

## ICANN BOARD SUBMISSION NO. 2018.07.18.1b

**TITLE:** **Next Steps on Uniform Board Member Integrity Screening Process**

**PROPOSED ACTION:** **For Board Consideration and Approval**

### **EXECUTIVE SUMMARY:**

The ICANN Board and the community have discussed the need to ensure that prospective Board members are adequately vetted to ensure that each is willing and able to perform the fiduciary and general obligations of service, and capable of upholding the reputation and credibility of the Board. Each of the nominating groups (the ASO, ccNSO, GNSO, At-Large Community and Nominating Committee (NomCom) for Board Directors, and the GAC, IETF, SSAC, and RSSAC for Board Liaisons) employ community-specific processes to select ICANN Board Directors and Board Liaisons (collectively Board members) in accordance with the ICANN Bylaws. Currently, only the NomCom, the At-Large Community, and the ASO have incorporated an external screening process, facilitated by ICANN organization, to review selectees prior to finalizing their selection process.

The Board is being asked to strongly encourage that all Board-member selecting groups that do not currently employ a due diligence screening process similar to the Nominating Committee to adopt the [Proposed Screening Process](#). For any individual selected to serve as a Board member without undergoing the [Proposed Screening Process](#), the Board will ensure that ICANN organization facilitate completion of the screening process upon the announcement of selection by the Board-member selecting group.

### **BACKGROUND AND SUMMARY ON PUBLIC COMMENTS:**

On 2 November 2017, the ICANN Board passed Resolution [2017.11.02.33](#) directing the President and CEO, or his designee(s), to develop a proposal paper for public comment calling on ICANN's Supporting Organizations (SOs) and Advisory Committees (ACs) that do not currently employ a due diligence integrity screening process when selecting Board Directors a Liaisons to seriously consider utilizing an integrity screening process similar or identical to the Nominating Committee process.

Between 2 March through 17 April 2018, the [proposed Uniform Board Member Integrity Screening Process](#) (Proposed Screening Process) was published for [public comment](#). (See [Proposed Screening Process](#), attached as Attachment A to the Reference Materials.)

ICANN organization received six comments from Stephen Deerhake of GDNS, LLC (GDNS), the Noncommercial Stakeholders Group (NCSG), the Registrar Stakeholder Group (RrSG), the Registries Stakeholder Group (RySG), and two individuals. In general, the commenters were in support of a uniform screening process across all SOs and ACs regardless if certain SOs or ACs currently perform their own screening process. Two commenters (NCSG and GDNS) expressed some concerns. The NCSG was concerned about the feasibility of access to documents called for per the screening process in certain regions and its impact on the timelines in the [Proposed Screening Process](#). GDNS suggested that the [Proposed Screening Process](#) might impact Board member selection of the SOs and ACs that elect, rather than appoint Board members and noted that the [Proposed Screening Process](#) “contains no objective criteria that would govern the disqualification of a prospective Board member.” (See Report of Public Comments, attached as Attachment B to Reference Materials.)

#### **BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:**

The BGC recommends that the Board again encourage the Board-member selecting groups that do not currently employ a due diligence screening process similar to the Nominating Committee to adopt the [Proposed Screening Process](#). The BGC further recommends that for any individual selected to serve as a Board member without undergoing the [Proposed Screening Process](#), the Board will ensure that ICANN organization facilitate completion of the screening process upon the announcement of selection by the Board-member selecting group.

#### **PROPOSED RESOLUTION:**

Whereas, the Board agrees that the ICANN Community and organization should expect Board members to hold the highest values of integrity and to uphold the reputation and credibility of the Board as a whole.

Whereas, there is no uniform practice in place today for conducting screening of Directors and Liaisons (collectively Board members) selected to the ICANN Board.

Whereas, the ICANN Nominating Committee has long maintained a practice of conducting, or having conducted, due diligence screening of their selected candidates prior to finalizing selections, including basic compliance screening, public records reviews, criminal records reviews, and reputational reviews. The Address Supporting Organization and the At-Large Community have also adopted this same due diligence screening process as part of their regular Board-member selection procedures.

Whereas, on [2 November 2017](#), the Board directed the President and CEO, or his designee(s), “to develop a proposal paper to be posted for public comment... ask[ing] all of ICANN's Supporting Organizations and Advisory Committees that do not currently employ a due diligence integrity screening process similar to the Nominating Committee to seriously consider utilizing the same or similar due diligence integrity screening process for both voting Directors and non-voting Liaisons.”

Whereas, a [public comment proceeding](#) was held from 2 March to 17 April 2018 on the Proposed Integrity Screening Process and all comments received during the public comment period generally supported the [Proposed Screening Process](#).

Whereas, some of the comments expressed concerns regarding the timing and criteria of the screening process, which are addressed in the [Proposed Screening Process](#) document and related information that can be found in the [ICANN Bylaws](#).

Whereas, the Board re-emphasizes the importance of a relying upon a uniformed due diligence integrity screening process in Board member selection as a good practice towards seating Board members with high levels of integrity.

Resolved (2018.07.17.xx), the Board strongly encourages all Board-member selecting groups that do not currently employ a due diligence screening process similar to the Nominating Committee to adopt the [Proposed Screening Process](#). For any individual selected to serve as a Board member without undergoing the [Proposed Screening Process](#), the Board will ensure that

ICANN organization facilitate completion of the screening process upon the announcement of selection by the Board-member selecting group.

**PROPOSED RATIONALE:**

Because of the ever-increasing scrutiny of the ICANN Board of Directors, relying upon due diligence integrity screening practices in Board member selection – including interviews, reference checks and external due diligence checks – is a good practice towards seating Board members with high levels of integrity. While conducting such diligence cannot prevent future bad acts of Board members, it does give a level of confidence of the integrity of members at the time of seating. It also serves to uphold confidence in ICANN overall, as seating Board members with red flags in their past undermines the integrity and reputation of ICANN as a whole.

On 2 November 2017, the ICANN Board passed Resolution [2017.11.02.33](#) directing the President and CEO, or his designee(s), to develop a proposal paper for public comment calling on ICANN's Supporting Organizations (SOs) and Advisory Committees (ACs) that do not currently employ a due diligence integrity screening process to seriously consider utilizing an integrity screening process similar or identical to the Nominating Committee process to screen both voting Directors and non-voting Liaisons.

Between 2 March through 17 April 2018, the [proposed Uniform Board Member Integrity Screening Process](#) (Proposed Screening Process) was published for [public comment](#). (See [Proposed Screening Process](#).)

ICANN organization received six comments from Stephen Deerhake of GDNS, LLC (GDNS), the Noncommercial Stakeholders Group (NCSG), the Registrar Stakeholder Group (RrSG), the Registries Stakeholder Group (RySG), and two individuals, Alfredo Calderon (AC) and Vanda Scartezini (VS). (See [Report of Public Comments](#).)

In general, the commenters (RrSG, NCSG, AC, VS) were in support of a uniform screening process across all SOs and ACs regardless if certain SOs or ACs currently perform their own screening process.

Two commenters (NCSG and GDNS) expressed some concerns. The NCSG was concerned about the feasibility of access to documents called for per the screening process in certain regions and its impact on the timelines in the [Proposed Screening Process](#). GDNS suggested that the [Proposed Screening Process](#) might impact Board member selection of the SOs and ACs that elect, rather than appoint Board members and noted that the [Proposed Screening Process](#) “contains no objective criteria that would govern the disqualification of a prospective Board member.” (See [Report of Public Comments](#).)

As always, the Board thanks and appreciates the commenters for their views and concerns raised. The Board Governance Committee (BGC) has considered the comments provided and recommends no change to the Proposed Screening Process, and the Board agrees. First, the types of screenings set forth in the [Proposed Screening Process](#) are guidelines of screening processes commonly used in similar settings. The specified timing for each level are approximations, and not meant to serve as a strict timeline of when a specific screening level should be completed.

With respect to GDNS’ first concern regarding the potential impact on the selection process, the BGC noted, and the Board agrees, that as stated in the [Proposed Screening Process](#) document, the Process “is not intended to modify other community-specific selection criteria and processes applied by any of the Board member-selecting groups.” ([Proposed Screening Process](#), Pgs. 2, 4.) As for GDNS’ second concern relating to objective criteria for disqualification of Board members, the Board notes that the criteria are addressed in the [Proposed Screening Process](#) document and related information that can be found in the [ICANN Bylaws](#).

For any Board member who will undergo the screening process facilitated by ICANN organization upon the announcement of selection by the Board-member selecting group, their screening will be conducted using an external provider with expertise in international due diligence screening of individuals, similar to the process currently employed by the NomCom.

The screening process will be conducted in a manner that ensures the confidentiality of information received as part of the process for the Board member.

This decision is squarely within the public interest and consistent with ICANN's mission as it is imperative that selected Board members can perform their fiduciary and general obligations of service, and are capable of upholding the reputation and credibility of the Board, ICANN organization and the Community, along with being capable and committed to taking actions that are consistent with ICANN's Bylaws and Articles of Incorporation.

There is a fiscal impact to this decision, as there is a cost to each external due diligence integrity screening conducted. The Board anticipates that ICANN organization will facilitate and fund these screenings without negative impact on any of the budgets of the selecting entities.

This decision should not have any negative impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment at this stage as the underlying Proposed Screening Process has already been subject to public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
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**ICANN BOARD SUBMISSION NO. 2018.07.18.1c**

**TITLE:** **Revisions to the Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy**

**PROPOSED ACTION:** **For Board Consideration and Approval**

**EXECUTIVE SUMMARY:**

In 2011 and 2012, the ICANN Board approved modifications to the Conflicts of Interest Policy, Code of Conduct and Expected Standards of Behavior, and adopted new Governance Guidelines, in order to promote superior ethics, integrity and transparency into ICANN's deliberative processes. As part of this action, the Board noted that these are evolving documents, subject to change pending the needs of the ICANN community and the all relevant circumstances.

The Board is being asked to adopt the revised Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy, attached to the Reference Materials document as Attachments A through C, respectively. The nature of the proposed changes is to conform with the changes reflected in the Bylaws that went into effect 1 October 2016.

**BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:**

The BGC recommends that the Board adopt the revised Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy.

**PROPOSED RESOLUTION:**

Whereas, on [27 May 2016](#), the Board approved extensively revised Bylaws, which became effective on 1 October 2016.

Whereas, the Board Governance Committee has reviewed suggested changes to the Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Board Conflicts of Interest Policy to conform them to the 1 October 2016 Bylaws and recommends that the Board approve the revised documents.

Resolved (2018.07.18.XX), the Board adopts the revised Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy.

**PROPOSED RATIONALE:**

Adopting the revised Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy is consistent with ICANN's commitments to ensuring legitimacy and sustainability of the ICANN multistakeholder model by ensure that the Board members are operating at the highest ethical standards.

The Board Governance Committee (BGC) has recommended that the Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy be revised to conform with the 1 October 2016 version of the Bylaws and the Board agrees. Because these revisions are non-material, a public comment process is not required.

This decision is squarely within the public interest and consistent with ICANN's mission as it is expected to positively impact the ICANN community through the incorporation of recently adopted Bylaws into the Board's governance documents to ensure that those Bylaws revisions are consistently addressed.

The adoption of the revised Board of Directors' Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy is not expected to have a fiscal impact on ICANN organization.

This decision should not have any negative impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 12 July 2018  
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## ICANN BOARD SUBMISSION NO. 2018.07.18.2a

**TITLE:** **Consideration of Reconsideration Request 18-1**

**PROPOSED ACTION:** **For Board Consideration and Approval**

### **EXECUTIVE SUMMARY:**

The Requestor, DotMusic Limited, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>2</sup>

On 10 January 2018, the Requestor submitted the DIDP Request. The Requestor sought 19 categories of documents and information relating to the CPE Process Review.<sup>3</sup> On 9 February 2018, ICANN org responded to the DIDP Request (DIDP Response). ICANN provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the DIDP Response. Notwithstanding the Nondisclosure Conditions, ICANN org "also evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>4</sup> Additionally, in response to two of the requested items, ICANN org explained that the requested documentary information did not exist.<sup>5</sup>

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<sup>1</sup> Request 18-1, § 3, at Pg. 1-5, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-request-redacted-10mar18-en.pdf>.

<sup>2</sup> *Id.*, § 6, at Pg. 6-10.

<sup>3</sup> 2018 DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf>.

<sup>4</sup> Response to DIDP Request No. 20180110-1; Request 18-1 Ex. 2, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-response-redacted-09feb18-en.pdf>.

<sup>5</sup> *Id.*

On 10 March 2018, the Requestor filed the instant Reconsideration Request 18-1 (Request 18-1), which challenges certain portions of the DIDP Response.

On 5 June 2018, the Board Accountability Mechanisms Committee (BAMC) evaluated Request 18-1 and all relevant materials and recommended that the Board deny Request 18-1 because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (*See* Rebuttal, attached as Attachment D to the Reference Materials.)

### **BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)**

#### **RECOMMENDATION:**

The BAMC recommended that Request 18-1 be denied and that no further action be taken in response to the Request because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

#### **PROPOSED RESOLUTION:**

Whereas, on 10 January 2018, DotMusic Limited (the Requestor) submitted a request for the disclosure of documentary information pursuant to the ICANN Documentary Disclosure Information Policy (DIDP) seeking documents and information relating to the Community Priority Evaluation (CPE) Process Review (DIDP Request).

Whereas, on 9 February 2018, ICANN organization responded to the DIDP Request (DIDP Response).

Whereas, on 10 March 2018, the Requestor filed Reconsideration Request 18-1 (Request 18-1) claiming that certain portions of ICANN org's DIDP Response violate the DIDP and ICANN org's Commitments established in the Bylaws concerning accountability, transparency, and openness.

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 18-1 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-1 and all relevant materials and recommended that Request 18-1 be denied because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-1 and all relevant materials related to Request 18-1, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.xx), the Board adopts the [BAMC Recommendation on Request 18-1](#).

## **PROPOSED RATIONALE:**

### **1. Brief Summary and Recommendation**

The full factual background is set forth in the [BAMC Recommendation](#), which the Board has reviewed and considered, and which is incorporated here.

On 5 June 2018, the BAMC evaluated Request 18-1 and all relevant materials and recommended that the Board deny Request 18-1 because ICANN org adhered to established policies and procedures in its response to the DIDP Request. (See [BAMC Recommendation](#).)

On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (See [Rebuttal](#).) The Requestor claims that the DIDP Response "is clearly improper because (1) ICANN's assertion that the responsive documents fall under [] Nondisclosure Conditions is conclusory and

unsupported by any evidence; (2) the public interest outweighs any Nondisclosure Conditions; and (3) ICANN’s decision violates its Commitments and Core Values.”<sup>6</sup>

The Board has carefully considered the [BAMC’s Recommendation](#) and all relevant materials related to Request 18-1, including the Requestor’s rebuttal, and the Board agrees with the [BAMC’s Recommendation](#) and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

## 2. Issues

The issues for reconsideration are:

- Whether ICANN org complied with established ICANN policies in responding to the DIDP Request; and
- Whether ICANN org complied with its Core Values, Mission, and Commitments.<sup>7</sup>

These issues are considered under the relevant standards for reconsideration requests and DIDP requests, which are set forth in the [BAMC Recommendation](#).

## 3. Analysis and Rationale

### A. ICANN Org Adhered to Established Policies and Procedures in Responding to the DIDP Request.

#### 1. The DIDP Response Complies with Applicable Policies and Procedures.

The Requestor’s DIDP Request sought the disclosure of documents relating to the CPE Process Review. As noted in the [BAMC Recommendation](#), Request 18-1 focuses on ICANN org’s response to Items No. 1-9, 11-15, and 17-19. The DIDP Request sought the disclosure of: (i) emails relating to the CPE process (Items No. 1, 2, 4, 5, and 9); (ii) the CPE Provider’s work product (Items No. 6-8, 11, and 12);<sup>8</sup> (iii) FTI’s work product in the course of the CPE Process Review (Items No. 3 and 13-15);<sup>9</sup> and (iv) correspondence and documents relating to the CPE

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<sup>6</sup> Rebuttal at Pg. 3.

<sup>7</sup> Request 18-1.

<sup>8</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

<sup>9</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

Process Review and its scope (Items No. 17-19).<sup>10</sup> The BAMC determined that ICANN org's response was consistent with the DIDP Process, and the Board agrees. That is, ICANN org identified documents responsive to these Items and determined that they were subject to certain applicable Nondisclosure Conditions. (See [BAMC Recommendation](#), Pgs. 13-14.) The BAMC noted, and the Board agrees, that the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the DIDP Response. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the Nondisclosure Conditions.<sup>11</sup> The BAMC found that this argument constitutes a substantive disagreement with ICANN org's discretionary determination, and is not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, the BAMC concluded that reconsideration is not warranted, and the Board agrees.

Further, notwithstanding those Nondisclosure Conditions, the BAMC found that ICANN org *did* consider whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there were no circumstances for which the public interest in disclosure outweighed that potential harm.<sup>12</sup> Accordingly, the BAMC concluded, and the Board agrees, that the DIDP Response complied with applicable policies and procedures. The BAMC further concluded, and the Board agrees, that the Requestor provided no evidence to the contrary, because none exists.

**2. ICANN Org Adhered to Established Policy and Procedure in Finding That the Harm in Disclosing the Requested Documents That Are Subject to Nondisclosure Conditions Outweighs the Public's Interest in Disclosing the Information.**

Under the DIDP, information subject to the Nondisclosure Conditions is not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>13</sup> As detailed in the [BAMC Recommendation](#), the BAMC determined, and the Board

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<sup>10</sup> DIDP Request No. 20180110-1, <https://www.icann.org/en/system/files/files/didp-20180110-1-ali-request-redacted-10jan18-en.pdf> (internal citations omitted).

<sup>11</sup> *Id.*, § 6, at Pg. 9-10.

<sup>12</sup> *Id.* The 2018 DIDP Response noted that the Requestor had previously requested certain of these materials in its prior DIDP Requests. See *id.*

<sup>13</sup> <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

agrees, that ICANN org undertook such an analysis with respect to each Item requested by the Requestor, and articulated its conclusions in the DIDP Response.

The Requestor disagrees with ICANN org’s conclusions. The Requestor claims that the public interest in disclosure outweighs the harm that may be caused by such disclosure because the documents at issue “are given even greater import because . . . the CPE Provider has not agreed [to disclose the documents] and has threatened litigation,”<sup>14</sup> The BAMC found, and the Board agrees, that the Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure. ([BAMC Recommendation](#), Pg. 26.)

The Requestor also claims that the public interest in disclosure outweighs any purported harm because FTI’s conclusions are allegedly “contrary to the findings of other panels and experts”<sup>15</sup> and that “[w]ithout the underlying documents,” it cannot “analyze whether ICANN unduly influenced the CPE Provider.”<sup>16</sup> As discussed in detail in the [BAMC Recommendation](#), and incorporated herein by reference, the Requestor’s claims do not support reconsideration. The Requestor does not provide any support for this argument. The Board did *not* direct FTI to come to one conclusion over another. FTI was retained to assess the CPE process and reach its own conclusions. The Requestor has provided no evidence to the contrary.

The BAMC further concluded, and the Board agrees, that there is no merit to the Requestor’s argument that “ICANN cannot claim that there is no legitimate public interest in disclosing the requested documents”<sup>17</sup> because ICANN org “has not disclosed any ‘compelling’ reason that outweighs the public interest in disclosure.”<sup>18</sup> ICANN org *did* identify compelling reasons in each instance of nondisclosure; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>19</sup> There is no policy or procedure requiring ICANN org to provide *additional* justification for nondisclosure.<sup>20</sup> Further,

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<sup>15</sup> *Id.*, § 6, at Pg. 8.

<sup>16</sup> *Id.*

<sup>17</sup> Request 18-1, § 6, at Pg. 8.

<sup>18</sup> Request 18-1, § 6, at Pg. 10.

<sup>19</sup> 2018 DIDP Response at Pg. 9-21.

<sup>20</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

ICANN org did explain why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. Accordingly, reconsideration on this basis is not warranted.

The Requestor further claims that rather than state compelling reasons for nondisclosure, ICANN org “ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole.”<sup>21</sup> However, as the BAMC concluded, and the Board agrees, the Requestor provides no support—because there is none for this baseless assertion. ([BAMC Recommendation](#), Pg. 23.) The Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the DIDP Request.<sup>22</sup> No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor’s request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason for nondisclosure.<sup>23</sup>

Moreover, the BAMC noted, and the Board agrees, that it is a fundamental principle of law that invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. ([BAMC Recommendation](#), Pg. 24.) The BAMC and the Board therefore reject the Requestor’s assertion that the attorney-client privilege is merely a “loophole” that ICANN org sought to take advantage of here, and the Requestor’s suggestion that ICANN org’s invocation of the privilege indicates that ICANN org had anything to hide.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because “ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology.”<sup>24</sup> As the BAMC noted, ICANN org did not determine that applicants would not be interviewed or submit materials in the course of the CPE Process Review. (BAMC Recommendation, Pgs. 24-25.) Rather, FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports. The Requestor has not identified a

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<sup>21</sup> Request 18-1, § 6, at Pg. 9.

<sup>22</sup> *Id.*

<sup>23</sup> DIDP Nondisclosure Conditions.

<sup>24</sup> Request 18-1, § 6, at Pg. 9.

policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one.<sup>25</sup> Accordingly, reconsideration is not warranted on this basis.

**B. ICANN Org Adhered to Its Commitments and Core Values in Responding to the DIDP Request.**

**1. ICANN Org Adhered to Its Commitments to Accountability, Openness, and Transparency in Responding to the DIDP Request.**

The Requestor asserts that ICANN org’s determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments under the Bylaws to “operate to the maximum extent feasible in an open and transparent fashion,”<sup>26</sup> “apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,”<sup>27</sup> and “[r]emain accountable to the Internet community through mechanisms defined in [the] Bylaws that enhance ICANN’s effectiveness.”<sup>28</sup>

The DIDP, and particularly the Nondisclosure Conditions, balances ICANN org’s commitments to transparency and accountability against other competing commitments and obligations.<sup>29</sup> This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with

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<sup>25</sup> *Id.*

<sup>26</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

<sup>27</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(v).

<sup>28</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a)(vi); *see* Request 18-1, § 6, Pg. 7, § 8, Pg. 12. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-1. *See* Request 18-1, § 6, Pg. 7, § 8, Pg. 12. The BAMC considers Request 18-1 under the Bylaws in effect when the Requestor submitted the reconsideration request, which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor’s claims under the 22 July 2017 version of the Bylaws.

<sup>29</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission."<sup>30</sup>

A critical competing Core Value is ICANN org's Core Value of operating with efficiency and excellence<sup>31</sup> by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider's Confidential Information.<sup>32</sup> As part of ICANN's commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, if appropriate ICANN org seeks consent from the contractor to release information.<sup>33</sup> Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org's request, and has threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org's contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

## **2. ICANN Org Adhered to Its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the DIDP Request.**

The Board finds that the Requestor's argument 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"<sup>34</sup> does not support reconsideration.

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<sup>30</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(c).

<sup>31</sup> ICANN Bylaws, Art. 1, Section 1.2(b)(v).

<sup>32</sup> See New gTLD Program Consulting Agreement between ICANN organization and the CPE Provider, Exhibit A, § 5, at Pg. 6, 21 November 2011, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>33</sup> See, e.g., Response to Request 20150312-1 at Pg. 2, available at <https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf>.

<sup>34</sup> Request 18-1, § 6, at Pg. 6-7 (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 and 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)).

While ICANN org is committed to conform to *relevant* principles of international law and conventions,<sup>35</sup> constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>36</sup> ICANN org was not required to establish a DIDP, but instead did so voluntarily, as part of its commitment to transparency and accountability and with extensive community input. That procedure and those specific commitments are not outweighed by ICANN org's general commitment to conform to relevant principles of international law. Accordingly, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to the DIDP, and the fact that certain Nondisclosure Conditions apply here does not demonstrate that ICANN org violated its commitment to conform to relevant principles of international law.

Likewise, the Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor.<sup>37</sup>

The Requestor's conclusory statement that it has been deprived of due process because it did not have access to every document underlying the CPE Process Review Reports does not support reconsideration. The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-5.

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<sup>35</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

<sup>36</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

<sup>37</sup> For the same reasons, the Board was not required to direct FTI to "attempt[] to gather additional information and alternate explanations from community priority applicants, including DotMusic, to ensure that it was conducting a fair and thorough investigation about the CPE Process" or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. *See* 16 January 2018 letter from Ali to ICANN Board, at Pg. 3, 5, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

Ultimately, the Requestor has not identified any element of ICANN's Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN org's correspondence with the Requestor, as none were violated. Accordingly, reconsideration is not warranted.

**C. The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has carefully considered the Requestor's Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration. The Rebuttal claims that the DIDP Response "is clearly improper because (1) ICANN's assertion that the responsive documents fall under [] Nondisclosure Conditions is conclusory and unsupported by any evidence; (2) the public interest outweighs any Nondisclosure Conditions; and (3) ICANN's decision violates its Commitments and Core Values."<sup>38</sup> These are the same arguments set forth in the Request 18-1 and which were addressed by the BAMC in its Recommendation.

With respect to the first claim, the Requestor now asserts that "neither ICANN nor the BAMC provide any analysis on whether each requested document is covered by a Nondisclosure Condition."<sup>39</sup> The Board notes that the Requestor does not dispute the BAMC's finding that "the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in the DIDP Response."<sup>40</sup> Nor does the Requestor identify a policy or procedure requiring ICANN org or the BAMC to provide an "analysis" or other explanation for nondisclosure, because there is none. The Nondisclosure Conditions speak for themselves and each condition provides the explanation for why disclosure is not appropriate. Further, as noted in the BAMC's Recommendation, contrary to the Requestor's assertion, ICANN org *did* explain why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. Accordingly, reconsideration on this basis is not warranted.

Second, the Requestor repeats its argument that "the public interest outweighs any Nondisclosure Conditions" because the CPE Process Review "not only affects all of the community gTLD applicants but also the entire Internet community, which will benefit from certain community

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<sup>38</sup> Rebuttal at Pg. 3.

<sup>39</sup> Rebuttal at Pg. 8.

<sup>40</sup> BAMC Recommendation at Pg. 12.

gTLDs, such as .MUSIC.”<sup>41</sup> While the Requestor believes that ICANN org should have exercised its discretion differently, that is not a basis for reconsideration because the Requestor has not shown that ICANN org contravened the DIDP in any way. Accordingly, the Board finds that this argument was sufficiently considered and addressed in the BAMC Recommendation and the Board adopts the BAMC’s Recommendation that reconsideration is not warranted.<sup>42</sup> The Requestor also suggests that ICANN org has “restricted [] access to information regarding the independent review in blatantly unfair decisions that keep affected applicants uninformed and endangers the integrity of the independent review itself.”<sup>43</sup> The Board notes that the BGC and ICANN org have provided several updates concerning the CPE Process Review, including updates on 2 June 2017,<sup>44</sup> 1 September 2017,<sup>45</sup> and 13 December 2017<sup>46</sup>. In addition, ICANN org published three reports on the CPE Process Review, which detailed the methodology and conclusions reached by FTI.<sup>47</sup> The suggestion that applicants are “uninformed” about the CPE Process Review is not only unsupported but also irrelevant to the DIDP Response.

Third, the Requestor repeats its argument that “ICANN must comply with its Commitments and Core Values, even when issuing the DIDP Response, or ICANN will violate its own Bylaws.”<sup>48</sup> The BAMC addressed this argument and found that the DIDP Response *did* comply with ICANN org’s Commitments and Core Values. As the BAMC concluded, and the Board agrees, neither the DIDP nor ICANN org’s Core Value of transparency obligates ICANN org to make public every document in ICANN org’s possession.<sup>49</sup>

Fourth, the Requestor again asserts that that the DIDP Response contradicted ICANN’s Commitments to fairness and accountability, which required ICANN org to disclose the requested materials even if certain Nondisclosure Conditions apply, because the CPE Process Review “is significant not only to Requestor but also to other gTLD applicants.”<sup>50</sup> The Board

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<sup>41</sup> Rebuttal at Pgs. 7-8.

<sup>42</sup> BAMC Recommendation at Pgs. 19-25.

<sup>43</sup> Rebuttal at Pg. 8.

<sup>44</sup> <https://www.icann.org/news/announcement-4-2017-06-02-en>.

<sup>45</sup> <https://www.icann.org/news/announcement-2017-09-01-en>.

<sup>46</sup> <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>47</sup> <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>48</sup> Rebuttal at Pg. 3.

<sup>49</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3.

<sup>50</sup> Rebuttal at Pg. 6.

finds that this argument is not supported. The “public interest” is not determined by whether any entity deems the matter to be “significant.” Instead, “public interest” refers to the benefit or well-being of the general public. As explained in the BAMC Recommendation, consistent with the DIDP, ICANN org exercised its discretion in finding that the harm in disclosing the requested information – some of which comprised privileged materials and other documents which were subject to contractual confidentiality obligations – outweighed the public interest in disclosing the information.

Nor is there support for the Requestor’s claim that “ICANN’s refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community . . . .”<sup>51</sup> As explained in the BAMC Recommendation, without contravening its commitment to transparency and accountability, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

Further, the Requestor’s assertion that “the CPE Provider may be seeking to intentionally obscure the defects in its review, perhaps aided and abetted by ICANN staff”<sup>52</sup> is baseless and does not support the Requestor’s claim that ICANN org violated its Commitment to fairness. As support, the Requestor cites to the fact that the CPE Provider refused to produce certain categories of documents to FTI. The CPE Provider claimed 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.”<sup>53</sup> This is no evidence of obfuscation by the CPE Provider, nor is it evidence of any complicit action by ICANN org. The CPE Provider asserted its position with respect to its contractual obligations under the parties’ Statement of Work; no policy or procedure required ICANN org to litigate that issue. Further, 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. The CPE Provider also made its staff available for interviews by FTI; ICANN org did the same. FTI also received and reviewed emails (and attachments)

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<sup>51</sup> Rebuttal at Pg. 9.

<sup>52</sup> Rebuttal at Pg. 7, n. 29.

<sup>53</sup> 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>.

produced by ICANN org between relevant CPE Provider personnel and relevant ICANN org personnel related to the CPE process and evaluations. Accordingly, there is no support for the Requestor’s assertion that the CPE Provider or ICANN org attempted to “obscure” any facts pertinent to CPE.

Finally, the Requestor repeats its claim that “[t]he ICANN Bylaws thus require that ICANN comply with principles of international law, which includes due process.”<sup>54</sup> However, as explained in the BAMC Recommendation, the Requestor has not demonstrated how the DIDP Response violates this commitment.

Moreover, the Requestor does not have the “right” to due process with respect to the DIDP. Indeed, the Requestor does not cite any persuasive authority supporting its position that such due process rights exist here. To the contrary, all the Requestor cites is an excerpt from *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), which was authored by two attorneys representing other gTLD community applicants in connection with the pending reconsideration requests relating to the CPE process and which raise similar issues to those asserted by the Requestor here. The excerpt cited simply posits the authors’ unsupported opinion that principles of international law should be placed first before local law and ICANN’s Bylaws.<sup>55</sup> Indeed, the book even states that it offers only the “recommendations” of the authors, which are “no doubt colored by their perspectives; after all, the authors have been involved in many of the leading IRP proceedings and have counseled innumerable applicants on their right in the domain name system and the new gTLD application process.”<sup>56</sup> These “recommendations” are not definitive of international law principles, nor do they support reconsideration.

Accordingly, the Board concludes that nothing in the Requestor’s rebuttal warrants reconsideration.

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<sup>54</sup> Rebuttal at Pg. 4.

<sup>55</sup> Rebuttal at Pg. 4.

<sup>56</sup> Flip Petillion, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. XXIV.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 10 July 2018  
Email: amy.stathos@icann.org

## ICANN BOARD SUBMISSION NO. 2018.07.18.2b

**TITLE:** **Consideration of Reconsideration Request 18-2**

**PROPOSED ACTION:** **For Board Consideration and Approval**

### **EXECUTIVE SUMMARY:**

The Requestor, dotguy LLC, seeks reconsideration of ICANN organization's response to the Requestor's request for documents (DIDP Request), pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the Community Priority Evaluation (CPE) process review (CPE Process Review).<sup>1</sup> Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Commitments established in the Bylaws concerning accountability, transparency, and openness.<sup>2</sup>

On 15 January 2018, the Requestor submitted the DIDP Request. The Requestor sought 21 categories of documents and information relating to the CPE Process Review.<sup>3</sup> On 14 February 2018, ICANN org responded to the DIDP Request (DIDP Response). ICANN provided links to all the responsive, publicly available documents. With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Defined Conditions of Nondisclosure (Nondisclosure Conditions) set forth in the DIDP Response. Notwithstanding the Nondisclosure Conditions, ICANN org "also evaluated the documents subject to these conditions . . . [and] determined that there are no circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure."<sup>4</sup> Additionally, in response to three of the requested items, ICANN org explained that the requested documentary information did not exist.<sup>5</sup>

On 15 March 2018, the Requestor filed the instant Reconsideration Request 18-2 (Request 18-2), which challenges certain portions of the DIDP Response.

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<sup>1</sup> Request 18-2, § 3, at Pg. 1-4.

<sup>2</sup> *Id.*, § 6, at Pg. 6-10.

<sup>3</sup> 2018 DIDP Request, available at <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-request-redacted-15jan18-en.pdf>.

<sup>4</sup> Response to DIDP Request No. 20180115-1; Request 18-2 Ex. 6, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

<sup>5</sup> *Id.*

On 5 June 2018, the Board Accountability Mechanisms Committee (BAMC) evaluated Request 18-2 and all relevant materials and recommended that the Board deny Request 18-2 because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (*See Rebuttal*, attached as Attachment D to the Reference Materials.)

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECOMMENDATION:**

The BAMC recommended that Request 18-2 be denied and that no further action be taken in response to the Request because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

**PROPOSED RESOLUTION:**

Whereas, on 15 January 2018, dotgay LLC (the Requestor) submitted a request for the disclosure of documentary information pursuant to the ICANN Documentary Disclosure Information Policy (DIDP) seeking documents and information relating to the Community Priority Evaluation (CPE) Process Review (DIDP Request).

Whereas, on 14 February 2018, ICANN organization responded to the DIDP Request (DIDP Response).

Whereas, on 15 March 2018, the Requestor filed Reconsideration Request 18-2 (Request 18-2) claiming that certain portions of ICANN org's DIDP Response violate the DIDP and ICANN org's Commitments established in the Bylaws concerning accountability, transparency, and openness.

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 18-2 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Sections 4.2(j) and (k) of the Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-2 and all relevant materials and recommended that Request 18-2 be denied because ICANN org adhered to established policies and procedures in its response to the DIDP Request.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-2 and all relevant materials related to Request 18-2, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.xx), the Board adopts the [BAMC Recommendation on Request 18-2](#).

## **PROPOSED RATIONALE:**

### **1. Brief Summary and Recommendation**

The full factual background is set forth in the [BAMC Recommendation](#), which the Board has reviewed and considered, and which is incorporated here.

On 5 June 2018, the BAMC evaluated Request 18-2 and all relevant materials and recommended that the Board deny Request 18-2 because ICANN org adhered to established policies and procedures in its response to the DIDP Request. (See [BAMC Recommendation](#).)

On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (See [Rebuttal](#).) The Requestor claims that Request 18-2 "is properly within the scope of the reconsideration process, ICANN must recognize and apply international principles, and that both the DIDP Response and [BAMC] Recommendation violate ICANN's commitments and core values."<sup>6</sup>

The Board has carefully considered the BAMC's Recommendation and all relevant materials related to Request 18-1, including the Requestor's rebuttal, and the Board agrees with the

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<sup>6</sup> Rebuttal, at Pg. 1.

BAMC’s Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

## **2. Issues**

The issues for reconsideration are:

- Whether ICANN org complied with established ICANN policies in responding to the DIDP Request, and particularly with respect to Item Nos. 1-9, 12-16, and 18-21; and
- Whether ICANN org complied with its Core Values, Mission, and Commitments.<sup>7</sup>

These issues are considered under the relevant standards for reconsideration requests and DIDP requests, which are set forth in the BAMC Recommendation.

## **3. Analysis and Rationale**

### **A. ICANN Org Adhered to Established Policies and Procedures in Responding to the DIDP Request.**

#### **1. The DIDP Response Complies with Applicable Policies and Procedures.**

The Requestor’s DIDP Request sought the disclosure of documents relating to the Community Priority Evaluation (CPE) process review (CPE Process Review). As noted in the BAMC Recommendation, Request 18-2 focuses on ICANN org’s response to Items No. 1-9, 12-16, and 18-21. The DIDP Request sought the disclosure of: (i) emails relating to the CPE process (Items No. 1, 2, 4, 5, and 9); (ii) the CPE Provider’s work product (Items No. 6-8, 12, and 13); (iii) FTI’s work product in the course of the CPE Process Review (Items No. 3 and 14-16); and (iv) correspondence and documents relating to the CPE Process Review and its scope (Items No. 18-21).<sup>8</sup> The BAMC determined that ICANN org’s response was consistent with the DIDP Process, and the Board agrees. That is, ICANN org identified documents responsive to these Items and determined that they were subject to certain applicable Nondisclosure Conditions. (See [BAMC Recommendation](#), Pgs. 14-21.) The BAMC noted, and the Board agrees, that the Requestor does

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<sup>7</sup> Request 18-2.

<sup>8</sup> See Request 18-2.

not challenge the *applicability* of the Nondisclosure Conditions asserted in the DIDP Response. Instead, the Requestor claims that ICANN org is “hiding behind” those Nondisclosure Conditions and, in the Requestor’s view, ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.<sup>9</sup> The BAMC found, and the Board agrees, that this represents a substantive disagreement with ICANN org’s discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted. ([BAMC Recommendation](#), Pg. 12.)

**2. ICANN Org Adhered to Established Policy and Procedure in Finding That the Harm in Disclosing the Requested Documents That Are Subject to Nondisclosure Conditions Outweighs the Public’s Interest in Disclosing the Information.**

Under the DIDP, information subject to the Nondisclosure Conditions is not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.<sup>10</sup> As detailed in the its Recommendation, the BAMC determined, and the Board agrees, that ICANN org undertook such an analysis with respect to each Item requested by the Requestor, and articulated its conclusions in the DIDP Response. ([BAMC Recommendation](#), Pgs. 24-27.)

The Requestor disagrees with ICANN org’s conclusions. The Requestor claims that the public interest in disclosure outweighs the harm that may be caused by such disclosure because the documents at issue “are given even greater import because . . . the CPE Provider has not agreed [to disclose the documents] and has threatened litigation.”<sup>11</sup> The BAMC found, and the Board agrees, that the Requestor provides no explanation as to why the CPE Provider’s decision not to permit disclosure of the documents renders those materials more important than they otherwise would be or why it justifies disclosure. ([BAMC Recommendation](#), Pg. 24.)

The BAMC also found, and the Board agrees, that the Requestor’s claims that the public interest in disclosure outweighs any purported harm because “there are clear problems and contradictions

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<sup>9</sup> *Id.* § 6, at Pg. 10.

<sup>10</sup> <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>11</sup> Request 18-2, § 6, at Pg. 10 (internal quotation marks and citations omitted).

contained within the reports,”<sup>12</sup> and that it cannot “analyze whether ICANN unduly influenced the [CPE Provider] without the underlying documents”<sup>13</sup> do not support reconsideration. The Board did *not* direct FTI to come to one conclusion over another. FTI was retained to assess the CPE process and reach its own conclusions. The Requestor has provided no evidence to the contrary to support its claims.

The BAMC further concluded, and the Board agrees, that there is no merit to the Requestor’s claim that ICANN org “failed to state compelling reasons for nondisclosure as it pertains to each document request, which it was required to do under its own policy.”<sup>14</sup> ICANN org *did* identify compelling reasons in each instance of nondisclosure; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.<sup>15</sup> There is no policy or procedure requiring that ICANN org to provide *additional* justification for nondisclosure.<sup>16</sup> Further, ICANN org explained why many of the Nondisclosure Conditions applied to the requested items, even though it was not required to do so. Accordingly, reconsideration on this basis is not warranted.

The Requestor further claims that rather than state compelling reasons for nondisclosure, ICANN org “ensured that critical items that could expose both ICANN and the CPE Provider be withheld based on the attorney-client privilege loophole.”<sup>17</sup> However, as the BAMC concluded, and the Board agrees, the Requestor provides no support—because there is none for this baseless assertion. ([BAMC Recommendation](#), Pg. 25.) The Requestor does not dispute the application of the attorney-client privilege to these documents; the Requestor merely asserts that ICANN org should waive the privilege in light of the DIDP Request.<sup>18</sup> No policy or procedure requires ICANN org to waive the attorney-client privilege at a Requestor’s request, and the DIDP explicitly recognizes that the attorney-client privilege is a compelling reason for nondisclosure.<sup>19</sup>

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<sup>12</sup> *Id.*, § 6, at Pg. 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, § 6 at Pg. 10-11.

<sup>15</sup> 2018 DIDP Response at Pg. 9-22.

<sup>16</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> DIDP Nondisclosure Conditions.

Moreover, the BAMC noted, and the Board agrees, that it is a fundamental principle of law that invocation of the attorney-client privilege is not an admission of wrongdoing or a concession that the protected communication contains negative information concerning the entity invoking the privilege. ([BAMC Recommendation](#), Pg. 26.) The BAMC and the Board therefore reject the Requestor’s assertion that the attorney-client privilege is merely a “loophole” that ICANN org sought to take advantage of here, and its suggestion that ICANN org’s invocation of the privilege indicates that ICANN org had anything to hide.

Finally, the Requestor asserts that the public interest in disclosing the requested documents outweighs the harm that may come from such disclosure because “ICANN reject[ed] participation from all affected applicants and parties in the creation of the CPE Process Review methodology.”<sup>20</sup> As the BAMC noted, ICANN org did not determine that applicants would not be interviewed or submit materials in the course of the CPE Process Review. ([BAMC Recommendation](#), Pgs. 26.) Rather, FTI determined the methodology for its investigation, which it explained in the CPE Process Review Reports. The Requestor has not identified a policy or procedure requiring FTI to conduct interviews after determining that such interviews were unnecessary and inappropriate, nor is there one. Accordingly, reconsideration is not warranted on this basis.

**B. ICANN Org Adhered to Its Commitments and Core Values in Responding to the DIDP Request.**

**1. ICANN Org Adhered to Its Commitments to Accountability, Openness, and Transparency in Responding to the DIDP Request.**

The Requestor asserts that ICANN org’s determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments under the Bylaws to “operate to the maximum extent feasible in an open and transparent manner,”<sup>21</sup> “apply[] documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,”<sup>22</sup> and “[r]emain accountable to the Internet community through

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<sup>20</sup> Request 18-2, § 6, at Pg. 11.

<sup>21</sup> ICANN Bylaws, 22 July 2017, Art. 3, § 3.1.

<sup>22</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(v).

mechanisms defined in [the] Bylaws that enhance ICANN’s effectiveness.”<sup>23</sup> The BAMC concluded, and the Board agrees, that this assertion does not support reconsideration.

The DIDP, and particularly the Nondisclosure Conditions, balance ICANN org’s commitments to transparency and accountability against its competing commitments and obligations.<sup>24</sup> This balancing test allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.”<sup>25</sup>

A critical competing Core Value is ICANN org’s Core Value of operating with efficiency and excellence<sup>26</sup> by complying with its contractual obligation to the CPE Provider to maintain the confidentiality of the CPE Provider’s Confidential Information. As part of ICANN’s commitment to transparency and information disclosure, when it encounters information that might otherwise be proper for release but is subject to a contractual obligation, if appropriate ICANN org seeks consent from the contractor to release information.<sup>27</sup> Here, ICANN org endeavored to obtain consent from the CPE Provider to disclose certain information relating to the CPE Process Review, but the CPE Provider has not agreed to ICANN org’s request, and has

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<sup>23</sup> *Id.*, Art. 1, § 1.2(a)(vi); Request 18-2, § 6, at Pg. 9-10. The Requestor appears to have quoted from the 11 February 2016 Bylaws, although it references the 22 July 2017 Bylaws in the footnotes of Request 18-2. *See* Request 18-2, § 6, at Pg. 9. The BAMC considers Request 18-2 under the Bylaws in effect when the Requestors submitted the reconsideration request which are the current Bylaws, enacted 22 July 2017. Accordingly, the BAMC evaluates the Requestor’s claims under the 22 July 2017 version of the Bylaws.

<sup>24</sup> *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, available at <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

<sup>25</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(c).

<sup>26</sup> ICANN Bylaws, Art. 1, Section 1.2(b)(v).

<sup>27</sup> *See, e.g.*, Response to Request 20150312-1 at Pg. 2, available at <https://www.icann.org/en/system/files/files/didp-response-20150312-1-gannon-25mar15-en.pdf>.

threatened litigation should ICANN org breach its contractual confidentiality obligations. ICANN org’s contractual commitments must be weighed against its other commitments, including transparency. The commitment to transparency does not outweigh all other commitments to require ICANN org to breach its contract with the CPE Provider.

**2. ICANN Org Adhered to Its Commitment to Conform with Relevant Principles of International Law and International Conventions in Responding to the DIDP Request.**

The Board finds the Requestor’s argument that the CPE Process Review did not provide due process to the Requestor because “it has been unable to address the evidence supporting the FTI Reports because they have not been made publically available”<sup>28</sup> does not support reconsideration. The Requestor claims that “[p]ursuant to [international] laws and conventions, there 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.’”<sup>29</sup>

As discussed in the BAMC Recommendation, and incorporated herein by reference, while ICANN org is committed to conform to *relevant* principles of international law and conventions,<sup>30</sup> constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN org, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>31</sup> Accordingly, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP, and the fact that certain Nondisclosure Conditions apply here does not demonstrate that ICANN org violated its commitment to conform to relevant principles of international law.

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<sup>28</sup> *Id.*

<sup>29</sup> Request 18-2, § 6, at Pg. 8 (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 and Int’l L.* 411, 422 (2013) and Charles T. Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* 179 (Mar. 15, 2017)).

<sup>30</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

<sup>31</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

The Board was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone to set a particularly wide or narrow scope for it, or for the disclosure of supporting materials to the Requestor.<sup>32</sup>

The Requestor's conclusory statement that it has been deprived of due process because it did not have access to every document underlying the CPE Process Review Reports does not support reconsideration. The Requestor has no basis for this assertion, as the BAMC has not yet issued a recommendation on Request 16-3.

Ultimately, the Requestor has not identified any element of ICANN's Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN org's correspondence with the Requestor, as none were violated. Accordingly, reconsideration is not warranted.

**C. The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has considered the Requestor's Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration.

The Requestor claims that Request 18-2 "is properly within the scope of the reconsideration process, ICANN must recognize and apply international principles, and that both the DIDP Response and [BAMC] Recommendation violate ICANN's commitments and core values."<sup>33</sup>

These are the same arguments set forth in Request 18-2 and which were addressed by the BAMC in its Recommendation.

With respect to the first claim, the Requestor asserts that ICANN's Bylaws "do not limit reconsideration requests to contesting 'the process by which ICANN reached that decision.'"<sup>34</sup>

According to the Requestor, the Reconsideration Request process instead provides a vehicle for

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<sup>32</sup> For the same reasons, the Board was not required to "seek . . . input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation," or to instruct FTI to evaluate the substance of the research or interview or accept documents from CPE applicants. See 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

<sup>33</sup> Rebuttal, at Pg. 1.

<sup>34</sup> Rebuttal, at Pg. 1.

requestors to seek reconsideration of ICANN organization “actions or inactions that contradict ICANN’s Mission, Commitments, Core Values, and/or established ICANN policy(ies) and adversely affect the requestor.”<sup>35</sup> The Requestor is correct that reconsideration may be appropriate *if* the Requestor demonstrates that the action or inaction contradicts “ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies).”<sup>36</sup> However, a Reconsideration Request that challenges the *outcome* of ICANN organization action or inaction without any supporting evidence beyond the requestor’s dissatisfaction with that outcome does not meet the standard for reconsideration. Similarly, a Reconsideration Request that does not explain how the challenged action or inaction contradicted ICANN organization’s Mission, Commitments, Core Values, and/or established ICANN policy(ies), without more, cannot justify reconsideration; if it did, the Board would be compelled to grant reconsideration to every requestor that sought it, which would render the process meaningless.

Second, the Requestor repeats its argument that “[t]he DIDP Response violates the principle of transparency.”<sup>37</sup> The Board finds that this argument has been sufficiently addressed by the BAMC and that the Rebuttal provides no new fact or evidence to support reconsideration. (BAMC Recommendation, Pgs. 27-31.)

Similarly, with respect to the Requestor’s argument that the requested documents should be disclosed because the “public is specifically interested” in the CPE Process Review”<sup>38</sup> was sufficiently considered and addressed in the BAMC Recommendation and the Board adopts the BAMC’s Recommendation that reconsideration is not warranted.<sup>39</sup> While the Requestor believes that ICANN org should have exercised its discretion differently, that is not a basis for reconsideration because the Requestor has provided any new facts or evidence on rebuttal warranting reconsideration.

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<sup>35</sup> ICANN Bylaws, Art. 4, Section 4.2(c)(i).

<sup>36</sup> *Id.*; *see also, e.g.*, Board Determination on Request 17-3, <https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.b>; Board Determination on Request 17-1, <https://www.icann.org/resources/board-material/resolutions-2017-06-24-en#2.d>. Reconsideration also is appropriate if the requestor shows that it was adversely affected by Board or Staff action or inaction taken without consideration of material information, or taken as a result of reliance on false or inaccurate relevant information. (ICANN Bylaws, Art. 4, Section 4.2(c)(ii), (iii).)

<sup>37</sup> Rebuttal, at Pg. 3.

<sup>38</sup> *Id.*

<sup>39</sup> BAMC Recommendation, Pgs. 21-27.

Nor is there support for the Requestor’s suggestion that there was only a “single harm” – namely the “[w]eakening [of] the attorney-client privilege – that ICANN org considered when it determined that the public interest did not warrant the harm that would be caused by disclosure under the circumstances.<sup>40</sup> This claim has already addressed by the BAMC and the Requestor provides no additional evidence or facts that would support reconsideration. The Requestor’s other arguments concerning the application of the attorney-client privilege confirm that no policy or procedure exists that would require ICANN org to waive the privilege just because the Requestor asks it to do so. ([Rebuttal](#), Pg. 7).

Fourth, the Requestor asserts that ICANN org has “restricted interested parties’ access to information in a blatantly unfair decision that keeps affected applicants uninformed and raised several red flags regarding the integrity of the independent review itself.”<sup>41</sup> The Board notes that the Board Governance Committee and ICANN org have provided several updates concerning the CPE Process Review, including updates on 2 June 2017,<sup>42</sup> 1 September 2017,<sup>43</sup> and 13 December 2017<sup>44</sup>. In addition, ICANN org published three reports on the CPE Process Review, which detailed the methodology and conclusions reached by FTI.<sup>45</sup> The suggestion that applicants are “uninformed” about the CPE Process Review is not only unsupported but also irrelevant to the DIDP Response.

Nor is there support for the Requestor’s claim that “ICANN’s refusal to disclose certain documents regarding the independent review lets it avoid accountability to the Internet community . . . .”<sup>46</sup> As explained in the BAMC Recommendation, without contravening its commitment to transparency and accountability, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

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<sup>40</sup> Rebuttal, at Pgs. 6-7.

<sup>41</sup> Rebuttal, at Pg. 9.

<sup>42</sup> <https://www.icann.org/news/announcement-4-2017-06-02-en>.

<sup>43</sup> <https://www.icann.org/news/announcement-2017-09-01-en>.

<sup>44</sup> <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>45</sup> <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>46</sup> Rebuttal at Pg. 9.

Finally, the Requestor repeats its claim that “[t]he ICANN Bylaws require that ICANN comply with principles of international law, which includes due process.”<sup>47</sup> However, the Requestor has not demonstrated how the DIDP Response violates this commitment.

Moreover, the Requestor does not have the “right” to due process with respect to the DIDP. Indeed, the Requestor does not cite any persuasive authority supporting its position that such due process rights exist here. To the contrary, all the Requestor cites is an excerpt from *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), which was authored by at least two attorneys representing other gTLD community applicants in connection with the pending reconsideration requests relating to the CPE process and which raise similar issues to those asserted by the Requestor here. The excerpt cited simply posits the authors’ unsupported opinion that principles of international law should be placed first before local law and ICANN’s Bylaws.<sup>48</sup> Indeed, the book even states that it offers only the “recommendations” of the authors, which are “no doubt colored by their perspectives; after all, the authors have been involved in many of the leading IRP proceedings and have counseled innumerable applicants on their right in the domain name system and the new gTLD application process.”<sup>49</sup> These “recommendations” are not definitive of international law principles, nor do they support reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

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<sup>47</sup> Rebuttal, at Pg. 2.

<sup>48</sup> Rebuttal at Pg. 2.

<sup>49</sup> Flip Petillion, *Competing for the Internet: ICANN Gate – An Analysis and Plea for Judicial Review through Arbitration* (2017), p. XXIV.

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**ICANN BOARD SUBMISSION NO. 2018.07.18.2c**

**TITLE:** **Consideration of Reconsideration Request 18-3**

**PROPOSED ACTION:** **For Board Consideration and Approval**

**EXECUTIVE SUMMARY:**

The Requestor, Astutium Limited, seeks reconsideration of ICANN organization’s decision to issue a Notice of Termination (Termination Notice) of the Requestor’s 2013 Registrar Accreditation Agreement (RAA) with ICANN organization.<sup>1</sup> Specifically, the Requestor alleges that, in deciding to issue the Termination Notice, ICANN org: (i) relied on faulty data and misunderstandings; and (ii) failed to adhere to applicable policies and procedures. The Requestor also alleges that ICANN org published defamatory statements on its website that impacts the Requestor’s business reputation. The Requestor asks that ICANN org “cancel” the termination.

The Requestor entered into the RAA with ICANN org on 5 October 2014. On 17 December 2017, ICANN org’s Contractual Compliance Team (Contractual Compliance) received a complaint concerning claimed WHOIS inaccuracies regarding the domain name <tomzink.com> (Complaint), which is registered through the Requestor. Consistent with its approach and process,<sup>2</sup> Contractual Compliance validated the Complaint to ensure that it was within the scope of the RAA and consensus policies before forwarding the Complaint to the Requestor. Thereafter, Contractual Compliance attempted to resolve the claimed WHOIS inaccuracies with the Requestor through the Informal Resolution Process, but the Requestor did not cure the issues raised in the Complaint.

Contractual Compliance then escalated the matter to the Formal Resolution Process<sup>3</sup> by sending the Requestor a Breach Notice resulting from the Requestor’s failure to: (i) take reasonable steps to investigate and correct claimed WHOIS inaccuracies regarding the domain name <tomzink.com>; (ii) validate and verify WHOIS contact information; and (iii) maintain and

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<sup>1</sup> Request 18-3, § 2, at Pg. 2, available at <https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-request-redacted-30mar18-en.pdf>.

<sup>2</sup> See Contractual Compliance Approach and Process webpage, available at <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en>.

<sup>3</sup> See *id.*

make available to ICANN organization registration data and records relating to the Requestor's communications with the Registered Name Holder (RNH) of the domain name <tomzink.com>.<sup>4</sup>

The Requestor was to cure the deficiencies identified in the Breach Notice by 20 March 2018. The Requestor did not respond, despite a follow-up attempt by Contractual Compliance prior to the cure date.<sup>5</sup> Consistent with its Formal Resolution Process, Contractual Compliance then issued a Termination Notice on 21 March 2018 for failure to cure the issues raised in the Breach Notice.<sup>6</sup> The termination was scheduled to become effective 20 April 2018.

On 28 March 2018, the Requestor filed Reconsideration Request 18-3 (Request 18-3), seeking reconsideration of ICANN organization's decision to issue the Termination Notice.<sup>7</sup>

Pursuant to the Bylaws, Request 18-3 was submitted to the Ombudsman, who issued his substantive evaluation on 5 May 2018.<sup>8</sup> The Ombudsman concluded that Request 18-3 did not warrant "a recommendation by the BAMC or the Board to take any of the actions as requested by Requestor."<sup>9</sup>

On 5 June 2018, the Board Accountability Mechanisms Committee (BAMC) evaluated Request 18-3 and all relevant materials and recommended that the Board deny Request 18-3 because there was no sufficient basis for reconsideration.

On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws.<sup>10</sup> (*See* Rebuttal, attached as Attachment G to the Reference Materials.)

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<sup>4</sup> Notice of Breach, at Pg. 1, available at [https://www.icann.org/uploads/compliance\\_notice/attachment/1003/serad-to-golding-27feb18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1003/serad-to-golding-27feb18.pdf).

<sup>5</sup> Notice of Termination, at Pg. 5, available at [https://www.icann.org/uploads/compliance\\_notice/attachment/1013/serad-to-golding-21mar18.pdf](https://www.icann.org/uploads/compliance_notice/attachment/1013/serad-to-golding-21mar18.pdf).

<sup>6</sup> *See generally*, Notice of Termination. *See also* Formal Resolution Process – General Guidelines, available at <https://www.icann.org/en/system/files/files/formal-resolution-07mar17-en.pdf>.

<sup>7</sup> Reconsideration Request 18-3, available at <https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-request-redacted-30mar18-en.pdf>.

<sup>8</sup> Evaluation by the ICANN Ombudsman of Request for Reconsideration 18-3, available at <https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-evaluation-icann-ombudsman-request-04may18-en.pdf>.

<sup>9</sup> *Id.*, at Pg. 8.

<sup>10</sup> Rebuttal, available at <https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-requestor-rebuttal-bamc-recommendation-20jun18-en.pdf>.

## **BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)**

### **RECOMMENDATION:**

The BAMC recommended that Request 18-3 be denied and that no further action be taken in response to the Request because: (i) ICANN org adhered to established policies and procedures when it issued the Termination Notice; (ii) ICANN org did not rely on faulty data or misunderstandings when it issued the Termination Notice; and (iii) ICANN org did not publish any defamatory statements concerning the Requestor on its website.

### **PROPOSED RESOLUTION:**

Whereas, 5 October 2014, Astutium Ltd. and ICANN organization executed the Registrar Accreditation Agreement (RAA).

Whereas, on 17 December 2017, ICANN org's contractual compliance team (Contractual Compliance) received a complaint concerning WHOIS inaccuracies regarding the domain name <tomzink.com>, which is registered through Astutium Ltd.

Whereas, following unsuccessful resolution of the issues through an informal resolution process, Contractual Compliance issued a Notice of Breach, requesting that Astutium Ltd. cure the breaches by 20 March 2018, but the Requester failed to cure the breaches.

Whereas, on 21 March 2018, Contractual Compliance issued the Notice of Termination to Astutium Ltd; the termination was scheduled to become effective 20 April 2018.

Whereas, on 30 March 2018, Astutium Ltd. filed Reconsideration Request 18-3 (Request 18-3) challenging the Notice of Termination on the basis that ICANN organization: (i) relied on faulty data and misunderstandings; and (ii) failed to adhere to applicable policies and procedures.

Whereas, 5 May 2018, the Ombudsman submitted his substantive evaluation of Request 18-3 to the BAMC and concluded that "nothing [the] Requestor has set forth in Request 18-3 merits a recommendation by the BAMC or the Board to take any of the actions as requested by [the] Requestor."

Whereas, the BAMC carefully considered the merits of Request 18-3 and all relevant materials and recommended that Request 18-3 be denied because: (i) ICANN org adhered to established policies and procedures when it issued the Termination Notice; (ii) ICANN org did not rely on faulty data or misunderstandings when it issued the Termination Notice; and (iii) ICANN org did not publish any defamatory statements concerning the Requestor on its website.

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-3 and all relevant materials related to Request 18-3, including Astutium Ltd.'s rebuttal, and the Board agrees with the BAMC's recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.XX), the Board adopts the [BAMC Recommendation on Request 18-3](#) and directs the President and CEO, or his designee(s), to continue with the termination process of Astutium Ltd.'s RAA.

## **PROPOSED RATIONALE:**

### **1. Brief Summary and Recommendation**

The full factual background is set forth in the [BAMC Recommendation](#), which the Board has reviewed and considered, and which is incorporated here.

On 5 June 2018, the BAMC recommended that Request 18-3 be denied because the Requestor has not demonstrated sufficient basis for reconsideration for the reasons set forth in the [BAMC Recommendation](#), which are incorporated here. (*See [BAMC Recommendation](#).*)

On 20 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws, which the Board has also carefully reviewed and considered. (*See [Rebuttal](#)*, attached as Attachment G to the Reference Materials.) In the rebuttal, the Requestor suggests that: (1) Contractual Compliance failed to communicate with the Requestor during the informal and formal resolution process; (2) the Complaint contained inaccuracies that were not vetted by ICANN org; (3) the Requestor corrected the inaccuracies in the Complaint; (4) ICANN org misunderstood the Requestor's process to validate the information; (5) the Requestor responded to the Notice of Breach; (6) the Requestor was prevented by EU privacy laws from disclosing information to ICANN org; (7) the

Requestor complied with the Expired Registration Recovery Policy (ERRP) Section 4.1; and (8) the Requestor maintained a valid correspondence address on its website.<sup>11</sup>

The Board has carefully reviewed and considered the Rebuttal and finds that the Rebuttal provides no additional argument or evidence to support reconsideration.

## **2. Issues**

The issues for reconsideration are:

- Whether ICANN organization complied with applicable Commitments, Core Values, and established policies when it issued the Termination Notice;
- Whether ICANN organization relied on faulty data or misunderstandings when it issued the Termination Notice; and
- Whether ICANN organization published defamatory statements on ICANN organization's website, in violation of the applicable Commitments, Core Values, and established policies.

These issues are considered under the relevant standards for reconsideration requests and the contractual compliance process, which are set forth in the BAMC Recommendation.

## **3. Analysis and Rationale**

### **A. Contractual Compliance Complied with Applicable Policies and Procedures.**

The Requestor claims that Contractual Compliance's decision to issue the Termination Notice was based on an "overall failure of ICANN staff/policies/procedures."<sup>12</sup> As discussed below and in further detail in the BAMC Recommendation, Contractual Compliance adhered to the applicable policies and procedures when addressing each of the six areas of noncompliance identified in the Termination Notice.

1. Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to take reasonable steps to investigate and correct WHOIS inaccuracies.

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<sup>11</sup> See generally Rebuttal.

<sup>12</sup> Request 18-3, § 5, at Pg. 2.

The Requestor claims that the Complaint regarding the <tomzink.com> domain name contained inaccuracies that “were clearly and obviously faults in the ICANN reporting process;” that the Requestor nonetheless contacted the registrant and updated the inaccuracies; and that Contractual Compliance’s “demands for copies of communications to ‘demonstrate compliance’ are both unreasonable and unnecessary.”<sup>13</sup> The Requestor also claims that Contractual Compliance did not manually review the Complaint and instead automatically forwarded it to the Requestor. The BAMC determined, and the Board agrees, that Requestor’s claims are factually incorrect and do not support reconsideration.

First, Contractual Compliance follows a defined approach and process to ensure compliance with contractual obligations.<sup>14</sup> The BAMC determined, and the Board agrees, that Contractual Compliance followed its process with respect to the handling of the Complaint. That is, upon receipt of the Complaint, Contractual Compliance evaluated and confirmed that the Complaint was within the scope of the relevant RAA and consensus policies. While some portions of the Complaint may have been inaccurate, the Complaint contained other portions that were within scope. Thus, Contractual Compliance initiated the “Informal Resolution Process” by sending the first compliance notice to the Requestor, attaching the entire Complaint.<sup>15</sup> Contractual Compliance does not modify complaints, except to redact reporter-related data associated with requests for anonymity, even if it determines that portions of the complaint are inaccurate. Registrars are free to explain why portions of a complaint do not need to be addressed, but the fact that a portion of a complaint is inaccurate does not waive the need to address the accurate/in-scope portions of the complaint.

Second, the BAMC concluded, and the Board agrees, that the Requestor’s claims that Contractual Compliance’s “demands for copies of communications to ‘demonstrate compliance are unreasonable and unnecessary’”<sup>16</sup> do not support reconsideration. The RAA requires the Requestor to “comply with the obligations specified in the Whois Accuracy Program Specification” (WAPS) to maintain and confirm accurate contact information for its Registered Name Holder (RNH). (BAMC Recommendation, Pg. 3.) The Requestor also is required to

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<sup>13</sup> Request 18-3, § 9, at Pgs. 4-5.

<sup>14</sup> See About ICANN’s Contractual Compliance Approach and Processes webpage, available at <https://www.icann.org/resources/pages/approach-processes-2012-02-25-en>.

<sup>15</sup> See Notice of Termination, at Pg. 4.

<sup>16</sup> Request 18-3, § 9, at Pgs. 4-5.

maintain “all written communications constituting registration applications, confirmations, modifications, or terminations and related correspondence with Registered Name Holders,” and must make such data available to ICANN org upon reasonable notice.<sup>17</sup> (BAMC Recommendation, Pg. 4.) The Requestor’s refusal to provide or make such data available to Contractual Compliance is a breach of its RAA. (*See* BAMC Recommendation, Pgs. 17-18.)

As discussed in detail in the BAMC Recommendation, the Requestor did not remedy all the WHOIS inaccuracies at issue during the Informal Resolution Process. For example, information in the Administrative and Technical fields (such as street names) appeared to belong to the Requestor rather than the registrant.<sup>18</sup> Additionally, the Requestor had not validated the postal address under WAPS to ensure it was in a proper format for the applicable country as defined in the UPU Postal addressing format templates.<sup>19</sup>

The Board notes that Contractual Compliance attempted numerous times to resolve the deficiencies with the Requestor through the three separate compliance notices during the Informal Resolution Process before escalating the matter to the Formal Resolution Process by the issuance of the Breach Notice on 27 February 2018.<sup>20</sup> (BAMC Recommendation, Pg. 18.)

The Requestor never responded to the Breach Notice, despite outreach effort from Contractual Compliance.<sup>21</sup> As a result, Contractual Compliance escalated the matter to termination in accordance with its process and Section 5.5.4 of the RAA. Accordingly, the BAMC concluded, and the Board agrees, that Contractual Compliance followed applicable policies and procedures throughout this process and therefore, the Requestor’s claims do not support reconsideration.

2. Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor’s failure to validate and verify WHOIS contact information, as required by WAPS.

The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor’s failure to validate and verify WHOIS contact information as required by WAPS. The Requestor claims

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<sup>17</sup> *See also* RAA, §§ 3.4.2.2; 3.4.3

<sup>18</sup> Contractual Compliance staff confirmed this fact during investigation of Request 18-3.

<sup>19</sup> *See, e.g.*, Attachment E, at Pg. 25.

<sup>20</sup> *Id.*, at Pg. 5.

<sup>21</sup> *Id.*

that Contractual Compliance “misunderstand[s] ... the technologies involved,” that “[v]alidation of client submitted data is done prior to acceptance of that data, and [that] manual ‘eyeballing’ of the data is not a general requirement.”<sup>22</sup> The Requestor explained that “[i]n the event of certain specific data being updated (and subject to it not already having been verified on other domains) automated processes are then invoked as needed in accordance with [WAPS] 1.f.”<sup>23</sup>

The Requestor’s claim is factually incorrect. WAPS Section 1 requires the Requestor, upon “any change in the [RNH] with respect to any Registered Name sponsored by” the Requestor, to “[v]alidate the presence of data for all fields required under Subsection 3.3.1 of the Agreement in a proper format,” and validate that other contact information is in the proper format.<sup>24</sup> It also requires the Requestor to verify “the email address of the [RNH] ... by sending an email requiring an affirmative response through a tool-based authentication method....”<sup>25</sup> Within 15 days of receiving “any changes to contact information in Whois ..., [the Requestor] will validate and, to the extent required by Section 1, verify the changed fields in the manner specified in Section 1 above. If [the Requestor] does not receive an affirmative response from the [RNH] providing the required verification, [the Requestor] shall either verify the applicable contact information manually or suspend the registration....”<sup>26</sup> WAPS Section 4 requires that if the Requestor “has any information suggesting that the contact information ... is incorrect[,] ... [it] must verify or re-verify as applicable....” If the Requestor does not receive an affirmative response, it “shall either verify the applicable contact information manually or suspend the registration.”<sup>27</sup>

Contractual Compliance requested this information from the Requestor throughout the Informal Resolution and Formal Resolution Processes. However, to date, Contractual Compliance has not received evidence of verification or validation, as required under WAPS Sections 1, 4, and 5.<sup>28</sup> Accordingly, the Requestor’s claims do not support reconsideration.

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<sup>22</sup> Request 18-3, § 9, at Pg. 5.

<sup>23</sup> *Id.*

<sup>24</sup> RAA, WAPS § 1.

<sup>25</sup> *Id.* § 1.f.i.

<sup>26</sup> *Id.* § 2.

<sup>27</sup> *Id.* § 4.

<sup>28</sup> *See* Notice of Termination, at Pg. 5. This was further confirmed with Contractual Compliance staff during investigation of Request 18-3.

3. Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to maintain and make available to ICANN registration data and records relating to the Requestor's communications with the RNH of the domain name <tomzink.com>.

The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor's failure to maintain and make available to ICANN org registration data and records of the Requestor's communications with the RNH of the domain name <tomzink.com>. Sections 3.4.2 and 3.4.3 of the RAA require the Requestor to maintain records "relating to its dealings with Registry Operator(s) and [RNHs]," including correspondence, and to make those available for inspection and copying to ICANN upon reasonable notice.<sup>29</sup> If the Requestor "believes that the provision of any such data, information or records to ICANN would violate applicable law or any legal proceedings, ICANN and [the Requestor] agree to discuss in good faith whether appropriate limitations, protections or alternative solutions can be identified to allow the production of such data."<sup>30</sup>

In Request 18-3, Requestor claims for the first time that it is prohibited from providing ICANN org the requested data because EU privacy laws limit the types of data that can be exported to the United States.<sup>31</sup> Yet, during Informal and Formal Resolution Processes, the Requestor never raised EU privacy law as a basis for withholding the requested information.<sup>32</sup> Rather, the Requestor simply refused to comply with Sections 3.4.2 and 3.4.3, stating "we don't provide details of private communications to 3<sup>rd</sup> parties," but did not provide a reason for withholding such communications.<sup>33</sup>

The BAMC noted that Contractual Compliance nevertheless offered to work with the Requestor on how such records could be provided to demonstrate compliance but that such efforts were met with the following response from the Requestor: "There is no requirement in WAPS to provide

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<sup>29</sup> RAA §§ 3.4.2, 3.4.3.

<sup>30</sup> *Id.* § 3.4.3.

<sup>31</sup> Request 18-3, § 9, at Pgs. 6-7.

<sup>32</sup> *See generally*, Attachment E.

<sup>33</sup> *Id.*, at Pgs. 13-14, 18.

you with anything at all.”<sup>34</sup> Accordingly, the BAMC concluded, and the Board agrees, that the Requestor’s claims do not support reconsideration.

4. Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor’s failure to provide domain name data in the specified response format, as required by the RAA.

The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor’s failure to provide domain name data in the format required by the RAA. In accordance with its process when a complaint reaches the third compliance notice phase,<sup>35</sup> Contractual Compliance conducted a full compliance check to identify whether there were any additional areas of non-compliance by Astutium Ltd., and confirmed that there were three additional areas of non-compliance as identified in the Breach Notice.<sup>36</sup> Contrary to the Requestor’s assertion, Contractual Compliance did not create additional “backdoor” requirements, but rather complied with its process when identifying other areas of noncompliance.

5. Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor’s failure to include a link in its registration agreement to its renewal fees and post-expiration renewal fees.

The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor’s failure to include a link to its renewal fees and post-expiration renewal fees in its registration agreement as required by Section 4.1 of the Expired Registration Recovery Policy (ERRP).<sup>37</sup> The Requestor claims that it complied with Section 4.1 of the ERRP because its fees are displayed on every page of its website.<sup>38</sup> However, a link to the Requestor’s renewal fees and post-expiration

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<sup>34</sup> Attachment E, Pg. 9.

<sup>35</sup> See Informal Resolution Process, available at <https://www.icann.org/en/system/files/files/informal-resolution-07mar17-en.pdf>.

<sup>36</sup> Notice of Breach, at Pgs. 1-2.

<sup>37</sup> ERRP § 4.1, available at <https://www.icann.org/resources/pages/errp-2013-02-28-en>.

<sup>38</sup> Request 18-3, § 9, at Pg. 8.

renewal fees on its website was not included in the Requestor's registration agreement as required by Section 4.1 of the ERRP.<sup>39</sup>

Accordingly, because Contractual Compliance adhered to applicable policies and procedures, the BAMC concluded, and the Board agrees, that reconsideration is not warranted.

6. Contractual Compliance complied with applicable policies and procedures when it issued the Termination Notice for Requestor's failure to publish a correspondence address on Requestor's website.

The BAMC determined, and the Board agrees, that Contractual Compliance complied with established procedures when it issued the Termination Notice based on the Requestor's failure to publish a correspondence address on its website. The Requestor claims that "[n]o breach has occurred" because the Requestor's website "has a 'Contact' link at the top of every page, has telephone numbers on every page, contains multiple methods of communication (email, telephone, ticket, fax post) listed and clearly shows [its] address at the bottom of every page."<sup>40</sup> However, the Requestor's correspondence address on its website must be the same as the address provided in its Registrar Information Specification (RIS).<sup>41</sup> Contractual Compliance was unable to locate the correspondence address provided in the Requestor's RIS on the Requestor's website.<sup>42</sup> Accordingly, consistent with the RAA and Contractual Compliance's process, Contractual Compliance issued the Termination Notice.

**B. The Requestor Has Not Demonstrated That Contractual Compliance Relied on False or Inaccurate Information When It Issued the Termination Notice.**

The BAMC concluded, and the Board agrees, that the Requestor has not identified any false or inaccurate information that Contractual Compliance purportedly relied upon when it decided to issue the Termination Notice. The only apparent reference to purported reliance on false or misleading information is the Requestor's claim that ICANN org "misunderstands ... the

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<sup>39</sup> See Notice of Breach, at Pg. 2; Notice of Termination, at Pg. 2. This fact was confirmed by Contractual Compliance staff during investigation of Request 18-3.

<sup>40</sup> Request 18-3, § 9, at Pg. 9 (emphasis added).

<sup>41</sup> RAA, § 3.17; RAA, RIS § 7.

<sup>42</sup> Notice of Breach, at Pg. 2; Notice of Termination, at Pg. 2.

technologies involved” in the Requestor’s automated validation process of registrant contact information.<sup>43</sup> That is not a basis for reconsideration.

**C. The Requestor Has Not Demonstrated That ICANN Org Published Defamatory Statements on Its Website or Violated Its Commitments by Publishing the Notices on Its Website.**

The BAMC concluded, and the Board agrees, that Contractual Compliance did not violate any established process or procedures when it published the Breach and Termination Notices on the Notices webpage. Notices sent during the Formal Resolution process are published on <https://www.icann.org/compliance/notices>, and ICANN updates the progress of each enforcement action.<sup>44</sup>

To the extent that the Requestor is suggesting that the publicly available Breach and Termination Notices contain libelous statements, the BAMC determined and the Board agrees that this is unconvincing. ICANN org takes defamation claims seriously. Accordingly, in the evaluation of Request 18-3, ICANN org reviewed the Breach and Termination Notices and confirmed that there neither the breaches identified nor any statements contained in the Notices are false or defamatory. Moreover, the Requestor has failed to show how any statements in the Notices are defamatory. Accordingly, the Requestor has not identified any element of ICANN’s Mission, Commitments, Core Values, or established ICANN policy(ies) violated by ICANN organization, and reconsideration is not warranted on this ground.

**D. The Requestor’s Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has considered the Requestor’s Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration.

The Rebuttal states that: (1) Contractual Compliance failed to communicate with the Requestor during the Informal and Formal Resolution Processes; (2) the Complaint contained inaccuracies that were not vetted by ICANN org; (3) the Requestor corrected the inaccuracies in the Complaint; (4) ICANN org staff misunderstands the process the Requestor used to validate the

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<sup>43</sup> *Id.*

<sup>44</sup> See Complaints and Disputes FAQ, Question 32, available at <https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#32>.

information; (5) the Requestor responded to the Notice of Breach; (6) the Requestor was prevented by EU privacy laws from disclosing information to ICANN org; (7) the Requestor complied with ERRP Section 4.1; and (8) the Requestor maintained a valid correspondence address on its website.

With respect to the first claim, the Board finds that this argument is not supported. Rather, the chronologies attached to the Breach and Termination Notices, as well as the detailed written correspondence between Contractual Compliance and the Requestor<sup>45</sup> demonstrate that Contractual Compliance repeatedly contacted the Requestor via email, facsimile, courier mail, and telephone to resolve the breaches at issue.

With respect to the Requestor's claim that there were inaccuracies in the Complaint sent to the Requestor, as detailed above in Section 3.A.1, the Board finds that this argument has been sufficiently addressed by the BAMC. The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration.

Similarly, the Board finds that the third and fourth claims in the Rebuttal have been sufficiently addressed by the BAMC for the reasons discussed above and in the BAMC Recommendation. The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration.

With respect to the Requestor's rebuttal that it responded to the Breach Notice by contacting Mukesh Chulani, the Registrar Services & Engagement Senior Manager, the Board finds that this claim does not support reconsideration. The Requestor does not provide – nor is ICANN org aware of – anything to show that the Requestor cured the breaches identified in the Breach Notice during the communication with Mr. Chulani. Moreover, Mr. Chulani engaged with the Requestor to encourage the Requestor to cure the breaches with Contractual Compliance before the matter escalated to termination. (*See* Attachment H to Reference Materials.)

With respect to the Requestor's rebuttal that it was prevented by EU privacy laws from disclosing information to ICANN org, the Board finds that this claim has been sufficiently addressed by the BAMC for the reasons discussed above and in the BAMC Recommendation.

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<sup>45</sup> See Attachment 1 to BAMC Recommendation on Request 18-3, available at <https://www.icann.org/en/system/files/files/reconsideration-18-3-astutium-bamc-recommendation-attachment-1-05jun18-en.pdf>.

The Requestor acknowledges that it never raised these concerns with Contractual Compliance during the Informal and Formal Resolution Processes. Further, as the BAMC noted, even though the Requestor did not identify privacy regulations as the basis for withholding from ICANN the requested information, Contractual Compliance nevertheless offered to work with the Requestor on how such records could be provided to demonstrate compliance, but the Requestor rejected Contractual Compliance's offer. ([Attachment 1 to BAMC Recommendation on Request 18-3](#), Pgs. 9-10.) The BAMC concluded, and the Board agrees, that the Requestor's response to Contractual Compliance on this matter demonstrates that the Requestor's concerns about this breach item is not the inability to comply due to privacy regulations, but rather that the Requestor believes that "[t]here is no requirement in WAPS to provide [Contractual Compliance] with anything at all." (*Id.* at Pg. 10.)

With respect to the Requestor's rebuttal that it complied with ERRP Section 4.1 because it displays its renewal fees and post-expiration renewal fees on its website, the Board finds that this argument has been sufficiently addressed by the BAMC. (*See infra* at Section 3.A.5.) The Requestor has not provided anything new to show that its Domain Registration Agreement contains a link to the renewal fees as required by the ERRP Section 4.1. Accordingly, reconsideration is not warranted.

Finally, with respect to the Requestor's claims that the RIS form that ICANN org has on file "is not the current RIS form" and that ICANN has "failed to update/store/file the correct and updated information,"<sup>46</sup> the Board finds that the Requestor has not provided anything to support these claims. While the Requestor claims that it updated its RIS through the ICANN Registrar Database RADAR,<sup>47</sup> RADAR does not, in fact, contain any RIS information because it does not have the functionality for RIS forms to be submitted on its platform. As specified in the Registrar Contacts Update webpage at <https://www.icann.org/resources/pages/registrar-contact-updates-2015-09-22-en>, RIS updates should be emailed to [registrarupdates@icann.org](mailto:registrarupdates@icann.org).<sup>48</sup> The Requestor has not provided any evidence demonstrating that it submitted a revised RIS form pursuant to applicable procedures. The only RIS form that ICANN org has received from the

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<sup>46</sup> Rebuttal (citing Pg. 25 of BAMC Recommendation).

<sup>47</sup> *Id.* ("I went through the convoluted procedure of updating ICANN with new details and forms when access to RADAR was restored. . . .").

<sup>48</sup> Registrar Information Specification Updates, available at <https://www.icann.org/resources/pages/registrar-contact-updates-2015-09-22-en>.

Requestor is the RIS form that Contractual Compliance sent the Requestor on 13 March 2018, and that form reflects an address that is different from the address listed on the Requestor's website.

Accordingly, the Board concludes that nothing in the Requestor's rebuttal warrants reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 10 July 2018  
Email: amy.stathos@icann.org

## ICANN BOARD SUBMISSION NO. 2018.07.18.2d

**TITLE:** **Consideration of Reconsideration Request 18-4**

**PROPOSED ACTION:** **For Board Consideration and Approval**

### **EXECUTIVE SUMMARY:**

The Requestor, dotgay LLC, 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.<sup>1</sup> Specifically, the Requestor claims that, “ICANN Board’s adoption of reports based on such inadequate factual development violates its commitment to fairness,” and is inconsistent with ICANN organization’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.<sup>2</sup>

The Requestor submitted a community-based application for the .GAY generic top-level domain (gTLD) (Application), which was placed in a contention set with three other .GAY applications.<sup>3</sup> The Requestor participated in CPE, but did not prevail. The Requestor challenged the results of the CPE in Reconsideration Request 15-21, which the Board Governance Committee (BGC) denied.<sup>4</sup> Thereafter, the Requestor filed Reconsideration Request 16-3, challenging the BGC’s denial of Request 15-21.<sup>5</sup> Request 16-3 is pending evaluation by the Board Accountability Mechanisms Committee (BAMC).

While Request 16-3 was pending, the Board directed ICANN org to undertake the CPE Process Review.<sup>6</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE

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<sup>1</sup> Request 18-4, § 3, at Pg. 1.

<sup>2</sup> Request 18-4, § 6, at Pg. 4-5.

<sup>3</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

<sup>4</sup> BGC Determination on Request 15-21, <https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>.

<sup>5</sup> See <https://www.icann.org/resources/pages/reconsideration-16-3-dotgay-request-2016-02-18-en>.

<sup>6</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.<sup>7</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>8</sup>

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.<sup>9</sup>

On 13 April 2018, the Requestor submitted Request 18-4, challenging the Resolutions.<sup>10</sup>

On 14 June 2018, the BAMC evaluated Request 18-4 and all relevant materials and recommended that the Board deny Request 18-4 because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

On 29 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (See [Rebuttal](#), attached as Attachment D to the Reference Materials.)

## **BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)**

### **RECOMMENDATION:**

The BAMC recommended that Request 18-4 be denied and that no further action be taken in response to the Request because the Board considered all material information when it adopted

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<sup>7</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>8</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>9</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>10</sup> Request 18-4, <https://www.icann.org/en/system/files/files/reconsideration-18-4-dotgay-request-redacted-13apr18-en.pdf>.

the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

**PROPOSED RESOLUTION:**

Whereas, dotgay LLC submitted a community-based application for the .GAY generic top-level domain (gTLD), which was placed in a contention set with three other .GAY applications.

Whereas, dotgay LLC participated in Community Priority Evaluation (CPE), but did not prevail.

Whereas, dotgay LLC challenged the results of the CPE in Reconsideration Request 15-21, which the Board Governance Committee (BGC) denied. Thereafter, dotgay LLC filed Reconsideration Request 16-3, challenging the BGC's denial of Request 15-21.

Whereas, while Request 16-3 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the CPE Process Review). The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-3, would be placed on hold until the CPE Process Review was completed.<sup>11</sup>

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

Whereas, on 15 March 2018, the Board passed the [Resolutions 2018.03.15.08 through 2018.03.15.11](#), which it 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 Board Accountability Mechanism 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.

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<sup>11</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

Whereas, on 13 April 2018, dotgay LLC submitted Reconsideration Request 18-4 (Request 18-4), claiming that the Board's adoption of the CPE Process Review Reports in Resolutions 2018.03.15.08 through 2018.03.15.11 violates its commitment to fairness, and is inconsistent with ICANN org'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.

Whereas, the BAMC previously determined that Request 18-4 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-4 and all relevant materials and recommended that Request 18-4 be denied because the Board considered all material information when it adopted Resolutions 2018.03.15.08 through 2018.03.15.11, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-4 and all relevant materials related to Request 18-4, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.xx), the Board adopts the [BAMC Recommendation on Request 18-4](#).

## **PROPOSED RATIONALE:**

### **1. Brief Summary and Recommendation**

The full factual background is set forth in the [BAMC Recommendation on Request 18-4](#) (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 14 June 2018, the BAMC evaluated Request 18-4 and all relevant materials and recommended that the Board deny Request 18-4 because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN’s Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in Resolutions 2018.03.15.08 through 2018.03.15.11 (the Resolutions), the Board considered the CPE Process Review Reports.<sup>12</sup> The CPE Process Review Reports identify the materials considered by FTI.<sup>13</sup> 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. (See [BAMC Recommendation](#).)

On 29 June 2018, the Requestor submitted a rebuttal to the BAMC’s Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN’s Bylaws. (See [Rebuttal](#).) The Requestor claims that: (i) the BAMC “misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-3;” (ii) the Requestor presented significant evidence that the ICANN Board violated its Bylaws by adopting the Resolutions;” (iii) FTI’s methodology for the CPE Process Review is materially flawed; and (iv) “the CPE Process Review Reports are substantively flawed.”<sup>14</sup>

The Board has carefully considered the [BAMC’s Recommendation](#) and all relevant materials related to Request 18-4, including the Requestor’s rebuttal, and the Board agrees with the [BAMC’s Recommendation](#) and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

## **2. Issue**

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

These issues are considered under the relevant standards for reconsideration requests, which are set forth in the [BAMC Recommendation](#).

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

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

<sup>14</sup> See generally Rebuttal.

### **3. 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 Reviews. The BAMC noted, and the Board agrees, 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 former employees of the CPE Provider; and (3) FTI did not accept materials from, or interview, CPE applicants in the course of its investigation.<sup>15</sup>

The BAMC determined, and the Board agrees, that , FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.<sup>16</sup> The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and relied on FTI to develop an appropriate methodology.<sup>17</sup> The Requestor has not identified a policy or procedure

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<sup>15</sup> Request 18-4, § 8, at Pg. 12-13. *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); 15 January 2018 letter from Ali to ICANN Board, at Pg. 3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf> (FTI did not interview or accept materials from applicants, and “received almost no input from the CPE Provider”)

<sup>16</sup> *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>.

<sup>17</sup> *See* CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

(because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

With respect to the first concern, the BAMC determined, and the Board agrees, that it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider. 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.<sup>18</sup> 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.<sup>19</sup>

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 that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”<sup>20</sup> The BAMC concluded, and the Board agrees, that 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. As such, this argument does not support reconsideration.

With respect to the second claim, as detailed in the [BAMC Recommendation](#), the Requestor has not identified a policy or procedure requiring FTI to do more because none exists. 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.<sup>21</sup> 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.<sup>22</sup> Neither FTI nor the Board were required to search out every

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<sup>18</sup> 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>.

<sup>19</sup> 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>.

<sup>20</sup> 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 CPE Provider Consulting Agreement Statement of Work #2 – Application Evaluation Services\_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

<sup>21</sup> *Id.* at Pg. 9.

<sup>22</sup> 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>.

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. Accordingly, the BAMC concluded, and the Board agrees, reconsideration is not warranted on this ground.

The BAMC also determined, and the Board agrees, that the Requestor has not identified a policy or procedure requiring FTI to interview the CPE applicants or accept materials from the applicants in the course of the review. The BAMC further noted that FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP) proceedings.<sup>23</sup> As discussed in further detail in the [BAMC Recommendation](#), the claim does not warrant reconsideration.

The BAMC also concluded and the Board agrees that 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,"<sup>24</sup> does not render the vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless "accept[ed] the path forward" that the Board was setting.<sup>25</sup>

## **2. FTI was Not Required to Agree with the Findings of Prior Third-Party Reports.**

The Requestor argues that the Board should not have accepted the findings of the CPE Process Review Reports because those findings are inconsistent with conclusions that third parties have reached concerning the CPE process.<sup>26</sup> As detailed in the [BAMC Recommendation](#), the Requestor asserts that certain third parties identified concerns with the CPE process before FTI completed the CPE Process Review that the Requestor believes are inconsistent with and not addressed in the CPE Process Review Reports. ([BAMC Recommendation](#), Pgs. 13-16.)

According to the Requestor, these reports should be taken to mean that any conclusion *other*

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<sup>23</sup> *Id.*

<sup>24</sup> San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>25</sup> *Id.*

<sup>26</sup> Request 18-4, § 8, at Pg. 13.

than that the CPE Provider’s process was inconsistent with the Applicant Guidebook and that ICANN org exerted undue influence over the CPE Provider must be incorrect.<sup>27</sup>

The BAMC determined, and the Board agrees, that the Requestor’s argument is both contrary to the facts and completely inconsistent with proper investigative methodology. As discussed in the BAMC Recommendation, 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 evidence<sup>28</sup>—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,” specifically allegations that the CPE criteria “were applied inconsistently across the various CPEs as reflected in the CPE reports.”<sup>29</sup> Second, as noted in the CPE Process Review Reports, FTI considered all available evidence, including but not limited to, relevant IRP documents, relevant Reconsideration Requests, and the report from the Ombudsman’s Own Motion Investigation on the CPE process.<sup>30</sup>

Based upon the *evidence* available, FTI concluded that the CPE Provider applied the CPE criteria in a consistent manner, and differences in scoring outcomes “were not the result of inconsistent application of the criteria,” but rather of different underlying circumstances.<sup>31</sup>

FTI was not directed to conduct an investigation that supported (or contradicted) the third parties opinions that identified concerns with the CPE process.<sup>32</sup> Nor was the Board obligated to direct

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<sup>27</sup> Request 18-4, § 8, at Pg. 13; 15 Nov. 2016 letter from A. Ali to ICANN Board at Pg. 8-10. The Requestor also points to reports that the Requestor and other CPE applicants submitted in support of their CPE applications. For the same reasons that the independent reports identified in text are not determinative of the outcome of the CPE Process Review, the CPE applicants’ expert reports are likewise not determinative. See Request 18-4, § 8, at Pg. 10, 13.

<sup>28</sup> 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>.

<sup>29</sup> Scope 3 Report, at Pg. 3.

<sup>30</sup> Scope 1 report, at Pgs. 3-6.

<sup>31</sup> *Id.*

<sup>32</sup> See Transcript of ICANN Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar, 18 January 2017, comments of M. Carvell and C. Chalaby, at Pg. 12, 20-21, available at

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.”<sup>33</sup> Contrary to the Requestor’s claim, the Board’s decision to initiate the CPE Process Review was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the 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.

Finally, the BAMC concluded, and the Board agrees, the fact that 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,”<sup>34</sup> does not render the Board vote invalid.

### **3. Professor Eskridge’s Criticisms of the CPE Process Review Do Not Support Reconsideration.**

The BAMC determined, and the Board agrees, that the “Second Expert Opinion of Professor William N. Eskridge, Jr.” (Second Eskridge Opinion), which the Requestor submitted in support of Request 16-3 and referenced in Request 18-4,<sup>35</sup> does not warrant reconsideration. ([BAMC Recommendation](#), Pgs. 16-17.) The claims set forth in the Second Eskridge Opinion will be addressed as part of the BAMC and Board’s consideration of Request 16-3.

Moreover, as the BAMC noted, Professor Eskridge’s primary complaint is that FTI did not re-evaluate the merits of the CPE applications or consider the substance and reasonableness of the CPE Provider’s research.<sup>36</sup> However, that was not what FTI was tasked to do and the Requestor provides no evidence of any policy or procedure requiring that the Board instruct FTI to re-evaluate the applications.

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[https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2).

<sup>33</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>34</sup> San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>35</sup> Request 18-4, § 8, at Pg. 14.

<sup>36</sup> Request 18-4, § 8, at Pg. 13.

With respect to the Requestor’s “assertion that ‘a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind,’” neither the Requestor nor Professor Eskridge “offers any support for this baseless claim, and there is none.”<sup>37</sup> Accordingly, these claims do not support reconsideration.

#### **4. The Third-Party Letters of Support Do Not Support Reconsideration.**

The BAMC considered three letters submitted to the Board by third parties in support of the dotgay Application, criticizing the CPE Process Review.<sup>38</sup> Although all three letters express “frustration” or dissatisfaction with the findings of the CPE Process Review, the BAMC determined, the Board agrees, that none states grounds for reconsideration, nor do they identify any policy or procedures that ICANN organization or FTI violated in the course of the CPE Process Review. Accordingly, they do not support reconsideration.

#### **5. The BAMC Will Consider All of the Evidence Submitted by the Requestor as Part of its Consideration of Request 16-3.**

The BAMC determined, and the Board agrees, that the Requestor claims that the BAMC’s “reliance on” the CPE Process Review Reports would “directly affect its consideration of [Request] 16-3”<sup>39</sup> does not support reconsideration. 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.<sup>40</sup> The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-3 (just as the Board will consider all of the materials submitted by the Requestor in connection with Request 16-3), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-3. ([BAMC Recommendation](#), Pg. 18.)

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<sup>37</sup> 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>.

<sup>38</sup> <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>;  
<https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>;  
<https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>.

<sup>39</sup> Request 18-4, § 6, at Pg. 4.

<sup>40</sup> 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>.

## **6. ICANN Organization Adhered to its Transparency Obligations.**

Finally, the Requestor asserts that ICANN org “has been remarkably nontransparent throughout” the CPE Process Review, and “has, and continues to, rebuff all efforts to obtain detailed information about FTI’s independent review,” because the “only substantive information available to the public about the independent review is the CPE Process Review Reports themselves.”<sup>41</sup>

As discussed in the BAMC Recommendation, the Requestor has not explained how making the CPE Process Review Reports public somehow falls short of ICANN organization’s transparency obligations. The Board addressed and resolved this claim in its determination on the Requestor’s Request 18-2,<sup>42</sup> which is incorporated herein, and will not repeat itself here, except to say that the Requestor has raised no additional argument here that warrants reconsideration based on this assertion.

### **B. The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has carefully considered the Requestor’s Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration. The Rebuttal claims that: (i) the BAMC “misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-3;” (ii) the Requestor presented significant evidence that the ICANN Board violated its Bylaws by adopting the Resolutions;” (iii) FTI’s methodology for the CPE Process Review is materially flawed; and (iv) “the CPE Process Review Reports are substantively flawed.”<sup>43</sup> These are the same arguments set forth in Request 18-4 and were addressed by the BAMC in its Recommendation.

First, the Requestor asserts that ICANN org “oversimplifies Requestor’s response to the BAMC’s limited invitation” to make a telephonic oral presentation to the BAMC in support of Request 16-3.<sup>44</sup> The Requestor concedes that it rejected ICANN org’s invitation, but asserts that

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<sup>41</sup> Request 18-4, § 8, at Pg. 12.

<sup>42</sup> See BAMC Recommendation on Request 18-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf>.

<sup>43</sup> See *generally* Rebuttal.

<sup>44</sup> Rebuttal, Pg. 1.

ICANN org did not respond to its demand that ICANN org permit the Requestor a more “meaningful opportunity to make additional submissions to ICANN regarding the CPE Process Review Reports.”<sup>45</sup> This claim does not support reconsideration. The Requestor does not have a right to dictate the manner in which it is permitted to present to the BAMC. Under the Bylaws in effect when Request 16-3 was filed, the BAMC’s decision on the opportunity to be heard is final.<sup>46</sup> Indeed, the same invitation was extended to all requestors with pending reconsideration requests; were ICANN org to treat the Requestor differently, that would be unfair to other applicants in contravention of ICANN’s commitments in its Bylaws.

Second, the Requestor claims that it “provided ICANN with significant evidence supporting its claims,” and thus takes issue with the BAMC’s conclusion that “no evidence [exists] demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s [other] commitments.”<sup>47</sup> This represents a substantive disagreement with the BAMC’s conclusions, and is not a basis for reconsideration. The Requestor otherwise attempts to import arguments it made in connection with Reconsideration Request 18-2, which challenges ICANN org’s response to the Requestor’s request for documents (DIDP Request) pursuant to ICANN’s Documentary Information Disclosure Policy (DIDP), relating to the CPE Process Review. The Board addressed and resolved the Requestor’s claims concerning ICANN org’s response to the DIDP Request in its determination on Request 18-2, which is incorporated herein, and will not be repeated here, except to say that the Requestor has raised no additional argument that warrants reconsideration based on this assertion.

Third, with respect to the Requestor’s claim that FTI’s methodology for the CPE Process Review is materially flawed, the Board finds that this argument has been sufficiently addressed by the BAMC. The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration. Moreover, there is *no* support for the Requestor’s assertion that FTI “simply accepted statements and information [from the CPE Provider and ICANN org] without further

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<sup>45</sup> *Id.*

<sup>46</sup> Bylaws, Art. IV, § 2.12, effective 11 February 2016. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

<sup>47</sup> Rebuttal, Pg. 2.

investigation or critical analysis.”<sup>48</sup> While the Requestor disagrees with the conclusions reached by FTI, that is *not* evidence that FTI failed to critically and impartially analyze the issues relevant to the CPE Process Review. As the BAMC concluded, and the Board agrees, FTI considered *all* available evidence, and did so in a fair and impartial manner. (See [BAMC Recommendation](#), Pgs. 13-16.)

Fourth, the Requestor repeats its assertion that the CPE Process Review Reports are substantively flawed because they “did not address any of the relevant independent evaluations,” and “failed to consider divergent views on the CPE Process.”<sup>49</sup> The Board finds that this argument has been sufficiently addressed by the BAMC. (See [BAMC Recommendation](#), Pgs. 16-17.) The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 11 July 2018  
Email: amy.stathos@icann.org

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<sup>48</sup> Rebuttal, Pg. 6.

<sup>49</sup> Rebuttal, Pg. 8.

**ICANN BOARD SUBMISSION NO. 2018.07.18.2e**

**TITLE:** **Consideration of Reconsideration Request 18-5**

**PROPOSED ACTION:** **For Board Consideration and Approval**

**EXECUTIVE SUMMARY:**

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.<sup>1</sup> 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.”<sup>2</sup>

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 evaluation by the Board Accountability Mechanisms Committee (BAMC).

While Request 16-5 was pending, the Board directed ICANN org to undertake the CPE Process Review.<sup>3</sup> The Board Governance Committee (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.<sup>4</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>5</sup>

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<sup>1</sup> Request 18-5, § 3, at Pg. 1.

<sup>2</sup> *Id.*, § 6, at Pg. 3.

<sup>3</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>4</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>5</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

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.<sup>6</sup>

On 14 April 2018, the Requestor submitted Request 18-5, challenging the Resolutions.<sup>7</sup>

On 14 June 2018, the BAMC evaluated Request 18-5 and all relevant materials and recommended that the Board deny Request 18-5 because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

On 29 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (See [Rebuttal](#), attached as Attachment D to the Reference Materials.)

## **BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)**

### **RECOMMENDATION:**

The BAMC recommended that Request 18-5 be denied and that no further action be taken in response to the Request because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

### **PROPOSED RESOLUTION:**

Whereas, DotMusic Limited submitted a community-based application for the .MUSIC generic top-level domain (gTLD), which was placed in a contention set with other .MUSIC applications.

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<sup>6</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>7</sup> Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-request-redacted-14apr18-en.pdf>.

Whereas, DotMusic Limited participated in Community Priority Evaluation (CPE), but did not prevail.

Whereas, DotMusic Limited challenged the results of the CPE in Reconsideration Request 16-5 (Request 16-5).

Whereas, while Request 16-5 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the CPE Process Review). The Board Governance Committee (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.<sup>8</sup>

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

Whereas, on 15 March 2018, the Board passed the [Resolutions 2018.03.15.08 through 2018.03.15.11](#), which it 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 Board Accountability Mechanism 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.

Whereas, on 14 April 2018, DotMusic Limited submitted Reconsideration Request 18-5 (Request 18-5), claiming that the CPE Process Review is procedurally and methodologically deficient; that the CPE Process Review failed to perform a substantive analysis of the CPE process; and that the Board's adoption of Resolutions 2018.03.15.08 through 2018.03.15.11 were in violation of ICANN's Bylaws.

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<sup>8</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

Whereas, the BAMC previously determined that Request 18-5 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-5 and all relevant materials and recommended that Request 18-5 be denied because the Board considered all material information when it adopted Resolutions 2018.03.15.08 through 2018.03.15.11, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-5 and all relevant materials related to Request 18-5, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.XX), the Board adopts the [BAMC Recommendation on Request 18-5](#).

## **PROPOSED RATIONALE:**

### **1. Brief Summary and Recommendation**

The full factual background is set forth in the [BAMC Recommendation on Request 18-5](#) (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 14 June 2018, the BAMC evaluated Request 18-5 and all relevant materials and recommended that the Board deny Request 18-5 because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in [Resolutions 2018.03.15.08 through 2018.03.15.11](#) (the Resolutions), the Board considered the

CPE Process Review Reports.<sup>9</sup> The CPE Process Review Reports identify the materials considered by FTI.<sup>10</sup> 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. ([See BAMC Recommendation.](#))

On 29 June 2018, the Requestor submitted a rebuttal to the BAMC’s Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN’s Bylaws. ([See Rebuttal.](#)) The Rebuttal claims that: (i) the BAMC “misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-5;” (ii) the Requestor presented “significant evidence that the ICANN Board violated its Bylaws by adopting the Resolutions;” (iii) FTI’s methodology for the CPE Process Review is flawed; and (iv) “the CPE Process Review Reports are substantively flawed.”<sup>11</sup>

The Board has carefully considered the [BAMC’s Recommendation](#) and all relevant materials related to Request 18-5, including the Requestor’s Rebuttal, and the Board agrees with the [BAMC’s Recommendation](#) and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

## **2. Issue**

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

These issues are considered under the relevant standards for reconsideration requests, which are set forth in the [BAMC Recommendation](#).

## **3. 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 Reviews. The BAMC noted, and the Board agrees, the Requestor provides

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<sup>9</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>10</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>11</sup> See generally Rebuttal.

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 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.<sup>12</sup>

The BAMC determined, and the Board agrees, that, FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review.<sup>13</sup> 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.<sup>14</sup> The Requestor has not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

With respect to the first concern, the BAMC determined, and the Board agrees, that it is inaccurate to suggest that FTI reviewed *no* materials from the CPE Provider. The CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes,

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<sup>12</sup> 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”).

<sup>13</sup> *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>.

<sup>14</sup> *See* CPE Process Review Update, 2 June 2017, <https://newgtlds.icann.org/en/applicants/cpe>.

and spreadsheets for all CPE Reports.<sup>15</sup> 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.<sup>16</sup>

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 that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”<sup>17</sup> The BAMC concluded, and the Board agrees, that 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. As such, this argument does not support reconsideration.

With respect to the second claim, as detailed in the [BAMC Recommendation](#), the Requestor has not identified a policy or procedure requiring FTI to do more because none exists. 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.<sup>18</sup> 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.<sup>19</sup> 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. Accordingly, the BAMC concluded, and the Board agrees, reconsideration is not warranted on this ground.

([BAMC Recommendation](#), Pgs. 9-12.)

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<sup>15</sup> 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>.

<sup>16</sup> 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>.

<sup>17</sup> 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 CPE Provider Consulting Agreement Statement of Work #2 – Application Evaluation Services\_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

<sup>18</sup> *Id.* at Pg. 9.

<sup>19</sup> 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>.

The BAMC also determined, and the Board agrees, that the Requestor has not identified a policy or procedure requiring FTI to interview the CPE applicants or accept materials from the applicants in the course of the review. The BAMC further noted that FTI reviewed all relevant materials regarding the CPE process submitted by the applicants through correspondence, reconsideration requests, and Independent Review Process (IRP) proceedings.<sup>20</sup> As discussed in further detail in the [BAMC Recommendation](#), the claim does not warrant reconsideration. ([BAMC Recommendation](#), Pgs. 9-12.)

The BAMC also concluded and the Board agrees that 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,"<sup>21</sup> does not render the vote invalid. Further, and notwithstanding her concerns, Ms. Doria nonetheless "accept[ed] the path forward" that the Board was setting.<sup>22</sup>

**2. FTI Was Not Required to Agree with Others' Substantive Conclusions and Did Not Fail to Engage in "Substantive Analysis."**

The Requestor argues 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."<sup>23</sup> The BAMC determined, and the Board agrees, that the Requestor's argument is both contrary to the facts and completely inconsistent with proper investigative methodology. As detailed in the BAMC Recommendation and incorporated herein by reference, 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 evidence<sup>24</sup>—not based on the opinions or investigations of prior investigators or commentators.

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<sup>20</sup> *Id.*

<sup>21</sup> San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>.

<sup>22</sup> *Id.*

<sup>23</sup> Request 18-5, § 6, at Pg. 6.

<sup>24</sup> 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>.

Consistent with this methodology, FTI “carefully considered the claims raised in Reconsideration Requests and [IRP] proceedings related to CPE,” specifically allegations that the CPE criteria “were applied inconsistently across the various CPEs as reflected in the CPE reports.”<sup>25</sup> Based upon the evidence available, FTI concluded that the CPE Provider applied the CPE criteria in a consistent manner, and differences in scoring outcomes “were not the result of inconsistent application of the criteria,” but rather of different underlying circumstances.<sup>26</sup> The fact that others reached different conclusions than FTI does not invalidate FTI’s Reports, nor does it warrant reconsideration of the Board’s action in adopting the Resolutions.<sup>27</sup> ([BAMC Recommendation](#), Pgs. 12-16.)

FTI was not directed to conduct an investigation that supported (or contradicted) the third party’s opinions that identified concerns with the CPE process.<sup>28</sup> Nor was the Board 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.”<sup>29</sup> Contrary to the Requestor’s claim, the Board’s decision to initiate the CPE Process Review was *not* an acknowledgement that the CPE process was flawed, but a directive to *consider* whether the 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. ([BAMC Recommendation](#), Pgs. 12-13.)

The BAMC concluded, and the Board agrees, that the Requestor’s claim that “FTI simply defended the CPE process without performing substantive analysis,”<sup>30</sup> does not support reconsideration. ([BAMC Recommendation](#), Pg. 16.) FTI did not conduct a *de novo* redetermination of the scores awarded to each applicant. That was not within the scope of the

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<sup>25</sup> Scope 3 Report, at Pg. 3.

<sup>26</sup> *Id.*

<sup>27</sup> 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.

<sup>28</sup> *See* Transcript of ICANN Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar, 18 January 2017, comments of M. Carvell and C. Chalaby, at Pg. 12, 20-21, *available at* [https://community.icann.org/download/attachments/53772757/transcript\\_ccwphrwebinar\\_180117.doc?version=1&modificationDate=1484926687000&api=v2](https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2).

<sup>29</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>30</sup> Request 18-5, § 6, at Pg. 10.

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.”<sup>31</sup> 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.**

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

With respect to the first claim, the Requestor asserts 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.”<sup>32</sup> As detailed in the BAMC Recommendation, the Requestor has not demonstrated how the Board’s action in adopting the Resolutions violates its commitment to “carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law.”<sup>33</sup> 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 its position, which the

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<sup>31</sup> Scope 2 Report, at Pg. 8.

<sup>32</sup> *Id.*, § 6, at Pg. 11.

<sup>33</sup> ICANN Bylaws, 22 July 2017, Art. 1, § 1.2(a).

BAMC is committed to giving, the Requestor does not have the “right” to due process or other “constitutional” rights with respect to the DIDP.<sup>34</sup> ([BAMC Recommendation](#), Pgs. 17-18.)

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.<sup>35</sup> 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.<sup>36</sup> 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 Reports<sup>37</sup> does not support reconsideration. ([BAMC Recommendation](#), Pg. 18.)

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 and in further detail in the BAMC Recommendation.<sup>38</sup>

The Board also finds no basis for reconsideration as to the Requestor’s claim that the Board’s action violated the Bylaws’ requirement of fairness because the CPE Review is purportedly “based on an incomplete and unreliable universe of documents biased in favor of ICANN.”<sup>39</sup> As discussed 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.

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<sup>34</sup> 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>.

<sup>35</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

<sup>36</sup> *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>.

<sup>37</sup> Request 18-5, § 6, p. 11-12.

<sup>38</sup> See generally [BAMC Recommendation](#).

<sup>39</sup> Request 18-5, § 6, at Pg. 13.

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

The BAMC determined, and the Board agrees, that 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”<sup>40</sup> does not support reconsideration. 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.<sup>41</sup> 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. ([BAMC Recommendation](#), Pgs. 19-20.)

**B. The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has carefully considered the Requestor’s Rebuttal and finds that the Requestor has not provided any additional arguments or facts supporting reconsideration. The Rebuttal claims that: (i) the BAMC “misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-5;” (ii) the Requestor presented “significant evidence that the ICANN Board violated its Bylaws by adopting the Resolutions;” (iii) FTI’s methodology for the CPE Process Review is flawed; and (iv) “the CPE Process Review Reports are substantively flawed.”<sup>42</sup> These are the same arguments set forth in Request 18-5 and were addressed by the BAMC in its Recommendation.

First, the Requestor asserts that ICANN org “oversimplifies Requestor’s response to the BAMC’s invitation” to make a telephonic oral presentation to the BAMC in support of Request 16-5.<sup>43</sup> The Requestor concedes that it rejected ICANN org’s invitation, but asserts that ICANN org did not respond to its demand that ICANN org permit the Requestor a more “meaningful

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<sup>40</sup> Request 18-5, § 6, at Pg. 3.

<sup>41</sup> 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>.

<sup>42</sup> See generally Rebuttal.

<sup>43</sup> Rebuttal, Pg. 1.

opportunity to make additional submissions to ICANN regarding the CPE Process Review Reports.”<sup>44</sup> This claim does not support reconsideration. The Requestor does not have a right to dictate the manner in which it is permitted to present to the BAMC. Under the Bylaws in effect when Request 16-5 was filed, the BAMC’s decision on the opportunity to be heard is final.<sup>45</sup> Indeed, the same invitation was extended to all requestors with pending reconsideration requests; were ICANN org to treat the Requestor differently, that would be unfair to other applicants in contravention of ICANN’s commitments in its Bylaws.

Second, the Requestor claims that it “provide[d] ICANN with significant evidence supporting its claims,” and thus takes issue with the BAMC’s conclusion that “no evidence [exists] demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s [other] commitments.”<sup>46</sup> This represents a substantive disagreement with the BAMC’s conclusions, and is not a basis for reconsideration. The Requestor otherwise attempts to import arguments it made in connection with Reconsideration Request 18-1, which challenges ICANN org’s response to the Requestor’s request for documents (DIDP Request) pursuant to ICANN’s Documentary Information Disclosure Policy (DIDP), relating to the CPE Process Review. The Board addressed and resolved the Requestor’s claims concerning ICANN org’s response to the DIDP Request in its determination on Request 18-1, which is incorporated herein, and will not be repeated here, except to say that the Requestor has raised no additional argument that warrants reconsideration based on this assertion.

Third, with respect to the Requestor’s claim that FTI’s methodology for the CPE Process Review is materially flawed, the Board finds that this argument has been sufficiently addressed by the BAMC. The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration. Moreover, there is *no* support for the Requestor’s assertion that FTI “simply accepted that the documents and interview statements [from the CPE Provider and ICANN org]

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<sup>44</sup> *Id.*

<sup>45</sup> Bylaws, Art. IV, § 2.12, effective 11 February 2016. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. *See* ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>.

<sup>46</sup> Rebuttal, Pg.

were accurate and free of bias” without further investigation or analysis.<sup>47</sup> While the Requestor disagrees with the conclusions reached by FTI, that is *not* evidence that FTI failed to critically and impartially analyze the issues relevant to the CPE Process Review. As the BAMC concluded, and the Board agrees, FTI considered *all* available evidence, and did so in a fair and impartial manner. (See [BAMC Recommendation](#), Pgs. 9-16.)

Fourth, the Requestor repeats its assertion that the CPE Process Review Reports are substantively flawed because they “did not address any of the independent evaluations,” and “fail[ed] to consider divergent views on the CPE Process.”<sup>48</sup> The Board finds that this argument has been sufficiently addressed by the BAMC. (See [BAMC Recommendation](#), Pgs. 19-20.) The Requestor has not set forth any new evidence in its Rebuttal supporting reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 12 July 2018  
Email: amy.stathos@icann.org

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<sup>47</sup> Rebuttal, Pg. 6.

<sup>48</sup> Rebuttal, Pg. 8.

## ICANN BOARD SUBMISSION NO. 2018.07.18.2f

**TITLE:** **Consideration of Reconsideration Request 18-6**

**PROPOSED ACTION:** **For Board Consideration and Approval**

**EXECUTIVE SUMMARY:**

The Requestors, Travel Reservations SRL, Fegistry LLC, Minds + Machines Group Limited, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) seek reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (the Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.<sup>1</sup> The Requestors claim that the Resolutions are contrary to ICANN org's commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>2</sup>

The Requestors each submitted standard applications for the .HOTEL generic top-level domain (gTLD). Another applicant, Hotel Top-Level Domain S.a.r.l (HTLD), submitted a community-based application for .HOTEL (HTLD Application). HTLD participated and prevailed in CPE. As a result, HTLD was awarded priority for the .HOTEL string thereby eliminating all other applicants for the .HOTEL string, including the Requestors' applications. Following the CPE of HTLD Application, the Requestors have challenged the CPE Provider's determination that the HTLD Application satisfied the requirements for community priority, and the Board's decision not to cancel the HTLD Application, via numerous DIDP Requests, Reconsideration Requests, and the Despegar IRP. All of those challenges have been resolved, with the exception of Request 16-11, which is pending.

While Request 16-11 was pending, the Board directed ICANN org to undertake the CPE Process Review.<sup>3</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.<sup>4</sup>

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<sup>1</sup> Request 18-6, § 3, at Pg. 1.

<sup>2</sup> *Id.* § 7, at Pg. 6-7.

<sup>3</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

<sup>4</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>5</sup>

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.<sup>6</sup>

On 14 April 2018, the Requestor submitted Request 18-6, challenging the Resolutions.<sup>7</sup>

On 14 June 2018, the BAMC evaluated Request 18-6 and all relevant materials and recommended that the Board deny Request 18-6 because the Board considered all material information when it adopted the 2018 Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

On 29 June 2018, the Requestor submitted a rebuttal to the BAMC's Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. (See [Rebuttal](#), attached as Attachment D to the Reference Materials.)

## **BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECOMMENDATION:**

The BAMC recommended that Request 18-6 be denied and that no further action be taken in response to the Request because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

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<sup>5</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>6</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>7</sup> Request 18-6, <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf>.

## **PROPOSED RESOLUTION:**

Whereas, Travel Reservations SRL, Fegistry LLC, Minds + Machines Group Limited, and Radix FZC (and its subsidiary applicant dotHotel Inc.) (collectively the Requestors) submitted standard applications for the .HOTEL generic top-level domain (gTLD), which was placed in a contention set with other .HOTEL applications. One of the other application for the .HOTEL gTLD, was a community applicant filed by HOTEL Top-Level-Domain S.a.r.l. (HTLD).

Whereas, HTLD participated in Community Priority Evaluation (CPE) and prevailed.

Whereas, the Requestors have challenged the CPE Provider's determination that the HTLD Application satisfied the requirements for community priority, and the Board's decision not to cancel the HTLD Application, via numerous DIDP Requests, Reconsideration Requests, and the Despegar IRP. All of those challenges have been resolved, with the exception of Reconsideration Request 16-11 (Request 16-11), which is pending.

Whereas, while Request 16-11 was pending, the Board directed ICANN organization to undertake a review of the CPE process (the CPE Process Review). The Board Governance Committee (BGC) determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.<sup>8</sup>

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

Whereas, on 15 March 2018, the Board passed the [Resolutions 2018.03.15.08 through 2018.03.15.11](#), 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 Board Accountability Mechanism Committee (BAMC) to move forward with consideration of the

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<sup>8</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.

Whereas, on 14 April 2018, the Requestors submitted Reconsideration Request 18-6 (Request 18-6), claiming that the Board's adoption of the CPE Process Review Reports in Resolutions 2018.03.15.08 through 2018.03.15.11 are contrary to ICANN org's commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 18-6 is sufficiently stated and sent the Request to the Ombudsman for review and consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, the Ombudsman recused himself from this matter pursuant to Article 4, Section 4.2(l)(iii) of the Bylaws.

Whereas, the BAMC carefully considered the merits of Request 18-6 and all relevant materials and recommended that Request 18-6 be denied because the Board considered all material information when it adopted Resolutions 2018.03.15.08 through 2018.03.15.11, which is consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies).

Whereas, the Board has carefully considered the BAMC's Recommendation on Request 18-6 and all relevant materials related to Request 18-6, including the Requestor's rebuttal, and the Board agrees with the BAMC's Recommendation and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2018.07.18.XX), the Board adopts the [BAMC Recommendation on Request 18-6](#).

## **PROPOSED RATIONALE:**

### **1. Brief Summary and Recommendation**

The full factual background is set forth in the [BAMC Recommendation on Request 18-6](#) (BAMC Recommendation), which the Board has reviewed and considered, and which is incorporated here.

On 14 June 2018, the BAMC evaluated Request 18-6 and all relevant materials and recommended that the Board deny Request 18-6 because the Board considered all material information when it adopted the Resolutions, which is consistent with ICANN’s Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in Resolutions 2018.03.15.08 through 2018.03.15.11 (the Resolutions), the Board considered the CPE Process Review Reports.<sup>9</sup> The CPE Process Review Reports identify the materials considered by FTL.<sup>10</sup> 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. (See [BAMC Recommendation](#).)

On 29 June 2018, the Requestor submitted a rebuttal to the BAMC’s Recommendation (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN’s Bylaws. (See [Rebuttal](#).) The Requestor claims that “the BAMC’s Recommendation is based on both factual errors and on a misrepresentation of Requestors’ position and of the applicable rules.”<sup>11</sup>

The Board has carefully considered the [BAMC’s Recommendation](#) and all relevant materials related to Request 18-6, including the Requestor’s rebuttal, and the Board agrees with the [BAMC’s Recommendation](#) and concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

## 2. Issue

The issue is whether the Board’s adoption of the Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies). These issues are considered under the relevant standards for reconsideration requests, which are set forth in the [BAMC Recommendation](#).

The Board notes that it agrees with the BAMC’s decision to not consider Request 16-11 in conjunction with Request 18-6 (as requested by the Requestors) because the Requests were filed

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<sup>9</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>10</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>11</sup> Rebuttal, Pg. 1.

under different Bylaws with different standards for Reconsideration and involve different subject matters.

### **3. 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, methodology, and scope of the CPE Process Review. The BAMC noted, and the Board agrees, 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 and in further detail in the [BAMC Recommendation](#) which is incorporated herein, these are not sufficient bases for reconsideration.

#### **1. The CPE Process Review Satisfied Applicable Transparency Obligations.**

The Requestors argue that the CPE Process Review—and therefore the Resolutions—are contrary to ICANN’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>12</sup> Specifically, the Requestors believe that the CPE Process Review lacked transparency concerning: (1) “the selection process for the CPE process reviewer ([FTI]), and the names and curricula vitae of the FTI individuals involved in the review”; (2) the “instructions FTI received from ICANN [organization]”; (3) the “criteria and standards that FTI used to perform the CPE process review”; (4) the “documents or the recordings of the interviews on which [FTI’s] findings are based”; and (5) the “questions that were asked during [FTI’s] interviews.”<sup>13</sup>

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<sup>12</sup> Request 18-6, § 7, at Pg. 6-7.

<sup>13</sup> 1 February 2018 letter from Petillion to BAMC at Pg. 1-2, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>.

With respect to the first three claims, ICANN org provided details concerning the selection process for the CPE process reviewer almost one year ago, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner.<sup>14</sup> In the same document, ICANN org provided information concerning the scope of FTI’s investigation.<sup>15</sup> Similarly, the CPE Process Review Reports themselves provide extensive detail concerning FTI’s “criteria and standards” for conducting the CPE Process Review.<sup>16</sup> Accordingly, the BAMC concluded, and the Board agrees, that none of these arguments support reconsideration. ([BAMC Recommendation](#), Pg. 13.)

Concerning FTI’s documents, recordings, and interview questions, as noted in the CPE Process Review Reports, many of the materials that FTI reviewed are publicly available documents, and are equally available to the Requestors.<sup>17</sup> Additionally, FTI requested, received, and reviewed (1) emails from ICANN org (internal to ICANN personnel as well external emails exchanged with the CPE Provider) and (2) the CPE Provider’s working papers, including draft reports, notes, and spreadsheets.<sup>18</sup> While the Requestors did not file a request for documentary information pursuant to the Documentary Information Disclosure Policy (DIDP), these materials are the subject of two DIDP Requests, which were submitted by parties in January 2018. ICANN organization considered the request and concluded that ICANN organization explained that those documents would not be made publicly available because they were subject to certain Nondisclosure Conditions.<sup>19</sup> These same Nondisclosure Conditions apply to the Requestors’ claim. Moreover, the reasoning set forth in the BAMC’s Recommendations on Reconsideration Requests 18-1 and 18-2, denying reconsideration on those DIDP Responses are applicable here and are therefore incorporated herein by reference.<sup>20</sup> The Requestors here provide no evidence

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<sup>14</sup> See CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>15</sup> See *id.*

<sup>16</sup> See, e.g., FTI 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>.

<sup>17</sup> Scope 1 Report at Pgs. 3-6.

<sup>18</sup> *Id.* at Pg. 6.

<sup>19</sup> See ICANN organization Response to DIDP Request 20180115-1, at Pg. 21-22, available at <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

<sup>20</sup> See BAMC Recommendation on Request 18-1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>; see also BAMC Recommendation on Request 18-2, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf>.

that ICANN org’s decision not to disclose these materials contravened any applicable policies, or ICANN’s Mission, Commitments, or Core Values. Accordingly, the BAMC determined, and the Board agrees, this argument does not support reconsideration.

## **2. The Requestors’ Challenges to FTI’s Methodology Do Not Warrant Reconsideration.**

The Requestors assert that the Board should not have acknowledged or accepted the CPE Process Review Reports because FTI’s methodology was flawed.<sup>21</sup> Specifically, the Requestors complain that FTI: (1) did not explain why the CPE Provider refused to produce email correspondence; and (2) did not try to contact former employees of the CPE Provider.<sup>22</sup>

As discussed in the detail in the [BAMC Recommendation](#), FTI, not the Board or ICANN org, defined the methodology for the CPE Process Review Reports.<sup>23</sup> The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and relied on FTI to develop an appropriate methodology.<sup>24</sup> The Requestors have not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

With respect to the Requestor’s first concern, the BAMC concluded, and the Board agrees, that the claim does not support reconsideration. 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.<sup>25</sup> FTI also received and reviewed emails (and attachments) produced by ICANN organization between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations.<sup>26</sup> The Requestors are correct that 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

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<sup>21</sup> 1 February 2018 letter from Petillion to BAMC at Pg. 2., *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>. *See also* Request 18-6, § 7, at Pg. 7.

<sup>22</sup> 1 February 2018 letter from Petillion to BAMC, at Pg. 2.

<sup>23</sup> *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>.

<sup>24</sup> *See* CPE Process Review Update, 2 June 2017, *available at* <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>25</sup> *See* Scope 2 Report at Pg. 7-8.

<sup>26</sup> *See* Scope 2 Report at Pg. 7-8.

certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”<sup>27</sup> The BAMC determined, and the Board agrees, no policy or procedure exists that would require ICANN organization to reject the CPE Process Review Reports because the CPE Provider did not produce internal emails. This argument does not support reconsideration.

The BAMC concluded, and the Board agrees, that the Requestors’ concern that FTI interviewed the “only two remaining [CPE Provider] personnel” does not warrant reconsideration. 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.<sup>28</sup> 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 not identified a policy or procedure requiring FTI to do more (including to explain why it did not seek out former employees) because none exists. Reconsideration is not warranted on this ground. ([BAMC Recommendation](#), Pg. 16.)

The Requestors also claim that FTI’s methodology was flawed because FTI did not identify that the CPE Provider determined that the HTLD Application “provided for an appeal system,” when in fact the application “d[id] not provide for an appeal system” as required under Criterion 3, Registration Policies.<sup>29</sup> The Requestors claim that “[t]he Despegar et al. IRP Panel considered [this] inconsistenc[y] to have merit,” and the “existence of said inconsistencies has never been contested.”<sup>30</sup> As discussed in detail in the BAMC Recommendation and incorporated herein by reference, this assertion is an overstatement of the Despegar IRP Panel’s findings. ([BAMC Recommendation](#), Pgs. 16-17.) The Despegar IRP Panel stated that: (1) ICANN org had confirmed that the CPE Provider did not have a “process for comparing the outcome of one CPE

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<sup>27</sup> See *id.* See also CPE Provider Consulting Agreement Statement of Work #2 – Application Evaluation Services\_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

<sup>28</sup> 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>.

<sup>29</sup> 1 February 2018 letter from Petition to BAMC, at Pg. 3, citing Despegar IRP Panel Declaration, ¶ 146.

<sup>30</sup> *Id.* at Pg. 4

evaluation with another in order to ensure consistency,” nor did ICANN org have a process for doing so; and that (2) “[m]uch was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations, . . . some of which, *on the basis solely of the arguments provided by [the Requestors]*, have some merit.”<sup>31</sup> The Despegar IRP Panel did not make a determination concerning these arguments, nor was it asked to. Accordingly, the IRP Panel’s side note concerning the Requestors’ allegations of inconsistencies does not support reconsideration.

### **3. The Requestors’ Challenge to the Scope of the CPE Process Review Does Not Warrant Reconsideration.**

The BAMC determined, and the Board agrees, that the Requestors’ complaints about the scope of FTI’s investigation do not support reconsideration.<sup>32</sup> The Requestors believe that FTI “sum[med] up” but did not “analyse” “the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria,” that it did not analyze “the inconsistencies invoked by applicants in [reconsideration requests], IRPs or other processes,” and that FTI “did not examine the gTLD applications underlying the CPE [evaluations].”<sup>33</sup> Essentially, the Requestors wanted FTI to substantively re-evaluate the CPE applications, which was beyond the scope of the CPE Process Review. The requestor’s substantive disagreement with FTI’s methodology is not a basis for reconsideration. ([BAMC Recommendation](#), Pgs. 17-18.)

### **4. The Resolutions Are Consistent with ICANN’s Mission, Commitments, Core Values, and Established Policy(ies).**

The BAMC concluded, and the Board agrees, that there is no merit to the Requestors’ assertions that the Resolutions are contrary to ICANN’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner,<sup>34</sup> and they will prevent Requestors from obtaining “a meaningful review of their complaints regarding HTLD’s application for .hotel, the CPE process and the CPE Review Process.”<sup>35</sup> In the Resolutions, the

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<sup>31</sup> Despegar IRP Panel Declaration, ¶ 146 (emphasis added).

<sup>32</sup> See 1 February 2018 letter from Petition to BAMC, available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petition-to-icann-bamc-redacted-01feb18-en.pdf>. See also Request 18-6, § 7, at Pg. 7.

<sup>33</sup> *Id.*

<sup>34</sup> Request 18-6, § 7, at Pg. 6-7.

<sup>35</sup> *Id.* § 5, at Pg. 3.

Board directed the BAMC to consider the CPE Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>36</sup> The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-11 (just as the BAMC will consider all of the materials submitted by the Requestors in connection with Request 16-11), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-11.

The BAMC notes that it provided the Requestors an opportunity to make a telephone presentation concerning the effect of the CPE Process Review on Request 16-11, which the Requestors accepted. The BAMC will carefully review and consider all of the materials that the Requestors submitted in support of Request 16-11, as well as the CPE Process Review Reports as one of many reference points in its consideration of Request 16-11. Accordingly, reconsideration is not warranted.

With respect to the Requestors' due process claims, as discussed in the BAMC Recommendation and incorporated herein by reference, while ICANN org is committed to conform with *relevant* principles of international law and conventions, any commitment to provide due process is voluntary and not coextensive with government actors' obligations. Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN organization, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>37</sup> ICANN organization was not required to establish any internal corporate accountability mechanism, but instead did so voluntarily. Accordingly, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to ICANN's accountability mechanisms. ([BAMC Recommendation](#), Pgs. 19-20).

Even if ICANN organization *did* have due process obligations, and even though the "rights" the Requestors invoke do not apply to corporate accountability mechanisms, the Requestors have not explained how the alleged misapplication of ICANN org's policies resulted in a denial of due

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<sup>36</sup> 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>.

<sup>37</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

process. ICANN org *did* take due process into account when it designed the accountability mechanisms, including the Reconsideration Request process that the Requestors exercised by submitting Request 16-11 and the IRP Process that the Requestors exercised in the Despegar IRP. ICANN org’s accountability mechanisms—that is, Reconsideration Requests and the Independent Review Process—consider the CPE Provider’s compliance with the Guidebook and with ICANN organization’s Articles of Incorporation and Bylaws. They consider whether the CPE Provider complied with its processes, which requires the adjudicator (the BAMC, Board, or an Independent Panel) to consider the outcome in addition to the process. Accordingly, the accountability mechanisms, including this reconsideration request, provide affected parties like the Requestor with avenues for redress of purported wrongs, and substantively review the decisions of third-party service providers, including the CPE Provider. This is not grounds for reconsideration.

**B. The Rebuttal Does Not Raise Arguments or Facts That Support Reconsideration.**

The Board has carefully considered the Requestors’ Rebuttal and finds that the Requestors have not provided any additional arguments or facts supporting reconsideration. The Rebuttal claims that “the BAMC’s Recommendation is based on both factual errors and on a misrepresentation of Requestors’ position and of the applicable rules.” ([Rebuttal](#), Pg. 1)

First, the Requestors assert that the ICANN Board did not consider the claims raised in the Requestors’ 16 January 2018 and 22 February 2018 correspondence when the Board adopted the 2018 Resolutions. This claim is factually incorrect and does not support reconsideration. The Requestors’ 16 January 2018 letter did not identify any specific challenges to the CPE Process Review Reports, but instead only made passing references to the Requestors’ broad “concerns” about transparency, the methodology employed by FTI, due process, and alleged disparate treatment and inconsistencies.<sup>38</sup> These “concerns” were then detailed in the Requestors’ 1 February 2018 letter, which the Board acknowledged and considered in the 2018 Resolutions.<sup>39</sup>

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<sup>38</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>.

<sup>39</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

Further, contrary to the Requestors' claim, the Board *did* acknowledge and consider the Requestors' 22 February 2018 letter.<sup>40</sup>

Second, the Requestors assert that ICANN org has "largely ignored" many of the Requestors' challenges to the CPE Provider's determination that the HTLD Application satisfied the requirements for community priority, and the Board's decision not to cancel the HTLD Application.<sup>41</sup> This claim is unsupported and does not warrant reconsideration because, as the BAMC explained (*see* [BAMC Recommendation](#), Pgs. 4, 14-15), and the Board agrees, ICANN org responded to Requestors' DIDP Requests,<sup>42</sup> Reconsideration Requests, and the Despegar IRP in accordance with established policies and procedures. With respect to Reconsideration Request 16-11, ICANN org has not "ignored" it, as the Requestors claim. Rather, it remains pending and will be considered on the merits as soon as practicable following the completion of the Requestors' oral presentation to the Board. Regarding the Requestors' claim that ICANN org has not provided details concerning the selection process for FTI, the Board finds that this argument has been sufficiently addressed by the BAMC. (*See* [BAMC Recommendation](#), Pgs. 13-14.) The Requestors have not set forth any new evidence in the Rebuttal supporting reconsideration.

Third, the Requestors repeat their argument that Board's adoption of the 2018 Resolutions will prevent Requestors from obtaining a "meaningful review of their complaints made in the framework of [Request] 16-11."<sup>43</sup> The Board finds that this argument has been sufficiently addressed by the BAMC. (*See* [BAMC Recommendation](#), Pgs. 18-19.) The Requestors have not set forth any new evidence in the Rebuttal supporting reconsideration.

Fourth, with respect to the Requestors' due process claim, the Requestors now assert that "the fact that the BAMC refuses to hear [Requests] 16-11 and 18-6 together limits Requestors' due

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<sup>40</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a> ("The Board also acknowledges the 22 February 2018 letter from applicants Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC (regarding "Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)).")

<sup>41</sup> Rebuttal, Pg. 2.

<sup>42</sup> In the Rebuttal, the Requestors repeat their challenge ICANN org's response to DIDP Requests submitted by other parties in January 2018. *See* Rebuttal, Pgs. 6-8. The Board finds that this argument has been sufficiently addressed by the BAMC. (*See* [BAMC Recommendation](#), Pgs. 14-15.) The Requestors have not set forth any new evidence in the Rebuttal supporting reconsideration.

<sup>43</sup> Rebuttal, Pg. 4.

process rights even further.”<sup>44</sup> The Requestors state that they “cannot accept the BAMC’s reasoning that both [Requests] cannot be handled together because [Request] 16-11 was filed under different (previous) Bylaws,” and summarily conclude that this will result in Request 16-11 being determined under “less robust accountability standards” than Request 18-6.<sup>45</sup> However, the Requestors do not provide any basis for this assertion, because there is none. As the BAMC explained, “the Requests were filed under different Bylaws with different standards for Reconsideration and involve different subject matters.” ([BAMC Recommendation](#), Pg. 11.) Accordingly, reconsideration is not warranted.

Finally, the Requestors again disagree with the scope of the CPE Process Review and the methodology employed by FTI. The Board finds that these arguments have been sufficiently addressed by the BAMC. (See [BAMC Recommendation](#), Pgs. 15-20.) The Requestors have not set forth any new evidence in the Rebuttal supporting reconsideration.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures, by having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. Adopting the BAMC's Recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 11 July 2018  
Email: amy.stathos@icann.org

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<sup>44</sup> Rebuttal, Pg. 6.

<sup>45</sup> *Id.*

## AGENDA – 18 JULY 2018 SPECIAL BOARD MEETING – 90 minutes

Time, etc.	Agenda Item	Shepherd
<b>Assembly, Roll Call &amp; Consent Agenda Vote</b>	<b>1. Consent Agenda</b>	
10 min	1.a. Approval of Board Meeting Minutes from 23 June 2018	John Jeffrey
	1.b. Revisions to the Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy	Becky Burr
<b>Discussion &amp; Decision</b>	<b>2. Main Agenda</b>	
	2.a. Next Steps on the Uniform Board Member Integrity Screening Process	Becky Burr
	2.b. Consideration of Reconsideration Request 18-1: DotMusic Limited	Chris Disspain
	2.c. Consideration of Reconsideration Request 18-2: dotgay LLC	Chris Disspain
60 min		

**AGENDA – 18 JULY 2018 SPECIAL BOARD MEETING – 90 minutes**

<b>Time, etc.</b>	<b>Agenda Item</b>	<b>Shepherd</b>
20 min	2.d. Consideration of Reconsideration Request 18-3: Astutium Ltd	Chris Disspain
	2.e. Consideration of Reconsideration Request 18-4: dotgay LLC	Chris Disspain
	2.f. Consideration of Reconsideration Request 18-5: DotMusic Limited	Chris Disspain
	2.g. Consideration of Reconsideration Request 18-6: Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., Fegistry LLC	Chris Disspain
	2.h. AOB	
	<b>3. Executive Session - Confidential</b>	
	See Confidential Agenda Table and Draft Resolutions Document	

**Directors and Liaisons,**

**Attached below please find Notice of date and time for a Special Meeting of the ICANN Board.**

**18 July 2018 – Special Meeting of the ICANN Board of Directors - at 14:00 UTC. This Board meeting is estimated to last approximately 90 minutes.**

**<https://www.timeanddate.com/worldclock/fixetime.html?msg=Special+Meeting+of+the+ICANN+Board&iso=20180718T14&p1=%3A&ah=1&am=30>**

**Some other time zones:**

**18 July 2018 – 7:00am PDT Los Angeles**

**18 July 2018 – 10:00am EDT Washington, D.C.**

**18 July 2018 – 4:00pm CEST Brussels**

**18 July 2018 – 11:00pm JST Tokyo**

## **SPECIAL MEETING OF THE ICANN BOARD**

Consent Agenda

- Approval of Board Meeting Minutes from 23 June 2018
- Next Steps on the Uniform Board Member Integrity Screening Process
- Revisions to the Code of Conduct, the Board Governance Guidelines, and the Conflicts of Interest Policy

Main Agenda

- Consideration of Reconsideration Request 18-1: DotMusic Limited
- Consideration of Reconsideration Request 18-2: dotgay LLC
- Consideration of Reconsideration Request 18-3: Astutium Ltd
- Consideration of Reconsideration Request 18-4: dotgay LLC
- Consideration of Reconsideration Request 18-5: DotMusic Limited

- Consideration of Reconsideration Request 18-6: Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., Registry LLC
- AOB

Executive Session – Confidential

**MATERIALS – You can access the Board Meeting materials, when available, in Google Drive here:**

Contact Information Redacted

*Please note that the agenda for the Executive Session was distributed to the ICANN Board via the Board-only email distribution list on 9 July 2018. In addition, there has been a separate Team Drive folder created for the materials for the Executive Session (confidential compensation items). A link to this folder will be emailed to the Board-only email distribution list or you can go directly to your Team Drive space within Google Drive to access.*

**If you have trouble with access, please let us know and we will work with you to assure that you get access to the documents.**

**If call information is required, it will be distributed separately.**

**If you have any questions, or we can be of assistance to you, please let us know.**

**John Jeffrey**

**General Counsel & Secretary, ICANN**

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