2.

³¹ *Id.*

³² 16 January Letter from Ali to ICANN Board, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

reached by FTI until parties had an opportunity to respond to the FTI Report and to be heard as it relates to their pending reconsideration requests.³³

On 19 March 2018, consistent with the Roadmap, 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.”³⁴

On 23 March 2018 and 5 April 2018, the Requestor “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.³⁵

D. Request 18-5.

On 14 April 2018, the Requestor submitted Request 18-5, which challenges the Resolutions.³⁶ The Requestor claims that “(1) the CPE review is procedurally and methodologically deficient; (2) the CPE Review failed to perform a substantive analysis of the CPE process; and (3) the Resolutions were adopted in violation of ICANN’s bylaws.”³⁷

E. Relief Requested.

³³ *Id.* at Pg. 5.

³⁴ Attachment 1, 19 March 2018 Email from ICANN to the Requestor.

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

<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>; Attachment 2, 5 April 2018 Email from the Requestor to ICANN.

³⁶ Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

³⁷ *Id.*, § 6, at Pg. 3.

The Requestor asks the Board to “reconsider its 15 March 2018 action and reject both the Resolutions and the findings of the CPE Review.”³⁸

III. Issue Presented.

The issue is whether the Board’s adoption of the Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).

IV. The Relevant Standards for Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws 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:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.³⁹

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.⁴⁰ Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.⁴¹ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC

³⁸ *Id.*, § 9, at Pg. 17.

³⁹ ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

⁴⁰ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

⁴¹ ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁴²

On 19 May 2018, the BAMC determined that Request 18-5 is sufficiently stated and sent Request 18-5 to the Ombudsman for review and consideration.⁴³ The Ombudsman thereafter recused himself from this matter.⁴⁴ Accordingly, the BAMC has reviewed Request 18-5 and issues this Recommendation.

V. Analysis and Rationale.

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

The Requestor’s claims focus on the transparency, fairness, efficiency, methodology, and scope of the CPE Process Review. But, the Requestor provides no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with efficiency and excellence. Rather, it appears that the Requestor simply does not agree with findings of the CPE Process Review Reports and the Board’s acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. The Requestor’s Challenges to FTI’s Methodology Do Not Warrant Reconsideration.

The Requestor claims that FTI’s methodology was flawed because: (1) the CPE Provider did not produce documents in the course of the investigation; (2) FTI did not interview any

⁴² ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

⁴³ Ombudsman Action Regarding Request 18-5, Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-ombudsman-action-21may18-en.pdf>.

⁴⁴ *Id.*

former employees of the CPE Provider; and (3) FTI did not interview CPE applicants or accept materials from them in the course of its investigation.⁴⁵

As a preliminary matter, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.⁴⁶ The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and it relied on FTI to develop an appropriate methodology.⁴⁷ The Requestor has identified no policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

Moreover, with respect to the first concern, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes, and spreadsheets for all CPE Reports.⁴⁸ FTI also received and reviewed emails (and attachments) produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the CPE process and evaluations.⁴⁹ Accordingly, it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider.

As noted in the CPE Process Review Reports, FTI requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider’s personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming

⁴⁵ Request 18-5, § 6, at Pg. 3. *See also, e.g.*, 23 March 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf> (FTI did not interview applicants); 16 January Letter from Ali to ICANN Board, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf> (alleging that FTI “deliberately ignored the information and materials provided by the applicants”).

⁴⁶ *See, e.g.*, Scope 2 Report at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁴⁷ *See* CPE Process Review Update, 2 June 2017, <https://newgtlds.icann.org/en/applicants/cpe>.

⁴⁸ *See* Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

⁴⁹ *See* Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and that internal and external emails were not “working papers.”⁵⁰ No policy or procedure exists that would require ICANN org to cancel the entire CPE Process Review because the CPE Provider did not produce its internal emails. This argument does not support reconsideration.

Similarly, with respect to the second concern, FTI interviewed the “only two remaining [CPE Provider] personnel,” who were both “part of the core team for all 26 evaluations” in the CPE Process Review.⁵¹ Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.⁵² Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has identified no policy or procedure requiring FTI to do more because none exists. Reconsideration is not warranted on this ground.

With respect to the argument that FTI did not interview CPE applicants or accept materials from the applicants in the course of the review, the Requestor has not identified a policy or procedure requiring FTI to do so. While the Requestor may disagree with FTI’s methodology, such disagreement is not sufficient grounds for reconsideration.

⁵⁰ See Scope 2 Report at Pg. 7-8, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>. See also EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services 12 Mar 2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

⁵¹ Scope 2 Report at Pg. 9.

⁵² Scope 1 Report, at Pg. 14, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

Indeed, FTI acknowledged that certain applicants had requested that they be interviewed, but explained that “such interviews are not necessary or appropriate” to the investigation.⁵³ FTI noted that neither the Applicant Guidebook nor the CPE Guidelines provided for applicant interviews by the CPE Provider, and consistent with the Applicant Guidebook and the CPE Guidelines, the CPE Provider did not interview the applicants. Accordingly, because the CPE Provider evaluated the applications on the written record, without additional input from applicants, FTI determined that it would not be necessary or appropriate to interview the applicants in the course of the CPE Process Review.⁵⁴ Despite that conclusion, FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP) proceedings.⁵⁵

The comments of one Board member about FTI’s methodology also do not support reconsideration. That Board member, Avri Doria, abstained from voting on the Resolutions due to concerns “about the rigor of the study and some of its conclusions,”⁵⁶ does not render the vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless “accept[ed] the path forward” that the Board was setting.⁵⁷ Likewise, that the Requestor and other parties disappointed in the outcome of CPE determinations raised similar criticisms of the CPE Review process in no way precludes the ICANN Board from accepting the results of that review.⁵⁸

2. FTI Was Not Required to Agree with Others’ Substantive Conclusions and Did Not Fail to Engage in “Substantive Analysis.”

⁵³ *Id.* at Pg. 8.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

⁵⁷ *Id.*

⁵⁸ *See* Request 18-5, § 6, at Pg. 7-8.

In its second argument, the Requestor contends that reconsideration is warranted because, according to the Requestor, “FTI not only performed no substantive review of the CPE process in order to reach its ultimate conclusions on [Scope 1 and Scope 2] but also concluded there are no issues with the CPE despite the significant evidence to the contrary.”⁵⁹ The Requestor’s suggestion that reconsideration is warranted because FTI’s conclusions differed from other opinions claiming that the CPE process is inconsistent.⁶⁰ The Association of Certified Fraud Examiners (ACFE), the anti-fraud organization that has codified the international investigative methodology that FTI followed, required that FTI form an investigative plan, collect all potentially relevant evidence and information, then analyze the relevant evidence and arrive at their conclusion based on that evidence⁶¹—not based on the opinions or investigations of prior investigators or commentators. Consistent with this methodology, FTI “carefully considered the claims raised in Reconsideration Requests and [IRP] proceedings related to CPE,” including specifically allegations that “ICANN organization 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”⁶² and that the CPE criteria “were applied inconsistently across the various CPEs as reflected in the CPE reports.”⁶³

Similarly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review. Rather, the review was “intended to have a positive impact on the community” and “provide greater transparency into the CPE evaluation process.”⁶⁴ This decision was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the

⁵⁹ Request 18-5, § 6, at Pg. 6.

⁶⁰ See Request 18-5, § 6, at Pg. 6-10.

⁶¹ See Scope 1 Report at Pg. 3, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

⁶² Scope 1 Report, at Pg. 3.

⁶³ Scope 2 Report, at Pg. 3.

⁶⁴ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

process had flaws or could otherwise be improved. If FTI conducted its investigation under the assumption that it should or would reach one particular conclusion, there would be no purpose to conducting the review in the first place. The Requestor’s arguments do not support reconsideration.

Specifically, the Requestor first notes the observation in the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC (Dot Registry IRP) that “ICANN staff was intimately involved in the [CPE] process” and “supplied continuing and important input on the CPE Reports.”⁶⁵ But there are good reasons for FTI to have reached different conclusions than the Dot Registry IRP Panel. That Panel considered the limited record before it in the context of that IRP, and observed that, based on that limited record, ICANN staff appeared to be “intimately involved in the [CPE] process.” At the same time, the Panel emphasized that the Panel was “not assessing whether ICANN staff or the [CPE Provider] failed themselves to comply with obligations under the Articles [of Incorporation], the Bylaws, or the [Guidebook].” In response, the Board undertook serious consideration of the Panel’s comments concerning how ICANN staff members interacted with the CPE provider and the CPE reports, and directed ICANN organization to undertake the CPE Process Review. Based on the *evidence* in a different record, FTI concluded that there was “no evidence that ICANN organization 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.”⁶⁶

⁶⁵ Request 18-5, § 6, at Pg. 6 (quoting Exhibit 08, 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>).

⁶⁶ Scope 1 Report, at Pg. 3.

Nor, contrary to Requestor's claims, does the "CPE Review contain[] further evidence that the CPE Provider did not act independently from ICANN."⁶⁷ After reviewing emails between ICANN organization and the CPE Provider, FTI concluded that the "vast majority" were "administrative in nature," and that even those that "discussed the substance of the CPE Process and specific evaluations" centered on attempts to "capture the CPE Provider's reasoning."⁶⁸ In reviewing the emails, "FTI observed no instances where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached."⁶⁹ And its interviews of ICANN org and CPE Provider personnel further confirmed that "ICANN organization never questioned or sought to alter the CPE Provider's conclusions," that the CPE Provider "never changed the scoring or the results based on ICANN organization's comments," and that "ICANN organization did not impact the CPE Provider's scoring decisions."⁷⁰

Similarly, the Requestor's complaints regarding the Scope 2 Report's conclusion that "the CPE Provider consistently applied the CPE criteria" is unfounded.⁷¹ The Requestor claims that statements from certain third parties and the Council of Europe (in its 4 November 2016 Report on "Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective" (CoE Report))⁷² are inconsistent with and not addressed by FTI in the CPE Process Review Reports. But again, the fact that others reached different conclusions than FTI does not invalidate FTI's Reports, nor

⁶⁷ Request 18-5, § 6, at Pg. 6.

⁶⁸ Scope 1 Report, at Pg. 11.

⁶⁹ Scope 1 Report, at Pg. 11-12.

⁷⁰ Scope 1 Report, at Pg. 14-15.

⁷¹ See Scope 2 Report, at Pg. 57.

⁷² Request 18-5, § 6, at Pg. 8.

does it warrant reconsideration of the Board’s action in adopting the Resolutions.⁷³ Contrary to the Requestor’s suggestion, FTI did not fail to address evidence of inconsistency. Rather, it “carefully considered the claims raised in Reconsideration Requests and IRP proceedings related to CPE,” and “specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports.”⁷⁴

Finally, the Requestor alleges that “FTI simply defended the CPE process without performing substantive analysis,”⁷⁵ and it cites a submission by another applicant dissatisfied with the results of the CPE Process that criticizes FTI for not examining the underlying CPE applications.⁷⁶ These complaints provide no basis for reconsideration. To be sure, FTI did not conduct a *de novo* redetermination of the scores awarded to each applicant. That was not within the scope of the CPE Process Review, and it would have been improper for FTI to do so. Instead, FTI “examined all aspects of the CPE Provider’s evaluation process in evaluating whether the CPE Provider consistently applied the CPE criteria throughout each CPE.”⁷⁷ The methodical nine-step process FTI laid out and followed cannot plausibly be described as lacking “substantive analysis.” Accordingly, reconsideration is not warranted.

3. The ICANN Board’s Adoption of the Resolutions Complied with the ICANN Bylaws.

Finally, the Requestor contends that the adoption of the Resolutions violated ICANN organization’s Bylaws in three ways: (1) that the Board’s action violated international law and conventions with which the Bylaws require compliance; (2) that the Board’s action violated the

⁷³ This is equally true of the reports of Dr. Blomqvist and Professor Eskridge that Requestor cites for their disagreement with the CPE Review’s conclusion. *See* Request 18-5, § 6, at Pg. 8.

⁷⁴ Scope 2 Report, at Pg. 3.

⁷⁵ Request 18-5, § 6, at Pg. 10.

⁷⁶ Request 18-5, § 6, at Pg. 9-10 (citing Letter from Flip Petillion to ICANN BMAC (1 Feb. 2018), at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>).

⁷⁷ Scope 2 Report, at Pg. 8.

Commitments and Core Values set out in the Bylaws; and (3) that the Board’s action violated the Bylaws’ requirement of fairness. As discussed below, none of these arguments warrant reconsideration.

First, as to the claim that the Board’s action purportedly violated international law and conventions, the Requestor asserts that “[t]here is an ‘international minimum standard of due process as fairness—based . . . on the universal views of all legal systems,’” which is “violated ‘when a decision is based on evidence and argumentation that a party has been unable to address.’”⁷⁸ The Requestor argues that the CPE Process Review did not provide due process to the Requestor because “it has been unable to address the evidence supporting the CPE Review because they [sic] have not been made publically available.”⁷⁹

The Bylaws provide that ICANN org is committed to “carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.”⁸⁰ The Requestor has not demonstrated how the Board’s action in adopting the Resolutions violates this commitment. Rather, the Requestor is attempting to reassert the claims it presented in Request 18-1, challenging ICANN organization’s response to its 2018 DIDP Request seeking documents related to the CPE Process Review. However, for the reasons set forth in the BAMC’s Recommendation of Request 18-1, which are incorporated herein by reference, ICANN org’s response to the Requestor’s 2018 DIDP request did not violate any relevant international law or convention; while the Requestor has a right to full consideration of

⁷⁸ Request 18-5, § 6, at Pg. 10-11 (quoting Charles T. Kotuby Jr., “General Principles of Law, International Due Process, and the Modern Role of Private International Law,” 23 *Duke J. of Comparative & Int’l L.* 411, 422 (2013) and Charles T. Kotuby & Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* 179 (Mar. 15, 2017)) (alteration in original).

⁷⁹ *Id.*, § 6, at Pg. 11.

⁸⁰ ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

its position, which the BAMC is committed to giving, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP⁸¹

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its oversight of the New gTLD Program, after considering all the relevant issues.⁸² As noted by the Panel in the *Booking v. ICANN* IRP Final Declaration, “the fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the Requestor.⁸³ Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone set a particularly wide or narrow scope for it or for the disclosure of supporting materials to the Requestor. The Requestor’s conclusory statement that it has been deprived due process because it did not have access to every document underlying the CPE Process Review Reports⁸⁴ does not support reconsideration.

With respect to the Requestor’s second claim that the Board purportedly violated its Commitments and Core Values set out in the Bylaws, the Requestor bases its claim on its earlier criticisms of the CPE Process Review, which does not warrant reconsideration for many of the reasons outlined above. For example, it alleges that the Core Value of “[o]perating with efficiency and excellence” was breached by the “knowing acceptance of a deficient independent evaluation.”⁸⁵ The BAMC finds no support for the Requestor’s claims that the evaluation was

⁸¹ Recommendation of the BAMC on Request 18-1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

⁸² <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁸³ *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138, *available at* <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

⁸⁴ Request 18-5, § 6, p. 11-12.

⁸⁵ Request 18-5, § 6, p. 13; *see* ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(b)(v).

“deficient,” let alone that ICANN org accepted it despite “knowing” it was so, and therefore, these arguments provide no basis for reconsideration.

Third, regarding the Requestor’s claims that the adoption of the Resolutions violated the Bylaws’ requirement that ICANN organization act “consistent with procedure[s] designed to ensure fairness, including implementing procedures to . . . encourage fact-based policy development work,”⁸⁶ because, according to Requestor, “[t]he CPE Review is based on an incomplete and unreliable universe of documents biased in favor of ICANN.”⁸⁷ But as described above, FTI’s choice of investigative methodology provides no reason for reconsideration, and it likewise does not when made again through the lens of this particular Bylaws provision.

4. The BAMC Will Consider All of the Evidence Submitted by the Requestor as Part of its Consideration of Request 16-5.

The Requestor claims that it is “materially affected by the Resolutions, which accept the findings of the CPE Review, because the BAMC intends to rely on the CPE Review to decide Requestor’s Reconsideration Request 16-5.”⁸⁸ When the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.⁸⁹ The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-5 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-5), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-5. The BAMC notes that it provided

⁸⁶ ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

⁸⁷ Request 18-5, § 6, at Pg. 13.

⁸⁸ Request 18-5, § 6, at Pg. 3.

⁸⁹ See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, *available at* <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

the Requestor an opportunity to “be heard” and to “respond to the FTI Report,”⁹⁰ but the Requestor declined the opportunity when it was offered to it in March and April 2018.⁹¹

VI. Recommendation.

The BAMC has considered the merits of Request 18-5 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments, and Core Values when it passed the Resolutions. Accordingly, the BAMC recommends that the Board deny Request 18-5.

⁹⁰ <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

⁹¹ 23 March 2018 letter from A. Ali to ICANN Board, at Pg. 4-5
<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>; Attachment 2, 5 April 2018 Email from the Requestor to ICANN.