

Report on the Transfer of the .TD (Chad) top-level domain to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC)

27 February 2018

This report is a summary of the materials reviewed as part of the process for the transfer of the .TD (Chad) top-level domain. It includes details regarding the proposed transfer, evaluation of the documentation pertinent to the request, and actions undertaken in connection with processing the transfer.

FACTUAL INFORMATION

Country

The “TD” ISO 3166-1 code is designated for use to represent Chad.

Chronology of events

In 1997, the .TD (Chad) top-level domain was delegated to Telecommunications Internationales du Tchad (TIT).

In 2000, after a restructuring of the telecom sector in Chad, the manager of .TD was changed to Société des télécommunications du Tchad (SOTEL TCHAD).

On 14 March 2017, l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC) was created by Act No 012/PR/2014. ADETIC is a public organization with administrative status under the auspices of the Ministry of Postal Service and New Information Technologies, Republic of Chad. Article 4 of the Act lists ADETIC's mission, which includes the management of the .TD top-level domain.

On 1 April 2017, Ordinance 005/PR/PM/MPNTI/SG/2017 transferring management of the .TD top-level domain from SOTEL TCHAD to ADETIC was signed by Mahamat Allahou Taher, Minister of the Postal Service and New Information Technologies.

On 15 September 2017, the IANA Services received the request to transfer management of the .TD top-level domain to ADETIC.

Proposed Manager and Contacts

The proposed manager is l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC). It is based in Chad.

The proposed administrative contact is Mahamat Hamid Haggar, System Engineer at ADETIC. The administrative contact is understood to be based in Chad.

The proposed technical contact is Abatcha Ali Moussa, Telecommunications Network Engineer at ADETIC.

EVALUATION OF THE REQUEST

String Eligibility

The top-level domain is eligible for transfer as the string for Chad is presently listed in the ISO 3166-1 standard.

Incumbent Consent

The incumbent manager is Société des Télécommunications du Tchad (SOTEL TCHAD). Informed consent for the transfer of .TD top-level domain to l'Agence de Développement des Technologies de l'Information et de la Communication (ADETIC) was provided by Mahamat Mbodou Mbodoumi, the Provisional Administrator of SOTEL TCHAD.

Public Interest

A letter of support was provided by Mahamat Adoum Tidjani, Central African Coordinator, African Civil Society on Information Society (ACSIS), a Pan-African network of over 100 member organizations dedicated to promoting sustainable, open and inclusive ICT in Africa.

The application is consistent with known applicable laws in Chad. The proposed manager undertakes responsibilities to operate the domain in a fair and equitable manner.

Based In Country

The proposed manager is constituted in Chad. The proposed administrative contact is understood to be a resident of Chad. The registry is to be operated in Chad.

Stability

At the time of request evaluation, the transfer of domain management had already taken place, therefore stability aspects relating to registry transfer have been evaluated with the view that the transfer has already taken place.

The application is not known to be contested.

Competency

The application has provided information on the technical and operational infrastructures and expertise that will be used to operate the domain.

Proposed policies for management of the domain have also been tendered.

EVALUATION PROCEDURE

PTI is tasked with coordinating the Domain Name System root zone as part of a set of functions governed by a contract with ICANN. This includes accepting and evaluating requests for delegation and transfer of top-level domains.

A subset of top-level domains are designated for the significantly interested parties in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains (ccTLDs), and are assigned to responsible managers that meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the manager has from its local Internet community, its capacity to ensure stable operation of the domain, and its applicability under any relevant local laws.

Through the IANA Services performed by PTI, requests are received for delegating new ccTLDs, and transferring or revoking existing ccTLDs. An investigation is performed on the circumstances pertinent to those requests, and, the requests are implemented where they are found to meet the criteria.

Purpose of evaluations

The evaluation of eligibility for ccTLDs, and of evaluating responsible managers charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet's unique identifier systems.

In considering requests to delegate or transfer ccTLDs, input is sought regarding the proposed new manager, as well as from persons and organizations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focused on the capacity for the proposed manager to meet the following criteria:

- The domain should be operated within the country, including having its manager and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.

- Significantly interested parties in the domain should agree that the prospective manager is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The proposed and incumbent managers should provide informed consent.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

Method of evaluation

To assess these criteria, information is requested from the applicant regarding the proposed manager and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the manager to operate the domain; the legal authenticity, status and character of the proposed manager; and the nature of government support for the proposal.

After receiving this documentation and input, it is analyzed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed manager should the information provided in the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed manager's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries correctly. Should any anomalies be detected, PTI will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed manager and its suitability to operate the relevant top-level domain.

REFERENCE MATERIALS – BOARD PAPER NO. 2018.03.15.2a

TITLE: **Next Steps in Community Priority Evaluation Process Review**

EXECUTIVE SUMMARY:

The Board is being asked to consider and adopt the Board Accountability Mechanisms Committee's (BAMC) recommendation that the Board take the following actions relating to the Community Priority Evaluation (CPE) process review (CPE Process Review): (i) acknowledge and accept the findings in the three CPE Process Review Reports; (ii) declare that, as a result of the findings in the CPE Process Review Reports, no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary; (iii) declare that the CPE Process Review has been completed; and (iv) direct 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 in accordance with the [Transition Process of Reconsideration Responsibilities from the BGC to the BAMC](#) document.

DOCUMENTS/RELEVANT LINKS

The following attachments are relevant to the Board's consideration of foregoing matters.

Attachment A is the Scope 1 CPE Process Review Report.

Attachment B is the Scope 2 CPE Process Review Report.

Attachment C is the Scope 2 CPE Process Review Report.

Attachment D is the Roadmap for Consideration of Pending Reconsideration Requests Relating to CPE Process Review.

Attachment E is the letter to the ICANN Board from dotgay LLC, dated 15 January 2018, regarding “FTI Consulting’s Evaluation and Findings Regarding the Community Priority Evaluation Process”, which is available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-15jan18-en.pdf>.

Attachment F is the letter to the ICANN Board from dotgay LLC, dated 20 January 2018, regarding “ICANN Board Determination Regarding dotgay”, , which is available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-20jan18-en.pdf>.

Attachment G is the letter to the ICANN Board from DotMusic Limited, dated 16 January 2018, regarding “FTI’s Reports” which is available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-16jan18-en.pdf>.

Attachment H is the letter to the ICANN Board from dotgay LLC, dated 31 January 2018, regarding “Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.’s Independent Review of the Community Priority Evaluation Process” (including the Second Expert Report), which is available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

Attachment I is the letter to the ICANN Board from Travel Reservations SRL, Minds + Machines Group Limited, Radix FXC, dot Hotel Inc. and Fegistry LLC, dated 1 February 2018, regarding “Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)”, which is available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>.

Attachment J is the email dated 2 February 2018 to the ICANN Board Chair, the Chair of the BAMC, and the ICANN President and CEO from DotMusic Limited,

attaching a 66 page expert report regarding “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports”, which is available at <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

Attachment K is 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)”, which is available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf>.

Attachment L is the 1 March 2018 letter from Chance Mitchell and Justin Nelson from the National LGBT Chamber of Commerce to the ICANN Board, which is available at <https://www.icann.org/en/system/files/correspondence/lovitz-to-board-01mar18-en.pdf>.

Attachment M is the 5 March 2018 letter from Kate Wallace, Esq. of Jones Day to Arif Ali of Dechert LLP re dotgay LLC, which is available at <https://www.icann.org/en/system/files/correspondence/wallace-to-ali-05mar18-en.pdf>.

Attachment N is the 5 March 2018 letter from Kate Wallace, Esq. of Jones Day to Constantine Roussos and Jason Schaeffer re DotMusic Limited, which is available at <https://www.icann.org/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf>.

Attachment O is the 6 March 2018 letter from Giacomo Mazzone from the EBU to the ICANN Board, which is available at <https://www.icann.org/en/system/files/correspondence/mazzone-to-baxter-06mar18-en.pdf>.

Attachment P is the 7 March 2018 letter from Arif Ali of Dechert LLP to Kate Wallace, Esq. of Jones Day re DotMusic Limited, which is available at

<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-jones-day-07mar18-en.pdf>.

Attachment Q is the 7 March 2018 letter from Arif Ali of Dechert LLP to Kate Wallace, Esq. of Jones Day re dotgay LLC, which is available at <https://www.icann.org/en/system/files/correspondence/ali-to-wallace-07mar18-en.pdf>.

Attachment R is the 1 March 2018 letter from SERO to the ICANN Board, which is available at <https://www.icann.org/en/system/files/correspondence/strub-to-chalaby-18feb18-en.pdf>.

Submitted By:	Amy A. Stathos, Deputy General Counsel
Date Noted:	13 March 2018
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13 DECEMBER 2017

COMMUNICATIONS BETWEEN ICANN ORGANIZATION AND THE CPE PROVIDER

PREPARED FOR JONES DAY



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Table of Contents

I.	Introduction.....	1
II.	Executive Summary.....	3
III.	Methodology.....	3
IV.	Background on CPE.....	7
V.	Analysis.....	9
	A. ICANN Organization’s Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.....	10
	1. The Vast Majority of the Communications Were Administrative in Nature.....	11
	2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.....	11
	B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.....	13
	C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.....	14
	D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.....	15
VI.	Conclusion.....	17

I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he

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

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 1 of the CPE Process Review and specifically details FTI's evaluation and findings regarding ICANN organization's interactions with the CPE Provider with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.

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

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

II. Executive Summary

FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI's review of the written communications and documents described in Section III below and FTI's interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.

III. Methodology

FTI followed the international investigative methodology, which is a methodology codified by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally and which grants certification to members who meet the ACFE's standards of professionalism.⁹ This methodology is used by both law enforcement and private investigative companies worldwide. This methodology begins with the formation of an investigative plan which identifies documentation, communications, individuals and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation. Then, investigators interview individuals who, based upon the preceding review of relevant documents, may have potentially relevant information. Investigators then analyze all the information collected to arrive at their conclusions.

Here, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:

⁹ www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2): <https://newgtlds.icann.org/en/applicants/agb>;
2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
3. CPE Panel Process Document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
4. CPE Guidelines document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
7. CPE results and reports: <https://newgtlds.icann.org/en/applicants/cpe#invitations>;
8. Preparing Evaluators for the New gTLD Application Process: <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest: <https://www.icann.org/news/announcement-2009-02-25-en>;
10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
11. Evaluation Panels Selection Process: <https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;
12. Application Comments: <https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request: <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests: <https://www.icann.org/resources/pages/accountability/reconsideration-en>;

16. CPE Archive Resources:
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1:
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:
<https://www.icann.org/resources/pages/correspondence>;
26. Board Resolution 2016.09.17.01 and Rationale for Resolution:
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
27. Minutes of 17 September 2016 Board Meeting:
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
28. BGC Minutes of the 18 October 2016 Meeting:
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;

29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016: <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>; and
 30. New gTLD Program Implementation Review Report: <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
 31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman: <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
 1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
 2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
 - Requested the following from the CPE Provider:
 1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
 2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
 3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN organization that were responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel

- Interviewed relevant CPE Provider personnel
- Compared the information obtained from both ICANN organization and the CPE Provider.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹⁰ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.¹¹ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹²

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.¹³ In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.¹⁴ The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.¹⁵ The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.

¹⁰ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

¹¹ See *id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹² *Id.*

¹³ <https://newgtlds.icann.org/en/applicants/agn>.

¹⁴ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁵ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.¹⁶

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.¹⁷

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant Guidebook and CPE Guidelines. According to the CPE Provider interviewees, each evaluator separately presented his/her findings in a database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated

¹⁶ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

¹⁷ *Id.*

that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer questions that arose during the review.¹⁸ The core team would then deliberate and come up with a consensus as to scoring. FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.¹⁹

ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report. Once the CPE Provider completed an initial draft CPE report, the CPE Provider would send the draft report to ICANN organization. ICANN organization provided feedback to the CPE Provider in the form of comments exchanged via email or written on draft CPE reports as well as verbal comments during conference calls.

V. Analysis

FTI undertook its analysis after carefully studying the materials described above and evaluating the substance of the interviews conducted. The materials and interviews provided FTI with a solid understanding of CPE. The interviews in particular provided FTI with an understanding of the mechanics of the CPE process as well as the roles

¹⁸ CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

¹⁹ See Applicant Guidebook §4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.").

undertaken both separately and together by ICANN organization personnel and the CPE Provider during the process.

FTI proceeded with its investigation in four parts, which are separately detailed below: (i) analysis of email communications among relevant ICANN organization personnel and between relevant ICANN organization personnel and the CPE Provider (including email attachments); (ii) interviews of relevant ICANN organization personnel; (iii) interviews of relevant CPE Provider personnel; and (iv) analysis of draft CPE reports.

A. ICANN Organization's Email Communications (Including Attachments) Did Not Show Any Undue Influence Or Impropriety By ICANN Organization.

In an effort to ensure the comprehensive collection of relevant materials, FTI provided ICANN organization with a list of search terms and requested that ICANN organization deliver to FTI all email (including attachments) from relevant ICANN organization personnel that "hit" on a search term. The search terms were designed to be over-inclusive, meaning that FTI anticipated that many of the documents that resulted from the search would not be pertinent to FTI's investigation. In FTI's experience, it is a best practice to begin with a broader collection and then refine the search for relevant materials as the investigation progresses. As a result, the search terms were quite broad and included the names of ICANN organization and CPE Provider personnel who were involved in the CPE process. The search terms also included other key words that are commonly used in the CPE process, as identified by a review of the Applicant Guidebook and other materials on the ICANN website. FTI's Technology Practice worked with ICANN organization to ensure that the materials were collected in a forensically sound manner. In total, ICANN organization provided FTI with 100,701 emails, including attachments, in native format. The time period covered by the emails received dated from 2012 to March 2017.

An initial review of emails produced to FTI confirmed FTI's expectation that the initial search terms were overbroad and returned a large number of emails that were not relevant to FTI's investigation. As a result, FTI performed a targeted key word search to

identify emails pertinent to the CPE process and reduce the time and cost of examining irrelevant or repetitive documents. FTI developed and tested these additional terms using FTI Technology's Ringtail eDiscovery platform, which employs conceptual analysis, duplicate detection, and interactive visualizations to assist in improving search results by grouping documents with similar content and highlighting those that are more likely to be relevant.

Based on FTI's review of email communications provided by ICANN organization, FTI found no evidence that ICANN organization had any undue influence on the CPE reports or engaged in any impropriety in the CPE process. FTI found that the vast majority of the emails were administrative in nature and did not concern the substance or the content of the CPE results. Of the small number of emails that did discuss substance, none suggested that ICANN acted improperly in the process.

1. The Vast Majority of the Communications Were Administrative in Nature.

The email communications that FTI reviewed and which were provided by ICANN organization were largely administrative in nature, meaning that they concerned the scheduling of telephone calls, CPE Provider staffing, timelines for completion, invoicing, and other similar logistical issues. Although FTI was not able to review the CPE Provider's internal emails relating to this work, as indicated above, FTI did interview relevant CPE Provider personnel, and each confirmed that any internal email communications largely addressed administrative tasks.

2. The Email Communications that Addressed Substance did not Evidence any Undue Influence or Impropriety by ICANN Organization.

Of the email communications reviewed by FTI, only a small number discussed the substance of the CPE process and specific evaluations. These emails generally fell into three categories. First, ICANN organization's emails with the CPE Provider reflected questions or suggestions made to clarify certain language reflected in the CPE Provider's draft reports. In these communications, however, FTI observed no instances

where ICANN organization recommended, suggested, or otherwise interjected its own views on what specific conclusion should be reached. Instead, ICANN organization personnel asked the CPE Provider to clarify language contained in draft CPE reports in an effort to avoid misleading or ambiguous wording. In this regard, ICANN organization's correspondence to the CPE Provider largely comprised suggestions on a particular word to be used to capture a concept clearly. FTI observed no instances where ICANN dictated or sought to require the CPE Provider to use specific wording or make specific scoring decisions.

Second, ICANN organization posed questions to the CPE Provider that reflected ICANN organization's efforts to understand how the CPE Provider came to its conclusions on a specific evaluation. Based on a plain reading, ICANN organization's questions were clearly intended to ensure that the CPE Provider had engaged in a robust discussion on each CPE criterion in the CPE report.

The third category comprised emails from the CPE Provider inquiring as to the scope of Clarifying Questions and specifically whether a proposed Clarifying Question was permissible under applicable guidelines.²⁰

Across all three categories, FTI observed instances where the CPE Provider and ICANN organization engaged in a discussion about using the correct word to capture the CPE Provider's reasoning. ICANN organization also advised the CPE Provider that the CPE Provider's conclusions, as stated in draft reports, at times were not supported by sufficient reasoning, and suggested that additional explanation was needed. However, ICANN organization did not suggest that the CPE Provider make changes in final scoring or adjust the rationale set forth in the CPE report.

Throughout its review, FTI observed instances where ICANN organization and the CPE Provider agreed to discuss various issues telephonically. Emails would then follow

²⁰ The CPE Provider may, at its discretion, provide a clarifying question (CQ) to be issued via ICANN organization to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>).

these telephone calls and note that the latest drafts reflected the telephone discussions that had occurred. FTI reviewed the drafts as noted in these communications and compared them with prior versions of the draft reports that were exchanged and confirmed that there was no evidence of undue influence or impropriety by ICANN organization, as described further below.

Ultimately, the vast majority of ICANN organization's emails were administrative in nature. FTI found no email communications that indicated that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE Process.

B. Interviews With ICANN Organization Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

In March 2017, FTI met with several ICANN organization employees in order to learn more about their interactions with the CPE Provider. FTI interviewed the following individuals who interacted with the CPE Provider over time regarding CPE.

- Chris Bare
- Steve Chan
- Jared Erwin
- Cristina Flores
- Russell Weinstein
- Christine Willett

Each of the ICANN organization personnel that FTI interviewed confirmed that the interactions between ICANN organization and the CPE Provider took place via email (including attachments which were primarily comprised of draft reports with comments in red line form) and conference calls.

The interviewees explained that the initial draft reports received from the CPE Provider (particularly for the first four reports) were not particularly detailed, and, as a result,

ICANN organization asked the CPE Provider a lot of “why” questions to ensure that the CPE Provider’s rationale was sufficiently conveyed. The interviewees stated that they emphasized to the CPE Provider the importance of remaining transparent and accountable to the community in the CPE reports. Based on a plain reading of ICANN organization’s comments to draft CPE reports, none of ICANN organization’s comments were mandatory, meaning that ICANN organization never dictated that the CPE Provider take a specific approach. FTI observed no instances where ICANN organization endeavored to change the scoring or outcome of any CPE. This was confirmed by both ICANN organization personnel and CPE Provider personnel in FTI’s interviews. If changes were made in response to ICANN organization’s comments, they usually took the form of the CPE Provider providing additional information to explain its scoring decisions and conclusions.

The CPE reports became more detailed over time. The ICANN organization personnel who were interviewed noted that, over time, the majority of communications took place via weekly conference calls. Most of ICANN organization’s interaction with the CPE Provider consisted of asking for supporting citations to the CPE Provider’s research or that more precise wording be used. ICANN organization personnel noted that they observed robust debate among CPE Provider personnel concerning various criteria, but that the CPE Provider strictly evaluated the applications against the criteria outlined in the Applicant Guidebook and the CPE Guidelines. The interviewees confirmed that ICANN organization never questioned or sought to alter the CPE Provider’s conclusions.

C. Interviews With CPE Provider Personnel Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI asked to interview relevant CPE Provider personnel involved in the CPE process. The CPE Provider stated that only two CPE Provider staff members remained. In June 2017, FTI interviewed the two remaining staff members, who were members of the core team for all CPEs that were conducted. During the interview, in addition to understanding the CPE process described above, see section IV above, FTI

endeavored to understand the interactions between the CPE Provider and ICANN organization.

The interviewees confirmed that ICANN organization was not involved in scoring the criteria or the drafting of the initial reports, but rather the CPE Provider independently scored each criterion. The interviewees stated that they were strict constructionists and used the Applicant Guidebook as their “bible”. Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

The CPE Provider also stated that ICANN organization provided guidance as to whether or not a particular report sufficiently detailed the CPE Provider’s reasoning. The CPE Provider stated that it never changed the scoring or the results based on ICANN organization’s comments. The only action the CPE Provider took in response to ICANN organization’s comments was to revise the manner in which its analysis and conclusions were presented (generally in the form of changing a word or adding additional explanation). The CPE Provider stated that it also received guidance from ICANN organization with respect to whether a proposed Clarifying Question was permissible under applicable guidelines.

In short, the CPE Provider confirmed that ICANN organization did not impact the CPE Provider’s scoring decisions.

D. FTI’s Review Of Draft CPE Reports Confirmed That There Was No Undue Influence Or Impropriety By ICANN Organization.

FTI requested and received from the CPE Provider all draft CPE reports, including any drafts that reflected feedback from ICANN organization. ICANN organization provided feedback in redline form. Some draft reports had very few or no comments, while others had up to 20 comments. In some drafts, the comments were just numbered and not attributed to a particular person. As such, at times it was difficult to discern which

comments were made by ICANN organization versus the CPE Provider.²¹ Of the comments that FTI can affirmatively attribute to ICANN organization, all related to word choice, style and grammar, or requests to provide examples to further explain the CPE Provider's conclusions. This is consistent with the information provided by ICANN organization and the CPE Provider during their interviews and in the email communications provided by ICANN organization.

For example, FTI observed comments from ICANN organization personnel suggesting that the CPE Provider include more detailed explanation or explicitly cite resources for statements that did not appear to have sufficient factual or evidentiary support. In other instances, the draft reports reflected an exchange between ICANN organization and the CPE Provider in response to ICANN organization's questions regarding the meaning the CPE Provider intended to convey. It is clear from the exchanges that ICANN organization was not advocating for a particular score or conclusion, but rather commenting on the clarity of reasoning behind assigning one score or another.

In general, it was not uncommon for the CPE Provider to make revisions in response to ICANN organization's comments. As noted above, these revisions generally took the form of additional information to add further detail to the stated reasoning. However, none of these revisions affected the scoring or results. At other times, the CPE Provider did not make any revisions in response to ICANN organization's comments.

Overall, ICANN organization's comments generally were not substantive, but rather reflected ICANN organization's suggestion that a revision could make the CPE report clearer. Based on FTI's investigation, there is no evidence that ICANN organization ever suggested that the CPE Provider change its rationale, nor did ICANN organization dictate the scoring or CPE results.

²¹ Some comments to draft CPE reports followed verbal conversations between CPE Provider staff and ICANN organization; the CPE Provider stated that it did not possess notes documenting these conversations.

VI. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI found no evidence that ICANN organization attempted to influence the evaluation process, scoring or conclusions reached by the CPE Provider. As such, FTI concludes that there is no evidence that ICANN organization had any undue influence on the CPE Provider or engaged in any impropriety in the CPE process.

13 DECEMBER 2017

ANALYSIS OF THE APPLICATION OF THE COMMUNITY PRIORITY EVALUATION (CPE) CRITERIA BY THE CPE PROVIDER IN CPE REPORTS

PREPARED FOR JONES DAY





Table of Contents

I.	Introduction.....	1
II.	Executive Summary.....	3
III.	Methodology.....	3
	A. FTI's Investigative Approach.....	3
	B. FTI's Investigative Steps for Scope 2 of the CPE Process Review..	5
IV.	Background on CPE.....	10
	A. Criterion 1: Community Establishment.....	13
	B. Criterion 2: Nexus between Proposed String and Community.....	15
	C. Criterion 3: Registration Policies.....	17
	D. Criterion 4: Community Endorsement.....	19
V.	The CPE Provider Applied The CPE Criteria Consistently In All CPEs. ...	21
	A. The Community Establishment Criterion (Criterion 1) was Applied Consistently in all CPEs.....	22
	1. Sub-criterion 1-A: Delineation	23
	a. Clearly Delineated.....	24
	b. Organization.....	27
	c. Pre-existence	30
	2. Sub-Criterion 1-B: Extension.....	32
	a. Size	32
	b. Longevity.....	34
	B. The Nexus Criterion (Criterion 2) was Applied Consistently in all CPEs.....	36
	1. Sub-Criterion 2-A: Nexus	37
	2. Sub-Criterion 2-B: Uniqueness.....	41
	C. The Registration Policies Criterion (Criterion 3) was Applied Consistently in all CPEs.....	42
	1. Sub-Criterion 3-A: Eligibility	43

2.	Sub-Criterion 3-B: Name Selection	44
3.	Sub-Criterion 3-C: Content and Use	47
4.	Sub-Criterion 3-D: Enforcement	48
D.	The Community Endorsement Criterion (Criterion 4) Was Applied Consistently in all CPEs	51
1.	Sub-Criterion 4-A: Support	51
2.	Sub-Criterion 4-B: Opposition	54
VI.	The CPE Provider's Use of Clarifying Questions Did Not Evidence Disparate Treatment	56
VII.	The CPE Provider's Use of Outside Research.	57
VIII.	Conclusion.....	57

I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the "process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the New gTLD Program.¹ The Board's action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization in order to conduct the CPE Process Review.

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

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

This report addresses Scope 2 of the CPE Process Review and specifically details FTI's evaluation of whether the CPE Provider consistently applied the CPE criteria throughout each CPE.

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

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

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

II. Executive Summary

FTI concludes that the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook (Applicant Guidebook)⁹ and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI's review of the written communications and documents and FTI's interviews with the relevant personnel described in Section III below.

Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.

III. Methodology

A. FTI's Investigative Approach.

In Scope 2 of the CPE Process Review, FTI was tasked with evaluating whether the CPE Provider applied the CPE criteria consistently throughout each CPE. This type of evaluation is commonly referred to in the industry as a "compliance investigation." In a compliance investigation, an investigator analyzes applicable policies and procedures and evaluates whether a person, corporation, or other entity complied with or properly applied those policies and procedures in carrying out a specific task. Here, FTI

⁹ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 to 4-19 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

employed the aforementioned compliance-focused investigative methodology and strategy in connection with Scope 2 of the CPE Process Review.

FTI also incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE).¹⁰ This international investigative methodology is used by both law enforcement and private investigative companies worldwide.

These types of investigations begin with the formation of an investigative plan which identifies documentation, communications, individuals, and entities that may be potentially relevant to the investigation. The next step involves the collection and review of all potentially relevant materials and documentation, including applicable procedures, materials, and communications pertaining to the subject of the investigation. After gaining a comprehensive understanding of the relevant background facts, investigators then interview relevant individuals deemed to have knowledge pertinent to the subject being investigated.

Investigators then re-review relevant documents and materials, compare information contained in those materials to the information obtained in interviews, identify any gaps, inconsistencies, or contradictions within the information gathered, and ascertain any need for additional information. This step also frequently results in follow-up interviews in order to either confirm or rule out any gaps, inconsistencies, or contradictions. Follow-up interviews also may be conducted to re-confirm with interviewees certain facts or ask for elaboration on certain issues.

Investigators then re-analyze all relevant documentation to prepare for writing the investigative report.

¹⁰ THE ACFE is the largest and most prestigious anti-fraud organization globally; it grants certification to members who meet its standards of professionalism. See www.acfe.com. FTI's investigative team, which includes published authors and frequent speakers on investigative best practices, holds this certification.

B. FTI's Investigative Steps for Scope 2 of the CPE Process Review.

Consistent with the above-described methodology, FTI undertook the following process to evaluate whether the CPE criteria were applied consistently throughout each CPE.

Specifically, FTI did the following:

- Reviewed publicly available documents pertaining to CPE, including:
 1. New gTLD Applicant Guidebook (the entire Applicant Guidebook with particular attention to Module 4.2):
<https://newgtlds.icann.org/en/applicants/agb>;
 2. CPE page: <https://newgtlds.icann.org/en/applicants/cpe>;
 3. CPE Panel Process document: <http://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>;
 4. CPE Guidelines document: <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>;
 5. Updated CPE FAQs: <https://newgtlds.icann.org/en/applicants/cpe/faqs-10sep14-en.pdf>;
 6. Contract and SOW between ICANN organization and the CPE Provider, available at: <https://newgtlds.icann.org/en/applicants/cpe>;
 7. CPE results and reports: <https://newgtlds.icann.org/en/applicants/cpe#invitations>;
 8. Preparing Evaluators for the New gTLD Application Process: <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>;
 9. New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest: <https://www.icann.org/news/announcement-2009-02-25-en>;
 10. Evaluation Panels: <https://newgtlds.icann.org/en/program-status/evaluation-panels>;
 11. Evaluation Panels Selection Process: <https://newgtlds.icann.org/en/about/evaluation-panels-selection-process>;

12. Application Comments:
<https://gtldcomment.icann.org/applicationcomment/viewcomments>;
13. External media: news articles on ICANN organization in general as well as the CPE process in particular;
14. BGC's comments on Recent Reconsideration Request:
<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>;
15. Relevant Reconsideration Requests:
<https://www.icann.org/resources/pages/accountability/reconsideration-en>;
16. CPE Archive Resources:
<https://newgtlds.icann.org/en/applicants/cpe#archive-resources>;
17. Relevant Independent Review Process Documents:
<https://www.icann.org/resources/pages/accountability/irp-en>;
18. New gTLD Program Implementation Review regarding CPE, section 4.1,
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>;
19. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>;
20. Community Priority Evaluation>Timeline:
<https://newgtlds.icann.org/en/applicants/cpe/timeline-10sep14-en.pdf>;
21. Community Priority Evaluation Teleconference – 10 September 2013, Additional Questions & Answers:
<https://newgtlds.icann.org/en/applicants/cpe/podcast-qa-10sep13-en.pdf>;
22. Community Priority Evaluation Process Review Update:
<https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>;
23. Board Governance Committee:
<https://www.icann.org/resources/pages/governance-committee-2014-03-21-en>;
24. ICANN Bylaws:
<https://www.icann.org/resources/pages/governance/bylaws-en>;
25. Relevant Correspondence related to CPE:
<https://www.icann.org/resources/pages/correspondence>;

26. Board Resolution 2016.09.17.01 and Rationale for Resolution:
<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>;
 27. Minutes of 17 September 2016 Board Meeting:
<https://www.icann.org/resources/board-material/minutes-2016-09-17-en>;
 28. BGC Minutes of the 18 October 2016 Meeting:
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>;
 29. Letter from Chris Disspain to All Concerned Parties, dated 17 April 2016:
<https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>;
 30. New gTLD Program Implementation Review Report,
<https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>; and
 31. Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman, <https://omblog.icann.org/index.html%3Fm=201510.html>.
- Requested, received, and reviewed the following from ICANN organization:
 1. Internal emails among relevant ICANN organization personnel relating to the CPE process and evaluations (including email attachments); and
 2. External emails between relevant ICANN organization personnel and relevant CPE Provider personnel relating to the CPE process and evaluations (including email attachments).
 - Requested the following from the CPE Provider:
 1. Internal emails among relevant CPE Provider personnel, including evaluators, relating to the CPE process and evaluations (including email attachments);
 2. External emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments); and
 3. The CPE Provider's internal documents pertaining to the CPE process and evaluations, including working papers, draft reports, notes, and spreadsheets.

FTI did not receive documents from the CPE Provider in response to Items 1 or 2. FTI did receive and reviewed documents from ICANN Organization that were

responsive to the materials FTI requested from the CPE Provider in Item 2 (i.e., emails between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations (including email attachments)). FTI received and reviewed documentation produced by the CPE Provider in response to Item 3.

- Interviewed relevant ICANN organization personnel.
- Interviewed relevant CPE Provider personnel.
- Compared the information obtained from both ICANN organization and the CPE Provider.

FTI understands that various applicants requested that they be interviewed in connection with the CPE Process Review. FTI determined that such interviews were not necessary or appropriate because FTI's task is to evaluate whether the CPE Provider consistently applied the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines, and neither of those governing documents provide for applicant interviews. Further, in keeping with the Applicant Guidebook and CPE Guidelines, the CPE Provider did not interview applicants during its evaluation process; accordingly, FTI determined that it was not warranted to do so in connection with Scope 2 of the CPE Process Review. FTI did obtain an understanding of applicants' concerns through a comprehensive review and analysis of the materials described above, including claims raised in all relevant Reconsideration Requests and IRP proceedings.

In the context of Scope 2 of the CPE Process Review, 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. Specifically, FTI's investigation included the following steps:

1. FTI formulated an investigative plan and, based on that plan, collected potentially relevant materials (as described above).
2. FTI analyzed all relevant materials (as described above) to ensure that FTI had a solid understanding of the CPE process and specifically the guidelines pertaining to the scoring of the CPE criteria.

3. With that foundation, FTI then evaluated the materials and email communications (including attachments) provided by ICANN organization and the CPE Provider (as described above). FTI also analyzed drafts and final versions of the CPE reports, as well materials submitted in relevant Reconsideration Requests and IRP proceedings challenging CPE outcomes. These documents were particularly relevant to Scope 2 of the CPE Process Review because they reflect the manner in which the CPE Provider applied the CPE criteria to each application and the concerns raised by various applicants regarding the CPE process.
4. FTI then interviewed relevant ICANN organization personnel separately. FTI asked each individual to describe the CPE process and his/her role in that process. FTI also asked each individual to explain his/her interaction with the CPE Provider and his/her understanding of the steps the CPE Provider undertook in order to perform CPE.
5. FTI then interviewed two members of the CPE Provider's staff and asked each to explain in detail his/her understanding of the CPE guidelines. As noted in FTI's report addressing Scope 1 of the CPE Process Review, these two individuals were the only two remaining personnel who participated in the CPE process (both were also part of the core team for all 26 evaluations). Each explained in detail his/her understanding of the CPE criteria. The interviewees also explained the evaluation process the CPE Provider undertook to perform CPE.
6. FTI then analyzed the CPE Provider's working papers associated with each evaluation, including documents capturing the evaluators' work, spreadsheets prepared by the core team for each evaluation and which reflect the initial scoring decisions, notes, and every draft of each CPE report including the final report as published by ICANN organization.
7. FTI engaged in follow-up communications with CPE Provider personnel in order to clarify details discussed in the earlier interviews and in the materials provided.
8. FTI then re-analyzed the Reconsideration Requests and materials submitted in IRP proceedings pertaining to CPE with a specific focus on identifying any claims that the CPE Provider inconsistently applied the CPE criteria.
9. FTI then reviewed the written materials produced by ICANN organization and the CPE Provider and prepared this report for Scope 2 of the CPE Process Review.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.¹¹ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.¹² CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).¹³

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.¹⁴ The CPE Provider personnel interviewed by FTI stated that they were strict constructionists and used the Applicant Guidebook as their "bible." Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

In addition, the CPE Provider published the CPE Panel Process Document, explaining that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions.¹⁵ The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including scoring rubrics,

¹¹ See Applicant Guidebook, Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

¹² *Id.* at Module 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³ *Id.*

¹⁴ <https://newgtlds.icann.org/en/applicants/agb>.

¹⁵ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

definitions of key terms, and specific questions to be scored.¹⁶ The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process. As discussed in further detail below, the CPE Guidelines set forth the methodology that the CPE Provider undertook to evaluate each criterion.

Based upon the materials reviewed and interviews with ICANN organization and CPE Provider personnel, FTI learned that each evaluation began with a notice of commencement from ICANN organization to the CPE Provider via email. As part of the notice of commencement, ICANN organization identified the materials in scope, which included: application questions 1-30a, application comments, correspondence, objection outcomes, and outside research (as necessary). ICANN organization delivered to the CPE Provider the public comments available at the time of commencement of the CPE process. The CPE Provider was responsible for gathering the application materials, including letters of support and correspondence, from the public ICANN organization website.¹⁷

The CPE Provider personnel responsible for CPE consisted of a core team, a Project Director, a Project Coordinator, and independent evaluators. Before the CPE Provider commenced CPE, all evaluators, including members of the core team, confirmed that no conflicts of interest existed. In addition, all evaluators underwent regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which was followed by regular training sessions to ensure that all evaluators had the same understanding of the evaluation process and procedures.¹⁸

Two independent evaluators were assigned to each evaluation. The evaluators worked independently to assess and score the application in accordance with the Applicant

¹⁶ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹⁷ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

¹⁸ *Id.*

Guidebook and CPE guidelines. During its investigation, FTI learned that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, "Is the community clearly delineated?"; the same question appears in the CPE Guidelines. The Answer section had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a "yes" or "no" response. In the Evidence section, the evaluator provided his/her reasoning for his/her answer. In the Source section, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including but not limited to, the application (or sections thereof), reference material, or letters of support or opposition. The same questions were asked and the same criteria were applied to every application, and the responses and resulting evaluations formed the basis for the evaluators' scoring decisions.

According to the CPE Provider interviewees, each evaluator separately presented his/her findings in the database and then discussed his/her findings with the Project Coordinator. Then, the Project Coordinator created a spreadsheet that included sections detailing the evaluators' answers to the Question section in the database and summarizing the evaluators' conclusions on each criterion and sub-criterion. The core team then met to review and discuss the evaluators' work and scores. Following internal deliberations among the core team, the initial evaluation results were documented in the spreadsheet. The interviewees stated that, at times, the evaluators came to different conclusions on a particular score or issue. In these circumstances, the core team evaluated each evaluator's work and then referred to the Applicant Guidebook and CPE Guidelines in order to reach a conclusion as to scoring. Consistent with the CPE Panel Process Document, before the core team reached a conclusion, an evaluator may be asked to conduct additional research to answer

questions that arose during the review.¹⁹ The core team would then deliberate and coming up with a consensus as to scoring.

The process of drafting a CPE report would then commence. Each sub-criterion and the scoring rationale were addressed in each relevant section of the draft report. As discussed in further detail in FTI's report relating to Scope 1 of the CPE Process Review, ICANN organization had no role in the evaluation process and no role in the writing of the initial draft CPE report. Based upon FTI's investigation, the CPE Provider followed the same evaluation process in each CPE.²⁰ The CPE Provider's role was to determine whether the community-based application fulfilled the four community priority criteria set forth in Section 4.2.3 of the Applicant Guidebook. As discussed in detail below, the four criteria include: (i) Community Establishment; (ii) Nexus between Proposed String and Community; (iii) Registration Policies; and (iv) Community Endorsement. The sequence of the criteria reflects the order in which they will be assessed by the panel.²¹ To prevail in CPE, an application must receive at least 14 out of 16 points on the scoring of the foregoing criteria, each of which is worth a maximum of four points.²² The CPE criteria is discussed further below.

A. Criterion 1: Community Establishment.

The Community Establishment criterion evaluates "the community as explicitly identified and defined according to statements in the application."²³ The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, "Delineation;" and (ii) 1-B, "Extension."²⁴

¹⁹ *Id.*

²⁰ See Report Re: Scope 1 of CPE Process Review.

²¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-10-4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

²² *Id.* at Pg. 4-10.

²³ *Id.*

²⁴ *Id.*

An application may receive a maximum of four points on the Community Establishment criterion, including up to two points for each sub-criterion, which are Delineation and Extension. To obtain two points for Delineation, the community must be "clearly delineated, organized, and pre-existing."²⁵ One point is awarded if a community is a "clearly delineated and pre-existing community" but does not fulfill the requirements for a score of 2.²⁶ Zero points are awarded if there is "insufficient delineation and pre-existence for a score of 1."²⁷

To obtain two full points for Extension, the community must be "of considerable size and longevity."²⁸ One point is awarded if the community is "of either considerable size or longevity, but not fulfilling the requirements for a score of 2."²⁹ Zero points are awarded if the community is "of neither considerable size nor longevity."³⁰

For sub-criterion 1-A, Delineation, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the community clearly delineated?³¹
- Is there at least one entity mainly dedicated to the community?³²
- Does the entity have documented evidence of activities?³³
- Has the community been active since at least September 2007?³⁴

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See CPE Guidelines at Pg. 3 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

The CPE Guidelines provide additional guidance on factors that can be considered when evaluating these four questions.³⁵

For sub-criterion 1-B, Extension, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the community of considerable size?³⁶
- Does the community demonstrate longevity?³⁷

B. Criterion 2: Nexus between Proposed String and Community.

The Nexus criterion evaluates "the relevance of the string to the specific community that it claims to represent."³⁸ The Nexus criterion is measured by two sub-criterion: (i) 2-A, "Nexus"; and (ii) 2-B, "Uniqueness."³⁹

An application may receive a maximum of four points on the Nexus criterion, including up to three points for Nexus and one point for Uniqueness. To obtain three points for Nexus, the applied-for string must "match the name of the community or be a well-known short-form or abbreviation of the community."⁴⁰ For a score of 2, the applied-for string should closely describe the community or the community members, without overreaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for ".TENNIS") then it would not

³⁵ *Id.* at Pgs. 3-5.

³⁶ *Id.* at Pg. 5.

³⁷ *Id.*

³⁸ See Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³⁹ *Id.* at Pgs. 4-12-4-13.

⁴⁰ *Id.*

qualify for a 2.⁴¹ Zero points are awarded if the string "does not fulfill the requirements for a score of 2."⁴² It is not possible to receive a score of one for this sub-criterion.

To obtain one point for Uniqueness, the applied-for string must have "no other significant meaning beyond identifying the community described in the application."⁴³ Uniqueness will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for Uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrase "beyond identifying the community" in the score of 1 for Uniqueness implies a requirement that the string does identify the community, i.e. scores 2 or 3 for Nexus, in order to be eligible for a score of 1 for Uniqueness.⁴⁴ It should be noted that Uniqueness is only about the *meaning* of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."⁴⁵ Zero points are awarded if the string "does not fulfill the requirements for a score of 1."⁴⁶

For sub-criterion 2-A, Nexus, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.⁴⁷

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at Pg. 4-13.

⁴⁴ *Id.* at Pgs. 4-13-4-14.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See CPE Guidelines at Pg. 7 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

For sub-criterion 2-B, Uniqueness, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the string have any other significant meaning (to the public in general) beyond identifying the community described in the application?⁴⁸

C. Criterion 3: Registration Policies.

The Registration Policies criterion evaluates the registration policies set forth in the application on four elements: (i) 3-A, "Eligibility"; (ii) 3-B, "Name Selection"; (iii) 3-C, "Content and Use"; and (iv) 3-D, "Enforcement."⁴⁹ An application may receive a maximum of four points on the Registration Policies criterion, including one point for each of the four sub-criterion stated above.

For sub-criterion 3-A, Eligibility, one point is awarded if "eligibility is restricted to community members."⁵⁰ If there is a "largely unrestricted approach to eligibility," zero points are awarded.⁵¹

For sub-criterion 3-B, Name Selection, one point is awarded if the policies set forth in an application "include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD."⁵²

For sub-criterion 3-C, Content and Use, one point is awarded if the policies set forth in an application "include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD."⁵³

For sub-criterion 3-D, Enforcement, one point is awarded if the policies set forth in an application "include specific enforcement measures (e.g., investigation practices,

⁴⁸ *Id.* at Pgs. 9-10.

⁴⁹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-14-4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁵⁰ *Id.* at Pg. 4-14.

⁵¹ *Id.*

⁵² *Id.* at Pg. 4-15.

⁵³ *Id.*

penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms."⁵⁴

For sub-criterion 3-A, Eligibility, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Is eligibility for being allowed as a registrant restricted?⁵⁵

For sub-criterion 3-B, Name Selection, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Do the policies set forth in the application include name selection rules?⁵⁶
- Are name selection rules consistent with the articulated community-based purpose of the applied-for gTLD?⁵⁷

For sub-criterion 3-C, Content and Use, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Do the policies set forth in the application include content and use rules?⁵⁸
- If yes, are the content and use rules consistent with the articulated community-based purpose of the applied-for gTLD?⁵⁹

For sub-criterion 3-D, Enforcement, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Do the enforcement policies set forth in the application include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms?⁶⁰

⁵⁴ *Id.*

⁵⁵ See CPE Guidelines at Pg. 11 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁵⁶ *Id.* at Pg. 12.

⁵⁷ *Id.*

⁵⁸ *Id.* at Pg. 13.

⁵⁹ *Id.*

⁶⁰ *Id.* at Pg. 14.

D. Criterion 4: Community Endorsement.

The Community Endorsement criterion evaluates community support for and/or opposition to an application.⁶¹ The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, "Support"; and (ii) 4-B, "Opposition."⁶² An application may receive a maximum of four points on the Community Endorsement criterion, including up to two points for each sub-criterion.

To obtain two points for the Support sub-criterion, an applicant must be the recognized community institution/member organization or have documented support from the recognized community institution/member organization, or have otherwise documented authority to represent the community.⁶³ "Recognized" community institutions are those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.⁶⁴ In cases of multiple institutions/organizations, there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.⁶⁵ To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.⁶⁶

One point is awarded if the applicant has submitted documented support with its application from at least one group with relevance,⁶⁷ but does not have documented support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent

⁶¹ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17
(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at Pgs. 4-17-4-18.

⁶⁵ *Id.* at Pg. 4-18.

⁶⁶ *Id.*

⁶⁷ *Id.* at Pg. 4-17.

the community with its application.⁶⁸ Zero points are awarded if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community.⁶⁹

To obtain two points for the Opposition sub-criterion, there must be "no opposition of relevance" to the application.⁷⁰ One point is awarded if there is "relevant opposition from one group of non-negligible size."⁷¹ Zero points are awarded if there is "relevant opposition from two or more groups of non-negligible size."⁷² When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for "Opposition." To be taken into account as relevant opposition, such objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.⁷³

For sub-criterion 4-A, Support, the CPE Guidelines state that the following questions must be evaluated when considering the application:

- Is the applicant the recognized community institution or member organization?⁷⁴
- Does the applicant have documented support from the recognized community institution(s)/member organization(s) to represent the community?⁷⁵

⁶⁸ *Id.* at Pg. 4-18.

⁶⁹ *Id.*

⁷⁰ *Id.* at Pg. 4-17.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at Pgs. 4-18-4-19 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁷⁴ See CPE Guidelines at Pgs. 16-17 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁷⁵ *Id.*

- Does the applicant have documented authority to represent the community?⁷⁶
- Does the applicant have support from at least one group with relevance?⁷⁷

For sub-criterion 4-B, Opposition, the CPE Guidelines state that the following question must be evaluated when considering the application:

- Does the application have any opposition that is deemed relevant?⁷⁸

V. The CPE Provider Applied The CPE Criteria Consistently In All CPEs.

FTI assessed whether the CPE Provider consistently followed the same evaluation process in all CPEs, and whether the CPE Provider applied the CPE criteria on a consistent basis throughout the evaluation process. FTI found that the CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE. In particular, as explained in detail below, the CPE Provider evaluated each application in the same way. While some applications received full points, others received partial points, and others received zero points for any given criterion, the scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI also evaluated whether the CPE Provider was consistent in the use of Clarifying Questions, and concludes that a consistent approach was employed.

FTI's investigation was informed by the concerns raised in the Reconsideration Requests, IRP proceedings and correspondence submitted to ICANN organization related to the CPE process. Reconsideration is an accountability mechanism available under ICANN organization's Bylaws and involves a review process administered by the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at Pg. 19.

BGC.⁷⁹ Since the commencement of the New gTLD Program, more than 20 Reconsideration Requests have been filed where the requestor sought reconsideration of CPE results. FTI reviewed in detail these requests and the corresponding BGC's recommendations and/or determinations, as well as the Board's actions associated with these requests.⁸⁰ Several requestors made claims that are of particular relevance to Scope 2 of the CPE Process Review. Specifically, FTI observed several claims that certain CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports, particularly with respect to the Community Establishment and Nexus criteria. FTI also reviewed claims raised by various claimants in IRP proceedings challenging CPE outcomes. FTI factored the CPE-related claims raised in both the Reconsideration Requests and the IRPs into its investigation. It is noted, however, that FTI's task is to evaluate whether the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines were applied consistently throughout each CPE.⁸¹ FTI was not asked to re-evaluate the applications. Ultimately, as detailed below, FTI found no evidence of inconsistent or disparate treatment by the CPE Provider.

A. The Community Establishment Criterion (Criterion 1) was Applied Consistently in all CPEs.

To assess whether the Community Establishment criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, i.e., Delineation and Extension. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and

⁷⁹ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN organizations Bylaws, 1 October 2016, ART. 4, § 4.2 (e) (<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 organization Bylaws, 22 July 2017, 4, § 4.2 (e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

⁸⁰ *Id.*

⁸¹ See <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>; see also <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

corresponding rationale for each sub-criterion for Community Establishment for each report and compared all reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Community Establishment criterion is measured by two sub-criterion: (i) Delineation (worth two points); and (ii) Extension (worth two points).⁸² While some applications received full points for the Community Establishment criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on its investigation, FTI concludes that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-criterion 1-A: Delineation

To receive two points for Delineation, the Applicant Guidebook and CPE Guidelines require that the community as defined in the application be clearly delineated, organized, and pre-existing.⁸³ FTI observed that all 26 CPE reports revealed that the CPE Provider methodically evaluated each element across all 26 CPEs. As reflected in twelve CPE reports, the relevant applications received the maximum two points;⁸⁴ as

⁸² Applicant Guidebook, Module 4.2.3 at Pg. 4-10 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁸³ *Id.* See also CPE Guidelines at Pg. 3 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁸⁴ Twelve CPE reports recorded the maximum two points. See OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

shown in one CPE report, the relevant application received one point;⁸⁵ and as noted in 13 CPE reports, the relevant applications received zero points.⁸⁶

a. Clearly Delineated

Two conditions must be met for a community to be clearly delineated: (i) there must be a clear, straightforward membership definition; and (ii) there must be awareness and recognition of a community as defined by the application among its members.⁸⁷

FTI observed that "a clear and straightforward membership" definition was deemed to be sufficiently demonstrated where membership could be determined through formal registration, certification, or accreditation (i.e., license, certificate of registration, etc.).⁸⁸ This was the case even if the CPE Provider found the community definition to be

⁸⁵ One CPE report recorded one point. See RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

⁸⁶ Thirteen CPE reports recorded zero points. See IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

⁸⁷ Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁸⁸ The CPE Provider determined that six of the 13 applications that received zero points for the Delineation sub-criterion were not "clearly delineated" because they did not demonstrate "a clear and straightforward membership." See ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>), GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

broad.⁸⁹ On the other hand, the CPE Provider determined that a community definition did not demonstrate a "clear and straightforward membership" if it was too broadly defined in the application and could not be determined through formal registration, or was "unbound and dispersed" because the community may not resonate with all stakeholders that it seeks to represent.⁹⁰ The CPE Provider also determined that a community definition showed a clear and straightforward membership where the membership was dependent on having a clear connection to a defined geographic area.⁹¹

FTI observed that the CPE Provider determined that there was "awareness and recognition of a community as defined by the application among its members" where membership could be determined through formal registration, certification, or accreditation (i.e., license, certificate of registration, etc.).⁹² On the other hand, the CPE Provider determined that the community as defined in the application did not have awareness and recognition among its members if the affiliated businesses and sectors had only a tangential relationship with the core community. In those instances, the CPE Provider found that the affiliated businesses and sectors would not associate

⁸⁹ See, e.g., TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

⁹⁰ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁹¹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); and CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>).

⁹² See, e.g., MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

themselves with the community as defined.⁹³ The CPE Provider also determined that commonality of interest was not enough to satisfy the "awareness and recognition of a community" element because it did not provide substantive evidence of what the Applicant Guidebook defines as "cohesion."⁹⁴

The applications underlying the 12 CPE reports that recorded two points, and the one CPE report that recorded one point satisfied both aspects of the clearly delineated prong of the Delineation sub-criterion: the applications demonstrated a "clear and straightforward membership" of community and an "awareness and recognition of a community as defined by the application among its members."⁹⁵ Of the applications underlying the 13 CPE reports that recorded zero points for the clearly delineated prong of the Delineation sub-criterion, six did not satisfy either element for the clearly delineated prong.⁹⁶ The applications underlying the seven CPE reports that recorded

⁹³ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); and LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁹⁴ See, e.g., ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>).

⁹⁵ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

⁹⁶ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report ([26](https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-</p></div><div data-bbox=)

zero points for the clearly delineated prong were determined to have demonstrated a "clear and straightforward membership" of community, but failed to demonstrate an "awareness and recognition of a community as defined by the application among its members."⁹⁷ The applications underlying all 13 of the CPE reports that recorded zero points failed to satisfy the "awareness" element of the clearly delineated prong of the Delineation sub-criterion.

b. Organization

Two conditions must be met to fulfill the requirements for organization: (i) there must be at least one entity mainly dedicated to the community; and (ii) there must be documented evidence of community activities.⁹⁸

FTI observed that, where the CPE Provider determined that there was not "at least one entity mainly dedicated to the community," then the existing entities did not represent a majority of the community as defined in the application.⁹⁹ If the CPE Provider determined that an application failed to satisfy either prong under the "clearly delineated" analysis (*see infra*), then the CPE Provider also determined that there was not "at least one entity mainly dedicated to the community" as defined in the application.¹⁰⁰ All applications that received two points for the Delineation sub-criterion

46695-en.pdf); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

⁹⁷ TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); and SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

⁹⁸ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁹⁹ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁰⁰ See IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840->

were determined to have "at least one entity mainly dedicated to the community."¹⁰¹ Of the applications underlying the 13 CPE reports that recorded zero points and the one report that recorded one point for the Delineation sub-criterion, all were deemed to lack "at least one entity mainly dedicated to the community" as defined.¹⁰²

With respect to the "documented evidence of community activities" prong, FTI observed that an application was deemed to have satisfied this condition where community

en.pdf); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁰¹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁰² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

activities were documented through formal membership or registration.¹⁰³ On the other hand, if the CPE Provider determined that an application was unable to demonstrate that there existed at least one entity mainly dedicated to the community as defined, then that application did not satisfy this prong. Of the applications underlying the 12 CPE reports that recorded two points for the Delineation sub-criterion, all satisfied the "documented evidence of community activities" prong.¹⁰⁴ All of the applications underlying the 14 CPE reports that were deemed to lack "at least one entity mainly dedicated to the community" as defined in the application, were also deemed to lack "documented evidence of community activities."¹⁰⁵

¹⁰³ See, e.g., HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); and TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>).

¹⁰⁴ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁰⁵ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

c. Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed).¹⁰⁶

Thirteen applications failed to satisfy the pre-existence prong;¹⁰⁷ twelve applications satisfied this prong.¹⁰⁸

FTI observed that, if the community as defined in the application was determined by the CPE Provider to be a "construed" community,¹⁰⁹ then the CPE Provider also found that the community did not exist prior to September 2007, even if its constituent parts may have been active prior to September 2007.¹¹⁰ Further, if the CPE Provider determined

¹⁰⁶ Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁰⁷ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁰⁸ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁰⁹ Applicant Guidebook, Module 4.2.3 at Pg. 4-9 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹¹⁰ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>).

that an application failed to satisfy either prong under the "clearly delineated" analysis (see *infra*), then the CPE Provider also determined that the application did not satisfy the requirements for pre-existence.¹¹¹ Each of the applications underlying the 13 CPE reports that recorded zero points for the Delineation sub-criterion were deemed by the CPE Provider to set forth a "construed community."¹¹² Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion were determined to have demonstrated pre-existence prior to September 2007.¹¹³

18840-en.pdf); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); and ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

¹¹¹ See Applicant Guidebook, Module 4.2.3 at Pg. 4-10

(<https://newgtlds.icann.org/en/applicants/agg/string-contention-procedures-04jun12-en.pdf>).

¹¹² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹¹³ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

2. Sub-Criterion 1-B: Extension

The Applicant Guidebook and CPE Guidelines require a community of considerable size and longevity to receive full points for the Extension sub-criterion.¹¹⁴

a. Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members. The CPE Provider determined that all community applicants defined communities of considerable size.¹¹⁵ FTI observed that, where the CPE Provider determined that the community lacked clear and straightforward membership or there was not awareness of a community (i.e., where the CPE Provider found that the

¹¹⁴ See Applicant Guidebook, Module 4.2.3 at Pg. 4-10, (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also CPE Guidelines at Pg. 5 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹¹⁵ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

community as defined in the application was not "clearly delineated"), then the CPE Provider determined that the size requirements could not be met.¹¹⁶ All of the applications underlying the 13 CPE Reports that recorded zero points for the "clearly delineated" prong failed to demonstrate awareness of a community among its members.¹¹⁷ Therefore, despite the fact that the CPE provider concluded that these 13 applications demonstrated communities of considerable size, all 13 that received zero points for the "clearly delineated" prong could not satisfy the size requirements.¹¹⁸ Each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion satisfied the awareness requirement for the clearly delineated prong.¹¹⁹ Consequently, each of the applications

¹¹⁶ See, e.g., MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) (application failed to satisfy size requirements because it did not satisfy the awareness requirement of the "clearly delineated" prong); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (application failed to satisfy size requirements because it did not satisfy either the clear and straightforward membership requirement or the awareness requirement of the clearly delineated prong).

¹¹⁷ IMMO (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹¹⁸ See *id.*

¹¹⁹ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>);

underlying the 13 CPE reports that recorded points for Delineation also satisfied the awareness requirement for size.¹²⁰

b. Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.¹²¹ FTI observed that, where the CPE Provider determined that the community lacked clear and straightforward membership or there was not awareness of a community (i.e., where the CPE Provider found that the community as defined in the application was not "clearly delineated"), then the CPE Provider determined that the longevity requirement could not be met. Of the 13 CPE Reports that recorded zero points for the "clearly delineated" prong, all 13 corresponding applications failed to demonstrate awareness of a community among its members.¹²² Therefore, each of the applications underlying the 13 CPE reports that recorded zero points for the "clearly delineated" prong could not satisfy the longevity requirements. Because each of the applications underlying the 12 CPE reports that recorded two points and the one that recorded one point for the Delineation sub-criterion satisfied the awareness requirement for the "clearly delineated" prong as well as the pre-existence prong, each of the

and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁰ See *id.*

¹²¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11-4-12 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹²² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

applications that received points for Delineation satisfied both requirements for longevity.¹²³

The CPE Guidelines state that if an application obtains zero points for Delineation, an application will receive zero points for Extension.¹²⁴ Accordingly, the 13 applications that received zero points for Delineation also received zero points for Extension.

One application received three out of a possible four points for the Community Establishment criterion.¹²⁵ For the Delineation sub-criterion, the application received one point because the CPE Provider determined that there was not one entity mainly dedicated to the community as defined in the application, and therefore the community as defined in the application was deemed not sufficiently organized.¹²⁶ The application received the full two points on the Extension sub-criterion.

Twelve applications received full points on the Community Establishment criterion. Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Community

¹²³ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁴ See Applicant Guidebook, Module 4.2 at Pg. 4-12, (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹²⁵ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹²⁶ *Id.* at Pgs. 2-3.

Establishment criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

B. The Nexus Criterion (Criterion 2) was Applied Consistently in all CPEs.

To assess whether the Nexus criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, i.e., Nexus and Uniqueness. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Nexus for each report and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Nexus criterion is measured by two sub-criterion: (i) Nexus (worth three points); and (ii) Uniqueness (worth one point).¹²⁷ While some applications received full points for the Nexus criterion and others did not,¹²⁸ the CPE Provider's

¹²⁷ Applicant Guidebook, Module 4.2.3 at Pgs. 4-12-4-13
(<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹²⁸ Of the 26 CPE reports, the CPE Provider determined that 19 applications received zero points for Nexus. SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); SHOP CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); MUSIC (.music LLP) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085->

findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-Criterion 2-A: Nexus

To receive a partial score of two points for Nexus,¹²⁹ the applied-for string must identify the community. According to the Applicant Guidebook, "'Identify' means that the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community."¹³⁰ In order to receive the maximum score of three points, the applied-for string must: (i) "identify" the community; and (ii) match the name of the community or be a well-known short-form or abbreviation of the community.

FTI observed that the CPE Provider determined that the applications underlying 19 CPE reports received zero points for the Nexus sub-criterion because, in the CPE Provider's determination, the applications failed to satisfy both of the requirements described above. First, for the applications underlying 11 of the 19 CPE reports that recorded zero points for the Nexus sub-criterion, the CPE Provider determined that the applied-for string did not identify the community because it substantially overreached the

en.pdf); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); and MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>).

¹²⁹ The Applicant Guidebook does not provide for one point to be awarded for the Nexus sub-criterion. An application only may receive two points or three points for the Nexus sub-criterion.

¹³⁰ Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

community as defined in the application by indicating a wider or related community of which the applicant is a part but is not specific to the applicant's community.^{131, 132}

Second, for the applications underlying eight of the 19 CPE reports that recorded zero points for the Nexus sub-criterion, the CPE Provider found that the applied-for string did not match the name of the community or was not a well-known short form or abbreviation. In this regard, the CPE Provider determined that, although the string identified the name of the core community members, it failed to match or identify the peripheral industries and entities included in the definition of the community set forth in the application. Therefore, there was a misalignment between the proposed string and the proposed community.¹³³ In several cases, the CPE Provider's conclusion that the

¹³¹ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>).

¹³² See Applicant Guidebook, Module 4.2.3 Criterion 2 definitions and Criterion 2 guidelines at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹³³ GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>) ("While the string identifies the name of the core community members (i.e. companies with the legal form of a GmbH), it does not match or identify the regulatory authorities, courts and other institutions that are included in the definition of the community as described in Criterion 1-A."); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>) (where community is defined to include tangentially related industries, applied-for string name of "TAXI" fails to match or identify the peripheral industries and entities that are included in the defined community); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (applied for string identifies only the name of the core community members (primary and secondary real estate members), but fails to identify peripheral industries and entities described as part of the community by the applicant and does not match the defined community); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>) ("While the string identifies the name of the core community members (i.e. artists and organized members of the arts community) it does not match or identify the art supporters that are included in the definition of the community as described in Criterion 1-A" such as "audiences, consumers, and donors"); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>) (concluding that although applied-for string identifies the core community members—kids—it fails to closely describe other community members such as parents, who are not commonly known as "kids"); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>) (applied

string did not identify the entire community was the consequence of the CPE Provider's finding that the proposed community was not clearly delineated because it described a dispersed or unbound group of persons or entities.¹³⁴ Without a clearly delineated community, the CPE Provider concluded that the one-word string could not adequately identify the community.

Five CPE reports recorded two points for the Nexus sub-criterion.¹³⁵ FTI observed that these CPE reports recorded partial points because the CPE Provider determined that the underlying applications satisfied only the two-point requirement for Nexus: the applied-for string must identify the community.¹³⁶ The CPE Provider determined that, although the applied-for string identified the proposed community as defined in the application, it did not "match" the name of the community nor constitute a well-known short-form or abbreviation of the community name.¹³⁷ Specifically, the CPE Provider concluded that, for the applications underlying these five CPE reports, the community definition encompassed individuals or entities that were tangentially related to the proposed community as defined in the application and therefore, the general public may

for string is over inclusive, identifying more individuals than are included in the defined community); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>) (the applied-for string refers to a large group of individuals – all gay people worldwide – of which the community as defined by the applicant is only a part); and GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>) (applied-for string "GAY" is commonly used to refer to men and women who identify as homosexual but not necessarily to others in the defined community).

¹³⁴ See, e.g., KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

¹³⁵ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹³⁶ Applicant Guidebook, Module 4.2.3 at Pgs. 4-12-4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³⁷ See, e.g., ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>) (concluding that string "ECO" identifies community of environmentally responsible organizations, but is not a match or well-known name because the various organizations in the defined community are generally identified by use of the word "environment" or by words related to "eco" but not by "eco" itself or on its own).

not necessarily associate all of the members of the defined community with the string.¹³⁸ Thus, for these applications, there was no "established name" for the applied-for string to match, as required by the Applicant Guidebook for a full score on Nexus.¹³⁹ For all CPE reports that did not record the full three points for the Nexus sub-criterion, the CPE Provider's rationale was based on the definition of the community as defined in the application.

Two CPE reports recorded the full three points for the Nexus sub-criterion.¹⁴⁰ The CPE Provider determined that the applied-for string in the applications underlying these two CPE reports was closely aligned with the community as defined in the application,¹⁴¹

¹³⁸ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>) (applied-for string "HOTEL" identifies core members of the defined community but is not a well-known name for other members of the community such as hotel marketing associations that are only related to hotels); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) (concluding that because the community defined in the application is a collection of many categories of individuals and organizations, there is no "established name" for the applied-for string to match, as required by the Applicant Guidebook for a full score on Nexus, but that partial points may be awarded because the string "MUSIC" identifies all member categories, and successfully identifies the individuals and organizations included in the applicant's defined community); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>) (concluding that string "ECO" identifies community of environmentally responsible organizations, but is not a match or well-known name because the various organizations in the defined community are generally identified by use of the word "environment" or by words related to "eco" but not by "eco" itself or on its own); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>) (applied-for string "ART" identifies defined community, but, given the subjective meaning of what constitutes art, general public may not associate all members of the broadly defined community with the applied-for string); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>) (applied-for string "RADIO" identifies core members of the defined community but is not a well-known name for other members of the community such as companies providing specific services that are only related to radio).

¹³⁹ See, e.g., MUSIC (DotMusic Limited) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹⁴⁰ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁴¹ SPA CPE Report at Pg. 4 (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); and OSAKA CPE Report at Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

and/or was the established name by which the community is commonly known by others.¹⁴²

2. Sub-Criterion 2-B: Uniqueness

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application.¹⁴³ According to the Applicant Guidebook and CPE Guidelines, if an application did not receive at least two points for the Nexus sub-criterion, it could not receive the one point available for the Uniqueness sub-criterion.¹⁴⁴ Therefore, the CPE Provider determined that the applications underlying the 19 CPE reports that recorded zero points for Nexus were ineligible for a score of one for Uniqueness. Each of the applications underlying the five CPE reports that recorded two points for Nexus,¹⁴⁵ as well as the applications underlying the two CPE reports that recorded three points for Nexus,¹⁴⁶ received one point for Uniqueness. For each of the applications underlying these seven CPE reports, the CPE Provider determined that the applied-for string had no other significant meaning beyond identifying the community described in the application.

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Nexus

¹⁴² SPA CPE Report at Pgs. 4-5 (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁴³ Applicant Guidebook, Module 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁴⁴ See CPE Guidelines at Pgs. 9-10, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>). See also Applicant Guidebook, Module 4.2.3 at Pg. 4-14 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁴⁵ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (efflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁴⁶ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Nexus criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

C. The Registration Policies Criterion (Criterion 3) was Applied Consistently in all CPEs.

To assess whether the Registration Policies criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, (i) Eligibility, (ii) Name Selection, (iii) Content and Use; and (iv) Enforcement. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Registration Policies for each application and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.

As noted above, the Registration Policies criterion is measured by four sub-criterion: (i) Eligibility; (ii) Name Selection; (iii) Content and Use; and (iv) Enforcement, each of which is worth one point.¹⁴⁷ While some applications received full points for the Registration Policies criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

¹⁴⁷ Applicant Guidebook, Module 4.2.3 at Pgs. 4-14-4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

1. Sub-Criterion 3-A: Eligibility

To fulfill the requirements for Eligibility, the registration policies set forth in the application must restrict the eligibility of prospective registrants to community members.¹⁴⁸ All applications received one point for Eligibility. The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point for Eligibility for all applications that underwent CPE because each application restricted eligibility to community members only, as required by the Applicant Guidebook.¹⁴⁹

In particular, the CPE Provider found that each application contained a registration policy that restricted eligibility in one of the following ways: (i) by requiring registrants to be verifiable participants in the relevant community or industry;¹⁵⁰ (ii) by listing the professions that are eligible to apply;¹⁵¹ (iii) by requiring proof of affiliation through licenses, certificates of registration or membership, official statements from

¹⁴⁸ *Id.* at Pg. 4-14.

¹⁴⁹ *Id.*

¹⁵⁰ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC CPE Report (.music LLC) (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); CPA (AICPA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁵¹ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

superordinate authorities, or owners of trademarks;¹⁵² (iv) by requiring registrants to be members of specified organizations linked to or involved in the functions relating to the applied-for community;¹⁵³ (v) by requiring that the registered domain name be "accepted as legitimate; and beneficial to the cause and values of the radio industry; and commensurate with the role and importance of the registered domain name; and in good faith at the time of registration and thereafter."¹⁵⁴

2. Sub-Criterion 3-B: Name Selection

To fulfill the requirements for Name Selection, the application's registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD.¹⁵⁵

In the sub-criterion for Name Selection, five CPE reports recorded zero points.¹⁵⁶ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to these five applications because each failed to satisfy a required element of the CPE Guidelines, including: (i) the name selection rules were too vague to be consistent with the purpose of the community;¹⁵⁷ (ii) there were no comprehensive name selection rules;¹⁵⁸ (iii) there were no restrictions or

¹⁵² TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>);

¹⁵³ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); and GmbH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁵⁴ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁵⁵ See Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁵⁶ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); and MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

¹⁵⁷ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>).

¹⁵⁸ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

guidelines for name selection;¹⁵⁹ (iv) the rules did not refer to the community-based purpose;¹⁶⁰ and (v) the applicant had not finalized name selection criteria.¹⁶¹

Twenty-one CPE reports recorded one point for Name Selection.¹⁶² The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the applications set forth registration policies for name selection that were consistent with the articulated community-based purpose of the applied-for gTLD, as required by the Applicant Guidebook.¹⁶³

The CPE Provider determined that the applications demonstrated adherence to the Name Selection sub-criterion by: (i) outlining a comprehensive list of name selection

¹⁵⁹ MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

¹⁶⁰ SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

¹⁶¹ MERCK (RH) CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

¹⁶² TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁶³ Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

rules;¹⁶⁴ (ii) outlining the types of names that may be registered, while the name selection rules were consistent with the purpose of the gTLD;¹⁶⁵ (iii) specifying that naming restrictions be specifically tailored to meet the needs of registrants while maintaining the integrity of the registry, and ensuring that domain names meet certain technical requirements;¹⁶⁶ (iv) specifying that the associated boards use their corporate name or an acronym, while foreign affiliates will also have to include geographical modifiers in their second level domains;¹⁶⁷ (v) specifying that the registrant's nexus with the community and use of the domain must be commensurate with the role of the registered domain, and with the role and importance of the domain name based on the meaning an average user would reasonably assume in the context of the domain name;¹⁶⁸ (vi) specifying that eligible registrants are entitled to register any domain name that is not reserved or registered at the time of registration submission while setting aside a list of domain names that will be reserved for major brands;¹⁶⁹ and (vii) outlining

¹⁶⁴ TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/llp-cpe-1-880-35508-en.pdf>).

¹⁶⁵ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

¹⁶⁶ TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>).

¹⁶⁷ MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>).

¹⁶⁸ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁶⁹ HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

restrictions on reserved names as well as a program providing special provisions for trademarks and other rules.¹⁷⁰

3. Sub-Criterion 3-C: Content and Use

To fulfill the requirements for Content and Use, the registration policies set forth in the application must include rules for content and use for registrants that are consistent with the articulated community-based purpose of the applied-for gTLD.¹⁷¹

In the sub-criterion for Content and Use, six CPE reports recorded zero points.¹⁷² The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to the applications underlying six of the CPE reports for one of three reasons: (i) the rules for content and use for the community-based purpose were too general or vague;¹⁷³ (ii) there was no evidence in the application of requirements, restrictions, or guidelines for content and use that arose out of the community-based purpose of the application;¹⁷⁴ or (iii) the policies for content and use were not finalized.¹⁷⁵

¹⁷⁰ ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

¹⁷¹ Applicant Guidebook, Module 4.2.3 at Pg. 4-16 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁷² IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); and SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>).

¹⁷³ IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); and GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>).

¹⁷⁴ MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

¹⁷⁵ MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

Twenty CPE reports recorded one point for Content and Use. FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the corresponding applications included registration policies for content and use that were consistent with the articulated community-based purpose of the applied-for gTLD. The CPE Provider found this to be the case when the application: (i) set forth specific registration policies for content and use that were tailored to the community-based purpose of the gTLD;¹⁷⁶ (ii) had policies that stated that content or use could not be inconsistent with the mission/purpose of the gTLD;¹⁷⁷ or (iii) had prohibitions on certain types of content and/or abuse.¹⁷⁸

4. Sub-Criterion 3-D: Enforcement

Two conditions must be met to fulfill the requirements for Enforcement: (i) the registration policies set forth in the application must include specific enforcement

¹⁷⁶ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); and GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹⁷⁷ TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); and RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁷⁸ OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); and LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

measures constituting a coherent set; and (ii) the application must set forth appropriate appeal mechanisms.¹⁷⁹

In the sub-criterion for Enforcement, 14 CPE reports recorded zero points.¹⁸⁰ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded zero points to the applications underlying 13 CPE reports because each of the relevant applications lacked appeal mechanisms.¹⁸¹ The remaining CPE report recorded zero points because the corresponding application did not outline specific enforcement measures constituting a coherent set.¹⁸² A coherent set refers to enforcement measures that ensure continued accountability to the named community, and can include investigation practices, penalties, and takedown procedures with

¹⁷⁹ Applicant Guidebook, Module 4.2.3 at Pg. 4-15 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁸⁰ INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); and ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

¹⁸¹ INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/lc/lc-cpe-1-880-17627-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/lp/lp-cpe-1-880-35508-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); and OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

¹⁸² ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>).

appropriate appeal mechanisms. This includes screening procedures for registrants, and provisions to prevent and remedy any breaches of its terms by registrants.¹⁸³

Twelve CPE reports recorded one point.¹⁸⁴ The CPE Provider made this determination on a consistent basis. Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the corresponding applications set forth appeal mechanisms and outlined specific enforcement measures constituting a coherent set.

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Registration Policies criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Registration Policies criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

¹⁸³ See CPE Guidelines at Pg. 14 (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

¹⁸⁴ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>); and SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

D. The Community Endorsement Criterion (Criterion 4) Was Applied Consistently in all CPEs.

To assess whether the Community Endorsement criterion was applied consistently, FTI evaluated how the CPE Provider applied each sub-criterion, (i) Support and (ii) Opposition. In doing so, FTI considered whether the CPE Provider approached in a consistent manner the questions that, pursuant to the Applicant Guidebook and CPE Guidelines, must be asked by the CPE Provider when evaluating each sub-criterion. In order to complete this evaluation, FTI reviewed the CPE Provider's scoring and corresponding rationale for each sub-criterion for Community Endorsement for each application and compared all CPE reports to each other to determine if the CPE Provider applied each sub-criterion consistently and in accordance with the Applicant Guidebook and CPE Guidelines.¹⁸⁵

As noted above, the Community Endorsement criterion is measured by two sub-criterion: (i) Support; and (ii) Opposition, each worth two points. While some applications received full points for the Community Endorsement criterion and others did not, the CPE Provider's findings in this regard were not the result of inconsistent application of the criterion. Rather, based on FTI's investigation, it was observed that all applications were evaluated on a consistent basis by the CPE Provider.

1. Sub-Criterion 4-A: Support

To receive two points for Support: (i) the applicant must be the recognized community institution/member organization; (ii) the application has documented support from the recognized community institution(s)/member organization(s); or (iii) the applicant has

¹⁸⁵ In its investigation, FTI observed that the CPE Provider engaged in the following process to evaluate the Community Endorsement criterion. The CPE Provider sent verification emails to entities that submitted letters of support or opposition in order to attempt to verify their authenticity. The CPE Provider's evaluators then logged the results into a database. Separate correspondence tracker spreadsheets also were maintained by the CPE Provider for each applicant. FTI reviewed all of these materials in the course of its investigation. See <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>; and <https://www.icann.org/en/system/files/correspondence/abruzzo-to-weinstein-14mar16-en.pdf>.

documented authority to represent the community.¹⁸⁶ To receive one point for Support, the application must have documented support from at least one group with relevance.¹⁸⁷ Zero points are awarded if the application has "insufficient proof of support for a score of 1."¹⁸⁸

All 26 CPE reports recorded at least one point for Support. Of those, 17 CPE reports recorded only one point.¹⁸⁹ Specifically, FTI observed that the CPE Provider awarded one point to the applications underlying these CPE reports because the CPE Provider determined that each application had sufficient documented support from at least one group with relevance, but could not receive a full score of two points because the applicant was not the recognized community institution/member organization, the applicant did not have documented support from the recognized community institution/member organization, nor did the applicant have documented authority to represent the community, as required by the Applicant Guidebook.¹⁹⁰ In each instance, the entity(ies) expressing support for the application was not deemed by the CPE Provider to constitute the recognized institutions that represent the community as

¹⁸⁶ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17
(<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>)

¹⁹⁰ See Applicant Guidebook, Module 4.2.3 at Pg. 4-17
(<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

defined in the application.¹⁹¹ In some cases, this meant that, although the supporting entity was dedicated to the community, the supporting entity lacked reciprocal recognition from community members as the entity authorized to represent them.¹⁹² In others, the supporting entity did not "represent" the community because the supporting entity was limited in geographic or thematic scope and, therefore, did not represent the entire community as defined in the application.¹⁹³

Nine CPE reports recorded the full two points for Support. Of the applications underlying these nine CPE reports, FTI observed that four applications received two points because the CPE Provider determined that the applications had documented support from the recognized community institution/member organization.¹⁹⁴ For the other applications that received two points, the CPE Provider determined that the applicant was the recognized community institution/member organization with the authority to represent the community.¹⁹⁵ Whether the applicant or the supporting entity

¹⁹¹ See 204, *supra*.

¹⁹² See, e.g., GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>) (concluding that supporting entity is clearly dedicated to the community and it serves the community and its members in many ways, but is not the "recognized" community institution because it lacked reciprocal recognition by community members of the organization's authority to represent it as required by the Applicant Guidebook).

¹⁹³ See, e.g., IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>) (relevant groups providing support do not constitute the recognized institutions to represent the community because they are limited in geographic and thematic scope); and ART (eFlux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>) (*same*).

¹⁹⁴ RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); and OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>).

¹⁹⁵ CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); and MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>).

constituted the recognized community institution was determined based upon consistent application of the Applicant Guidebook's definition of "recognized."¹⁹⁶

2. Sub-Criterion 4-B: Opposition

To receive two points for Opposition, an application must have no opposition of relevance.¹⁹⁷ To receive one point, an application may have relevant opposition from no more than one group of non-negligible size.¹⁹⁸

Nine CPE reports recorded one point for Opposition.¹⁹⁹ In each instance, the CPE Provider determined that the underlying applications received relevant opposition from no more than one group of non-negligible size. Opposition was deemed relevant on several grounds: (i) opposition was from a community not identified in the application but had an association to the applied-for string;²⁰⁰ (ii) the application was subject to a legal rights objection (LRO);²⁰¹ or (iii) opposition was not made for any reason forbidden by the Applicant Guidebook, such as competition or obstruction.²⁰²

¹⁹⁶ Applicant Guidebook, Module 4.2.3 at Pgs. 4-17 and 4-18 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁹⁷ *Id.* at Pg. 4-17.

¹⁹⁸ *Id.*

¹⁹⁹ MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>); GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>); and MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>). No CPE reports recorded zero points for Opposition.

²⁰⁰ LLP CPE Report (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>); LLC CPE Report (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>); and INC CPE Report (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

²⁰¹ MERCK (KGaA) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>); and MERCK (RH) CPE Report (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>).

²⁰² GAY CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf>); GAY 2 CPE Report (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>); SHOP (Commercial Connect) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-1830-1672-en.pdf>).

Seventeen CPE reports recorded the full two points for Opposition.²⁰³ The CPE Provider determined that the applications corresponding to 17 CPE reports did not have any letters of relevant opposition.²⁰⁴

Ultimately, FTI observed that the CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines. FTI observed no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Community Endorsement criterion. Based on FTI's investigation, FTI concludes that the CPE Provider consistently applied the Community Endorsement criterion in all CPEs. While the CPE Provider awarded different scores to different applications, the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

1830-1672-en.pdf); and MUSIC (.music LLC) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>).

²⁰³ ART (eflux) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); MUSIC (DotMusic Ltd.) CPE Report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>); ECO CPE Report (<https://www.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); HOTEL CPE Report (<https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>); OSAKA CPE Report (<https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>); SPA CPE Report (<https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); RADIO CPE Report (<https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>); TENNIS CPE Report (<https://www.icann.org/sites/default/files/tlds/tennis/tennis-cpe-1-1723-69677-en.pdf>); MLS CPE Report (<https://www.icann.org/sites/default/files/tlds/mls/mls-cpe-1-1888-47714-en.pdf>); CPA (USA) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1911-56672-en.pdf>); CPA (AU) CPE Report (<https://www.icann.org/sites/default/files/tlds/cpa/cpa-cpe-1-1744-1971-en.pdf>); GMBH CPE Report (<https://www.icann.org/sites/default/files/tlds/gmbh/gmbh-cpe-1-1273-63351-en.pdf>); IMMO CPE Report (<https://www.icann.org/sites/default/files/tlds/immo/immo-cpe-1-1000-62742-en.pdf>); SHOP (GMO) CPE Report (<https://www.icann.org/sites/default/files/tlds/shop/shop-cpe-1-890-52063-en.pdf>); KIDS CPE Report (<https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>); TAXI CPE Report (<https://www.icann.org/sites/default/files/tlds/taxi/taxi-cpe-1-1025-18840-en.pdf>); and ART (Dadotart) CPE Report (<https://www.icann.org/sites/default/files/tlds/art/art-cpe-1-1097-20833-en.pdf>).

²⁰⁴ *Id.*

VI. The CPE Provider's Use of Clarifying Questions Did Not Evidence Disparate Treatment.

Throughout the CPE process, the CPE Provider had the option to ask Clarifying Questions of the applicant about the relevant application.²⁰⁵ Clarifying Questions were not intended to permit an applicant to introduce new material or otherwise amend an application, but rather were a means for the applicant to make its application more clear and free from ambiguity.²⁰⁶ The CPE Provider composed the Clarifying Questions and sent them to ICANN organization, which would transmit the Clarifying Questions to the applicants. FTI observed that ICANN organization would review the wording of Clarifying Questions prior to sending them to the applicants. The CPE Provider confirmed that was done to ensure that the wording of the question was appropriate insofar as it did not contravene the Applicant Guidebook's guideline that responses to Clarifying Questions may not be used to introduce new material or amend the application.²⁰⁷ ICANN organization did not comment on the substance of any Clarifying Question.

Based on FTI's investigation, it was observed that the CPE Provider posed Clarifying Questions seven times in the CPE process. Based on a plain reading, five of the seven were framed to clarify information in the applications. For example, the CPE Provider asked a Clarifying Question where it found part of an application to be unclear or internally inconsistent insofar as the community was defined by the applicant differently in two different sections of the application.

Two Clarifying Questions related to letters of support. In one application, letters of support were referenced, but were not submitted with the application materials. Accordingly, the CPE Provider issued a Clarifying Question identifying the

²⁰⁵ See CPE Frequently Asked Questions at Pg. 4 (<https://newgtlds.icann.org/en/applicants/cpe/faqs-13aug14-en.pdf>).

²⁰⁶ *Id.* at Pgs. 4-5. See also Board Determination, at Pgs. 15-16 (<https://www.icann.org/en/system/files/files/reconsideration-15-21-dotgay-bgc-determination-01feb16-en.pdf>).

²⁰⁷ *Id.*

administrative error. In the other, the applicant submitted multiple letters of support, but the CPE Provider was unable to verify the nature and relevance of the support that the applicant received because the CPE Provider's verification attempts were unsuccessful. As a result, the CPE Provider issued a Clarifying Question; this application ultimately received the full two points for the Support sub-criterion.

Based on FTI's investigation, the CPE Provider did not issue Clarifying Questions on an inconsistent basis; nor did the CPE Provider's use of Clarifying Questions reflect disparate treatment of any applicant.

VII. The CPE Provider's Use of Outside Research.

FTI understands that "certain complainants [have] requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted."²⁰⁸ This is the subject of Scope 3 of the CPE Process Review, where FTI will compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations that are the subject of pending Reconsideration Requests.

VIII. Conclusion

Following a careful and comprehensive investigation, which included several interviews and an extensive review of available documentary materials, FTI concludes that the CPE Provider consistently applied the CPE criteria throughout all Community Priority Evaluations.

²⁰⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

13 DECEMBER 2017

COMPILATION OF THE REFERENCE MATERIAL RELIED UPON BY THE CPE PROVIDER IN CONNECTION WITH THE EVALUATIONS WHICH ARE THE SUBJECT OF PENDING RECONSIDERATION REQUESTS

PREPARED FOR JONES DAY

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Executive Summary.....	3
III.	Methodology.....	5
IV.	Background on CPE.....	8
V.	The CPE Provider Performed Research in the Eight Evaluations Which are the Subject of Pending Reconsideration Requests.	10
A.	.LLC.....	14
	1. Criterion 1: Community Establishment.....	14
	2. Criterion 2: Nexus between Proposed String and Community	17
	3. Criterion 3: Registration Policies	19
	4. Criterion 4: Community Endorsement	20
B.	.INC.....	21
	1. Criterion 1: Community Establishment.....	21
	2. Criterion 2: Nexus between Proposed String and Community	24
	3. Criterion 3: Registration Policies	24
	4. Criterion 4: Community Endorsement	25
C.	.LLP.....	25
	1. Criterion 1: Community Establishment.....	25
	2. Criterion 2: Nexus between Proposed String and Community	28
	3. Criterion 3: Registration Policies	30
	4. Criterion 4: Community Endorsement	30
D.	Second .GAY Evaluation	32
	1. Criterion 1: Community Establishment.....	32
	2. Criterion 2: Nexus between Proposed String and Community	35
	3. Criterion 3: Registration Policies	39
	4. Criterion 4: Community Endorsement	40

E.	.MUSIC (DotMusic Ltd.).....	41
1.	Criterion 1: Community Establishment.....	41
2.	Criterion 2: Nexus between Proposed String and Community	45
3.	Criterion 3: Registration Policies	45
4.	Criterion 4: Community Endorsement	45
F.	.CPA (Australia).....	46
1.	Criterion 1: Community Establishment.....	46
2.	Criterion 2: Nexus between Proposed String and Community	47
3.	Criterion 3: Registration Policies	48
4.	Criterion 4: Community Endorsement	49
G.	.HOTEL.....	49
1.	Criterion 1: Community Establishment.....	49
2.	Criterion 2: Nexus between Proposed String and Community	52
3.	Criterion 3: Registration Policies	53
4.	Criterion 4: Community Endorsement	53
H.	.MERCK (KGaA).....	55
1.	Criterion 1: Community Establishment.....	55
2.	Criterion 2: Nexus between Proposed String and Community	56
3.	Criterion 3: Registration Policies	56
4.	Criterion 4: Community Endorsement	57
VI.	Conclusion.....	57

I. Introduction

On 17 September 2016, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN organization) directed the President and CEO or his designees to undertake a review of the “process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the New gTLD Program.¹ The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.²

On 18 October 2016, the Board Governance Committee (BGC) discussed potential next steps regarding the review of pending Reconsideration Requests relating to the CPE process.³ The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review would also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of pending Reconsideration Requests (Scope 3).⁴ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained by Jones Day on behalf of its client ICANN organization to conduct the CPE Process Review.

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

² *Id.*

³ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁴ *Id.*

On 26 April 2017, Chris Disspain, the Chair of the BGC, provided additional information about the scope and status of the CPE Process Review.⁵ Among other things, he identified eight Reconsideration Requests that would be on hold until the CPE Process Review was completed.⁶ On 2 June 2017, ICANN organization issued a status update.⁷ ICANN organization informed the community that the CPE Process Review was being conducted on two parallel tracks by FTI. The first track focused on gathering information and materials from ICANN organization, including interviewing relevant ICANN organization personnel and document collection. This work was completed in early March 2017. The second track focused on gathering information and materials from the CPE Provider, including interviewing relevant personnel. This work was still ongoing at the time ICANN issued the 2 June 2017 status update.

On 1 September 2017, ICANN organization issued a second update, advising that the interview process of the CPE Provider's personnel that were involved in CPEs had been completed.⁸ The update further informed that FTI was working with the CPE Provider to obtain the CPE Provider's communications and working papers, including the reference material cited in the CPE reports prepared by the CPE Provider for the evaluations that are the subject of pending Reconsideration Requests. On 4 October 2017, FTI completed its investigative process relating to the second track.

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

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

⁷ <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

⁸ <https://newgtlds.icann.org/en/applicants/cpe/process//newgtlds.icann.org/en/applicants/cpe/podcast-qa-1-review-update-01sep17-en.pdf>.

This report addresses Scope 3 of the CPE Process Review. FTI was asked to identify and compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of the following Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),⁹ 14-32 (.INC),¹⁰ 14-33 (.LLP), 16-3 (.GAY),¹¹ 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

II. Executive Summary

In connection with Scope 3, FTI analyzed each CPE report prepared by the CPE Provider and published by ICANN organization for the evaluations that are the subject of pending Reconsideration Requests. FTI then analyzed the CPE Provider's working papers associated with each evaluation. The CPE Provider's working papers were comprised of information inputted by the CPE Provider into a database, spreadsheets prepared by the core team for each evaluation and which reflect the initial scoring decisions, notes, reference material,¹² and every draft of each CPE report.

In the course of its review and investigation, FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in

⁹ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>.

¹⁰ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

¹¹ After completion by the CPE Provider of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. See <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>. At the BGC's direction, the CPE Provider then conducted a new CPE of the application ("second .GAY evaluation" and "second final CPE report," cited as "GAY 2 CPE report"). For purposes of Scope 3 of the CPE Process Review, the second .GAY evaluation is subject to a pending Reconsideration Request and thus is the relevant evaluation.

¹² The CPE Provider's working papers associated with some evaluations contained the actual reference material relied upon by the CPE Provider, as compared to citations to reference material that appeared in the other working papers.

the CPE Provider's working papers to the extent that such material was not otherwise cited in the final CPE report.

Of the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL, and .MERCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the report. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance—the second .GAY final CPE report—FTI observed that while the final report referenced research, the citation to such research was not included in the final report or the working papers for the second .GAY evaluation. However, because the CPE Provider performed two evaluations for the .GAY application, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the citation supporting research referenced in the second .GAY final CPE report was reflected in those materials. Based upon FTI's investigation, FTI finds that the citation supporting the research referenced in the second .GAY final CPE report may have been recorded in the CPE Provider's working papers associated with the first .GAY evaluation.

Ultimately, FTI observed that the CPE Provider routinely relied upon reference material in connection with the CPE Provider's evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4). Each example of the reference material identified by FTI is attached to this report in Appendix A. FTI observed no citations to reference material in connection with the CPE Provider's

evaluation of the Registration Policies criterion (Criterion 3) for any of the eight relevant evaluations.¹³

III. Methodology

In Scope 3 of the CPE Process Review, FTI was asked to identify and compile the reference material relied upon by the CPE Provider to the extent such reference material exists for the evaluations which are the subject of the following Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),¹⁴ 14-32 (.INC),¹⁵ 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

Reconsideration is an accountability mechanism available under ICANN organization's Bylaws and involves a review process administered by the BGC.¹⁶ Since the commencement of the New gTLD Program, more than 20 Reconsideration Requests have been filed where the requestor sought reconsideration of CPE results. FTI reviewed in detail these requests and the corresponding BGC recommendations and/or determinations, as well as the Board's actions associated with these requests.¹⁷

¹³ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-10-4-17 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁴ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>.

¹⁵ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

¹⁶ Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2 (e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). 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) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

¹⁷ *Id.*

Several requestors made claims that are relevant to Scope 3 of the CPE Process Review.

In particular, as noted in Mr. Disspain's letter of 26 April 2017:

[C]ertain complainants [have] requested access to the documents that the CPE panels used to form their decisions and, in particular, the independent research that the panels conducted. The BGC decided to request from the CPE Provider the materials and research relied upon by the CPE panels in making determinations with respect to certain pending CPEs.¹⁸

To complete its investigation, FTI first reviewed publicly available documents pertaining to CPE to gain a comprehensive understanding of the relevant background facts concerning CPE. The publicly available documents reviewed by FTI, and which informed FTI's investigation for Scope 3, are identified in FTI's reports addressing Scope 1 and Scope 2 of the CPE Process Review. FTI also interviewed relevant ICANN organization and CPE Provider personnel. These interviews are described in further detail in FTI's reports addressing Scopes 1 and 2 of the CPE Process Review.

In the context of Scope 3, following FTI's review of relevant background materials and interviews of relevant personnel, FTI reviewed each CPE report prepared by the CPE Provider and published by ICANN organization for the evaluations that are the subject of pending Reconsideration Requests. FTI then analyzed the CPE Provider's working papers associated with each evaluation.

FTI then identified each instance where the CPE Provider referenced research and provided a citation to that research in the eight relevant evaluations. FTI also identified each instance where the CPE provider referenced research but did not include citations to such research in the final CPE report. Finally, FTI identified each additional instance where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. For each reference material

¹⁸ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

identified, FTI catalogued the CPE criterion and sub-criterion with which the reference material was associated.

In instances where the CPE Provider's final CPE report referenced research but did not provide a supporting citation, FTI undertook a review of the CPE Provider's working papers to determine if the referenced research was reflected in those materials. For example, if the final CPE report referenced research without providing a supporting citation in connection with sub-criterion 2-A, Nexus, FTI then reviewed the working papers for the relevant evaluation and determined if those materials reflected research associated with sub-criterion 2-A, Nexus. If the working papers provided citations to research undertaken in connection with the sub-criterion at issue, i.e., Nexus in this example, then FTI determined that the citations corresponded to the research referenced without citation in the final CPE report.¹⁹

FTI did not rely upon the substance of the reference material. Nor did FTI assess the propriety or reasonableness of the research undertaken by the CPE Provider. Both analyses are beyond the purview of Scope 3.

FTI defined "reference material" in a manner consistent with the CPE Panel Process Document.²⁰ Specifically, according to the CPE Panel Process Document, the CPE

¹⁹ The reference materials that were recorded in the working papers are URLs to websites that the CPE Provider visited or the URLs of research queries conducted by the CPE Provider. The working papers did not include a static rendering of webpages as they existed at the time of access by the CPE Provider. At times, FTI observed that some URLs cited in the CPE Provider's working papers were no longer active, which is not surprising because FTI received the CPE Provider's working papers long after the CPE Provider had completed the CPE process. As a result, FTI is not able to determine if the links were not active at the time they were accessed by the CPE Provider or if they were de-activated after the CPE Provider's evaluation process concluded. Similarly, in some instances, FTI observed that the URLs cited in the working papers contained typographical errors; however, FTI is not able to determine if the typographical errors appeared in the URLs at the time that the URLs were accessed by the CPE Provider or if they were incorrectly cited by the CPE Provider.

²⁰ See CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>). The CPE Panel Process Document explains that the CPE Provider was selected to implement the Applicant Guidebook's CPE provisions. The CPE Provider also published supplementary guidelines (CPE Guidelines) that provided more detailed scoring guidance, including

Provider’s evaluators provided individual evaluation results based on their assessment of the CPE criteria as set forth in the Applicant Guidebook and CPE Guidelines, application materials, and “secondary research without any influence from core team members.”²¹ Further, “[i]f the core team so decides, additional research may be carried out to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures.”²² FTI considered both the evaluators’ “secondary research” and any “additional research” conducted at the request of the core team to be within scope.

IV. Background on CPE

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.²³ CPE is defined in Module 4.2 of the Applicant Guidebook, and allows a community-based application to undergo an evaluation against the criteria as defined in section 4.2.3 of the Applicant Guidebook, to determine if the application warrants the minimum score of 14 points (out of a maximum of 16 points) to earn priority and thus prevail over other applications in the contention set.²⁴ CPE will occur only if a community-based applicant selects to undergo CPE for its relevant application and after all applications in the contention set have completed all

scoring rubrics, definitions of key terms, and specific questions to be scored. See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>). The CPE Provider personnel interviewed by FTI stated that the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process. The methodology that the CPE Provider undertook to evaluate the CPE criteria is further detailed in FTI’s report addressing Scope 2 of the CPE Process Review.

²¹ CPE Panel Process Document (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

²² *Id.*

²³ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

²⁴ See Applicant Guidebook, Module 4.2 at Pgs. 4-7 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

previous stages of the new gTLD evaluation process. CPE is performed by an independent provider (CPE Provider).²⁵

As noted, the standards governing CPE are set forth in Module 4.2 of the Applicant Guidebook.²⁶ The CPE Provider personnel interviewed by FTI stated that they were strict constructionists and used the Applicant Guidebook as their “bible.” Further, the CPE Provider stated that it relied first and foremost on material provided by the applicant. The CPE Provider informed FTI that it only accessed reference material when the evaluators or core team decided that research was needed to address questions that arose during the review.

During its investigation, FTI learned that the CPE Provider's evaluators primarily relied upon a database to capture their work (i.e., all notes, research, and conclusions) pertaining to each evaluation. The database was structured with the following fields for each criterion: Question, Answer, Evidence, Sources. The Question section mirrored the questions pertaining to each sub-criterion set forth in the CPE Guidelines. For example, section 1.1.1. in the database was populated with the question, "Is the community clearly delineated?"; the same question appears in the CPE Guidelines. The “Answer” field had space for the evaluator to input his/her answer to the question; FTI observed that the answer generally took the form of a "yes" or "no" response. In the “Evidence” field, the evaluator provided his/her reasoning for his/her answer. In the “Source” field, the evaluator could list the source(s) he/she used to formulate an answer to a particular question, including, but not limited to, the application (or sections thereof), reference material, or letters of support or opposition.

FTI observed that reference material was cited in the “Source” field of the database, spreadsheets generated by the Project Coordinator and core team for each evaluation and which reflect the scoring decisions, memoranda drafted by the evaluators, draft

²⁵ *Id.*

²⁶ <https://newgtlds.icann.org/en/applicants/agb>.

reports, and in the final CPE reports. FTI observed that the Project Coordinator at times requested that the member of the core team responsible for drafting the CPE report incorporate citations to the evaluator(s)' reference material into the draft report to strengthen the rationale with respect to a particular point.

FTI interviewed both ICANN organization and CPE Provider personnel about the CPE process and interviewees from both organizations stated that ICANN organization played no role in whether or not the CPE Provider conducted research or accessed reference material in any of the evaluations. That ICANN organization was not involved in the CPE Provider's research process was confirmed by FTI's review of relevant email communications (including attachments) provided by ICANN organization, inasmuch as FTI observed no instance where ICANN organization suggested that the CPE Provider undertake (or not undertake) research. Instead, research was conducted at the discretion of the CPE Provider.²⁷ Further, FTI observed that when ICANN organization commented on a draft report, it was only to suggest amplifying rationale based on materials already reviewed and analyzed by the CPE Provider.

V. The CPE Provider Performed Research in the Eight Evaluations Which are the Subject of Pending Reconsideration Requests.

With respect to the eight evaluations which are the subject of pending Reconsideration Requests, FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider's working papers to the extent such materials were not otherwise cited in the final CPE report.

²⁷ See Applicant Guidebook Module 4.2.3 at 4-9 ("The panel may also perform independent research, if deemed necessary to reach informed scoring decisions.") (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

The following chart provides the total number of citations to research or reference material in the final CPE report and working papers for each of the eight relevant evaluations, broken down by relevant CPE criterion:

String	<u>Criterion 1:</u> Community Establishment	<u>Criterion 2:</u> Nexus between Proposed String and Community	<u>Criterion 3:</u> Registration Policies	<u>Criterion 4:</u> Community Endorsement	Additional Research Materials Associated with String	Total
.LLC	18	5	0	11	2	36
.INC	13	4	0	6	0	23
.LLP	21	8	0	9	1	39
.GAY (Reevaluation)	27	51	0	9	1	88
.MUSIC (DotMusic Ltd.)	20	2	0	1	0	23
.CPA (Australia)	26	18	0	2	0	46
.HOTEL	42	3	0	12	6	63
.MERCK KGaA	6	8	0	2	0	16
Total	173	99	0	52	10	334

Below, FTI lists each reference material relied upon by the CPE Provider for the eight relevant evaluations, organized by criterion and sub-criterion. By comparing the final CPE reports to the CPE Provider’s working papers, FTI determined that some of the reference material that the CPE Provider relied upon during the CPE process was not cited in the final CPE report, but instead was only reflected in the CPE Provider’s working papers. As a result, below FTI identifies the reference material reflected in the final CPE reports as well as the reference material reflected in the working papers associated with those evaluations.

As detailed below, of the eight relevant CPE reports, FTI observed two reports (.CPA, .MERCK) where the CPE Provider included a citation in the report for each reference to research. For all eight evaluations (.LLC, .INC, .LLP, .GAY, .MUSIC, .CPA, .HOTEL,

and .MERCCK), FTI observed instances where the CPE Provider cited reference material in the CPE Provider’s working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.LLC, .INC, .LLP, .GAY, .MUSIC, and .HOTEL), FTI observed instances where the CPE Provider referenced research but did not include citations to such research in the report. In each instance, FTI reviewed the working papers associated with the relevant evaluation to determine if the citation supporting referenced research was reflected in the working papers. For all but one report, FTI observed that the working papers did reflect the citation supporting referenced research not otherwise cited in the corresponding final CPE report. In one instance, in the second .GAY final CPE report, FTI observed that while the final report referenced research, the citations supporting such research were not included in the final report or the working papers for the second .GAY evaluation. However, based on FTI’s review of the CPE Provider’s working papers associated with the first .GAY evaluation, FTI finds that the citations supporting the research referenced in the second .GAY final CPE report may have been cited in those materials.

Brief Note on CPE Criteria Definitions

FTI’s report addressing Scope 2 of the CPE Process Review extensively details the CPE criteria and FTI incorporates that discussion for purposes of this report. For the reader’s benefit, the following summary is provided:

- **Criterion 1: Community Establishment.** The Community Establishment criterion evaluates “the community as explicitly identified and defined according to statements in the application.”²⁸ The Community Establishment criterion is measured by two sub-criterion: (i) 1-A, “Delineation;” and (ii) 1-B, “Extension.”²⁹

²⁸ *Id.*

²⁹ *Id.*

- **Criterion 2: Nexus between Proposed String and Community.** The Nexus criterion evaluates “the relevance of the string to the specific community that it claims to represent.”³⁰ The Nexus criterion is measured by two sub-criterion: (i) 2-A, “Nexus”; and (ii) 2-B, “Uniqueness.”³¹
- **Criterion 3: Registration Policies.** The Registration Policies criterion evaluates the registration policies set forth in the application on four elements, each of which is worth one point: (i) 3-A, “Eligibility”; (ii) 3-B, “Name Selection”; (iii) 3-C, “Content and Use”; and (iv) 3-D, “Enforcement.”³²
- **Criterion 4: Community Endorsement.** The Community Endorsement criterion evaluates community support for and/or opposition to an application.”³³ The Community Endorsement criterion is measured by two sub-criterion: (i) 4-A, “Support”; and (ii) 4-B, “Opposition.”³⁴

CPE Reports Subject to Pending Reconsideration Requests

As noted above, the following evaluations are the subject of Reconsideration Requests that were pending at the time ICANN initiated the CPE Process Review: 14-30 (.LLC),³⁵ 14-32 (.INC),³⁶ 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK). The analysis below addresses each evaluation in the foregoing

³⁰ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

³¹ *Id.* at Pgs. 4-12 and 4-13.

³² See *id.* at Pgs. 4-14-4-15.

³³ See *id.* at Pgs. 4-17.

³⁴ *Id.*

³⁵ Request 14-30 (.LLC) was withdrawn on 7 December 2017. See <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>

³⁶ Request 14-32 (.INC) was withdrawn on 11 December 2017. See <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>.

order, which is the order in which the relevant Reconsideration Requests were submitted.

A. .LLC

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the CPE Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 1-A, Delineation.³⁷ The final CPE report states:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLC. Based on the Panel’s research, there is no evidence of LLCs from different sectors acting as a community.³⁸

The CPE Provider is referring to the Applicant Guidebook’s requirement that the community demonstrate “an awareness and recognition of a community among its members.”³⁹

Because the final CPE report does not provide citations supporting the research undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion.

³⁷ .LLC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

³⁸ *Id.*

³⁹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise reflected in the final CPE report: 1) the Wikipedia page for “Limited Liability Company,”⁴⁰ 2) the “LLC” webpage on www.sba.com,⁴¹ and 3) the “corporation” webpage on www.sba.com.⁴² Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain 13 citations to research or reference material for this sub-criterion, 1-A, Delineation, that were not otherwise cited in the final CPE report.⁴³

⁴⁰ http://en.wikipedia.org/wiki/Limited_liability_company. According to Wikipedia: About, “Anyone with Internet access can write and make changes to Wikipedia articles, except in limited cases where editing is restricted to prevent disruption or vandalism.” See <https://en.wikipedia.org/wiki/Wikipedia:About>. Further, “Unlike printed encyclopedias, Wikipedia is continually created and updated.” *Id.* For purposes of this report, FTI referenced Wikipedia pages as they appear now and not as they may have appeared at the time of review by the CPE Provider.

⁴¹ <http://www.sba.com/legal/llc/>.

⁴² <http://www.sba.gov/content/corporation>.

⁴³ They are:

http://en.wikipedia.org/wiki/Limited_liability_company;

<http://www.sba.com/legal/llc/>;

<http://www.sba.gov/content/corporation> (cited two times);

<http://dotregistry.org/>;

<http://dotregistry.org/about/who-is-dot-registry>;

<http://dotregistry.org/corporate-tlds/llc-domains> (cited two times);

<http://www.nass.org/>;

<http://www.nass.org/nass-committees/nassbusiness-services-committee/> (cited two times and referenced as “Nass Business Services Committee website” one time without providing the URL) (This is no longer an active link); and

<http://www.llc-reporter.com/16.htm> (This is no longer an active link).

1-B Extension

The final CPE report makes two references to the Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 1-B, Extension.⁴⁴ The final report states twice:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLC. Based on the Panel’s research, there is no evidence of LLCs from different sectors acting as a community.⁴⁵

Although this statement appears in both the “Size” and “Longevity” sub-sections of the CPE Panel’s discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel’s reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the research undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the Wikipedia page for “Limited Liability Company,”⁴⁶ 2) the “LLC” webpage on

⁴⁴ .LLC CPE Report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁴⁵ *Id.*

⁴⁶ http://en.wikipedia.org/wiki/Limited_liability_company.

www.sba.com,⁴⁷ and 3) the “corporation” webpage on www.sba.com.⁴⁸ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain two citations to research or reference material for sub-criterion 1-B, Extension, that were not otherwise cited in the final CPE report.⁴⁹

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report makes one reference to the Panel’s research, but does not provide a citation to, or otherwise indicate the nature of, that research, for sub-criterion 2-A, Nexus.⁵⁰ The final report states—without indicating the source of the information—that “[w]hile the string identifies the name of the community, it captures a wider geographical remit than the community has, as the corporate identifier is used in other jurisdictions

⁴⁷ <http://www.sba.com/legal/llc/>.

⁴⁸ <http://www.sba.gov/content/corporation>.

⁴⁹ They are:

<http://www.llc-reporter.com/16.htm> (This is no longer an active link); and

<http://www.sba.gov/content/limited-liability-companyllc> (This is no longer an active link).

⁵⁰ .LLC CPE Report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>). FTI understands that in Reconsideration Request 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), the Requestor made the following claim: “The Panel also states that its decision to not award any points to the .LLC Community Application for 2-A Nexus is based on “[t]he Panel’s research [which] indicates that while other jurisdictions use LLC as a corporate identifier, their definitions are quite different and there are no other known associations or definitions of LLC in the English language.” Reconsideration Request 14-30 (<https://www.icann.org/en/system/files/files/request-dotregistry-redacted-25jun14-en.pdf>), Pg. 7. The language the Requestor quoted from the CPE report is contained in a block quote that the CPE report states came from the “application documentation,” and drafts of the report indicate that the block quote originally said “Our research indicates that” .LLC CPE Report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf> and drafts). FTI therefore finds it reasonable to conclude that the statement references the *applicant’s* research, not the Panel’s research.

(outside the US).⁵¹ The CPE Panel is referring to the Applicant Guidebook’s requirement that the string “closely describes the community or the community members, without over-reaching substantially beyond the community.”⁵² This requirement is a component of sub-criterion 2-A, Nexus.⁵³

Because the final CPE report does not provide citations supporting the research purportedly undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Nexus sub-criterion. Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references: 1) the Wikipedia page for LLCs,⁵⁴ 2) a “Web search on [REDACTED],” and 3) the “International equivalents” sub-page for the Wikipedia page for LLCs.⁵⁵ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

⁵¹ .LLC CPE Report Pg. 5 (<https://www.icann.org/sites/default/files/tlds/llc/llc-cpe-1-880-17627-en.pdf>).

⁵² See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁵³ See *id.*

⁵⁴ http://en.wikipedia.org/wiki/Limited_liability_company.

⁵⁵ http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”).

Including the citations listed above, the working papers reflect three references to research or reference material for this sub-criterion, which may be related to the research discussed in the final CPE report.⁵⁶

2-B Uniqueness

The final CPE report does not contain any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain one citation to research or reference material for this sub-criterion.⁵⁷

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

⁵⁶ They are:

http://en.wikipedia.org/wiki/Limited_liability_company; and

http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”); this document may relate to the statement in the final CPE report that LLC “is used in other jurisdictions (outside the US).”

FTI notes that the CPE Provider referenced a “Web search on [REDACTED]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the three references to research in this sub-criterion.

⁵⁷ The working papers cite:

http://en.wikipedia.org/wiki/Limited_liability_company#International_equivalents in a discussion of Uniqueness (This is an active link to a Wikipedia page on limited liability companies, but it does not connect to a subsection on “international equivalents”).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not contain any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect ten references to research or reference material for this sub-criterion.⁵⁸

4-B Opposition

The final CPE report does not contain any references to research or reference material for sub-criterion 4-B, Opposition, but the working papers reflect one reference to research or reference material for this sub-criterion.⁵⁹

Additional Research Materials Associated with .LLC

The working papers include two documents not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its research concerning the .LLC CPE application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.⁶⁰

⁵⁸ They are:

http://icannwiki.com/index.php/Dot_Registry_LLC;

Six references to <http://dotregistry.org/> or to the “Applicant website” without providing the full URL. FTI included each reference to the “Applicant website” as one of the ten references to research in this sub-criterion.

FTI notes that the CPE Provider made three references to “Web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for these searches. FTI included each of these searches as one of the ten references to research in this sub-criterion.

⁵⁹ FTI notes that the CPE Provider referenced the “Applicant website” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as the one reference to research in this sub-criterion.

⁶⁰ The documents are:

A one-page Adobe PDF file named “businessRegisterStatisticsFeb2014.pdf” containing weekly data for the month of February, 2014 concerning registrations, liquidations, and dissolutions of companies

B. .INC

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the CPE Panel’s research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-A, Delineation.⁶¹ The final CPE report states:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an INC. Based on the Panel’s research, there is no evidence of INCs from different sectors acting as a community.⁶²

The CPE Provider is referring to the Applicant Guidebook’s requirement that the community demonstrate “an awareness and recognition of a community among its members.”⁶³

Because the final CPE report does not provide citations supporting the CPE Provider’s research, FTI analyzed the CPE Provider’s working papers in an effort to determine if the working papers reflected research concerning the Delineation sub-criterion. FTI observed that the CPE Provider’s working papers reflect such research. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following

in the United Kingdom. This document may relate to the CPE Provider’s assertion, in sub-criterion 2-A, that “[t]he [LLC] corporate identifier is used in other jurisdictions (outside the US).”

A Microsoft Excel file named “Orbis_Export_1 (LLC).xls” containing data about the number of companies and their operating revenue in each of over 100 countries for the “last avai[able] year.”

⁶¹ .INC CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

⁶² *Id.*

⁶³ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the “corporation” page for the United States Small Business Association,⁶⁴ and 2) the website for the National Association of Secretaries of State.⁶⁵ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers reflect eight references to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.⁶⁶

1-B Extension

The final CPE report makes two references to the CPE Panel’s research, but does not provide citations or otherwise indicate the nature of that research, for sub-criterion 1-B, Extension.⁶⁷ The final CPE report states twice:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . . Research

⁶⁴ <http://www.sba.gov/content/corporation>.

⁶⁵ <http://www.nass.org/>.

⁶⁶ They are:

<http://www.companieshouse.gov.uk/links/usaLink.shtml> (cited three times);

<http://www.sba.gov/content/corporation> (cited two times);

<http://www.nass.org/>;

<http://www.nass.org/nasscommittees/nass-business-servicescommittee/> (This is no longer an active link).

FTI notes that the CPE Provider referenced “[t]he NASS website . . . section on corporate registration” in the working papers. The working papers do not provide a full citation or identify the URL for the website. FTI included this website as one of the eight references to research in this sub-criterion.

⁶⁷ .INC CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/inc/inc-cpe-1-880-35979-en.pdf>).

showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an INC. Based on the Panel's research, there is no evidence of INCs from different sectors acting as a community.⁶⁸

Although this statement appears in both the "Size" and "Longevity" sub-sections of the CPE Panel's discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel's reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the referenced research, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider's working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the "corporation" page for the United States Small Business Association,⁶⁹ and 2) the website for the National Association of Secretaries of State.⁷⁰ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain two citations to research or reference material for sub-criterion 1-B, Extension, that are not otherwise cited in the final CPE report.⁷¹

⁶⁸ *Id.*

⁶⁹ <http://www.sba.gov/content/corporation>.

⁷⁰ <http://www.nass.org/>.

⁷¹ They are:
<http://www.companieshouse.gov.uk/links/usaLink.shtml>; and

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain two citations to research or reference material.⁷²

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain two citations to research or reference material relating to this sub-criterion.⁷³

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

<http://en.wikipedia.org/wiki/Corporation>.

⁷² They are:

http://en.wikipedia.org/wiki/Types_of_business_entity; and
<http://en.wikipedia.org/wiki/Inc>.

⁷³ They are:

http://en.wikipedia.org/wiki/Types_of_business_entity; and
<http://en.wikipedia.org/wiki/Inc>.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain six citations to research or reference material for this sub-criterion.⁷⁴

4-B Opposition

Neither the final CPE report nor the working papers reflect any reference to research or reference material for sub-criterion 4-B, Opposition.

C. .LLP

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report makes one reference to the Panel's research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-A, Delineation.⁷⁵ The final report states that:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLP. Based on

⁷⁴ <http://www.companieshouse.gov.uk/links/usaLink.shtml>;
http://icannwiki.com/index.php/Dot_Registry_LLC;
<http://dotregistry.org/> (cited three times); and
<https://www.cscglobal.com/global/web/csc/home>.

⁷⁵ .LLP CPE report Pg. 2 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

the Panel's research, there is no evidence of LLPs from different sectors acting as a community.⁷⁶

The CPE Provider is referring to the Applicant Guidebook's requirement that the community demonstrate "an awareness and recognition of a community among its members."⁷⁷

Because the final CPE report does not provide citations supporting the CPE Provider's research, FTI analyzed the CPE Provider's working papers to determine if the working papers reflected research concerning the Delineation sub-criterion. FTI observed that the CPE Provider's working papers reflect such research. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: "Question 1.1.1: Is the community clearly delineated?" FTI observed that the corresponding "Source" field for this question cited the following references that were not otherwise cited in the final CPE report: 1) the Wikipedia page for "Limited Liability Partnership" (specifically, the sub-page for "United States"),⁷⁸ and 2) the "LLP" webpage on www.sba.com.⁷⁹ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain eleven citations to research or reference material for this sub-criterion.⁸⁰

⁷⁶ *Id.*

⁷⁷ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁷⁸ http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States.

⁷⁹ <http://www.sba.com/legal/llp/>.

⁸⁰ They are:

<http://www.nass.org/nass-committees/nass-business-servicescommittee/> (cited two times) (This is no longer an active link);

<http://dotregistry.org/about/who-is-dot-registry> (cited two times);

<http://dotregistry.org/>;

1-B Extension

The final CPE report makes two references to the Panel’s research, but does not provide a citation or otherwise indicate the nature of that research, for sub-criterion 1-B, Extension.⁸¹ The final report states twice that:

[T]he community as defined in the application does not have awareness and recognition of a community among its members. . . Research showed that firms are typically organized around specific industries, locales, and other criteria not related to the entities['] structure as an LLP. Based on the Panel’s research, there is no evidence of LLPs from different sectors acting as a community.⁸²

Although this statement appears in both the “Size” and “Longevity” sub-sections of the CPE Panel’s discussion of sub-criterion 1-B, Extension, it is clear from the CPE Panel’s reference to the awareness and recognition requirement that the CPE Provider is, in fact, addressing sub-criterion 1-A, Delineation.

Because the final CPE report does not provide citations supporting the research, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion. Specifically, with respect to sub-criterion 1-A, Delineation, the database contains the following question: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were

<http://www.biztree.com/company/>;
http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States (cited two times);
http://en.wikipedia.org/wiki/Limited_liability_partnership;
<http://www.sba.com/legal/llp/>; and
<http://dotregistry.org/corporate-tlds/llp-domains>.

⁸¹ .LLP CPE report Pgs. 3-4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

⁸² *Id.*

not otherwise cited in the final CPE report: 1) the Wikipedia page for “Limited Liability Partnership” (specifically, the sub-page for “United States,”⁸³ and 2) the “LLP” webpage on www.sba.com.⁸⁴ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

The working papers contain seven citations to research or reference material for sub-criterion 1-B, Extension, that are not otherwise cited in the final CPE report.⁸⁵

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not directly reference any research or reference material for sub-criterion 2-A, Nexus, but it states—without indicating the source of the information—that “[t]he applied-for-string (.LLP) over-reaches substantially . . . [because it] captures a wider geographical remit than the community has, as the corporate identifier is used in Poland, the UK, Canada and Japan, amongst others.”⁸⁶ The CPE Panel is referring to the Applicant Guidebook’s requirement that the string “closely describes the community or the community members, without over-reaching

⁸³ http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States.

⁸⁴ <http://www.sba.com/legal/llp/>.

⁸⁵ They are:

http://en.wikipedia.org/wiki/Limited_liability_partnership#United_States (cited two times);

http://en.wikipedia.org/wiki/Limited_liability_partnership;

<http://www.sba.com/legal/llp/> (cited two times);

<http://www.biztree.com/?a=biztree&s=google&c=ustop&gclid=CJPnqb6SwL0CFUNo7Aodtl8A8g>; and <https://www.google.com/search> Confidential Business Information

⁸⁶ .LLP CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/llp/llp-cpe-1-880-35508-en.pdf>).

substantially beyond the community.”⁸⁷ This requirement is a component of sub-criterion 2-A, Nexus.⁸⁸

Because the final CPE report does not provide citations supporting the research purportedly undertaken by the CPE Provider, FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such research. FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Nexus sub-criterion.

Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references: 1) the Applicant’s website,⁸⁹ 2) the Wikipedia page for LLPs (cited three times),⁹⁰ 3) a British government webpage answering Frequently Asked Questions about LLPs,⁹¹ and 4) a Google search for **Confidential Business Information**.⁹² Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

⁸⁷ See Applicant Guidebook, Module 4.2.3 at Pg. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁸⁸ See *id.*

⁸⁹ <http://dotregistry.org/corporate-tlds/llp-domains>.

⁹⁰ http://en.wikipedia.org/wiki/Limited_liability_partnership.

⁹¹ <http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>.

⁹² <https://www.google.com/search> **Confidential Business Information**

Including the citations listed above, the working papers contain six citations to research or reference material for this sub-criterion.⁹³

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain one citation to research or reference material for this sub-criterion.⁹⁴

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect nine references to research or reference material.⁹⁵

⁹³ They are:

http://en.wikipedia.org/wiki/Limited_liability_partnership (cited three times);

<http://www.companieshouse.gov.uk/infoAndGuide/faq/llpFAQ.shtml>;

<https://www.google.com/search> Confidential Business Information

and

<http://dotregistry.org/corporate-tlds/llp-domains>.

⁹⁴ One working paper cites http://en.wikipedia.org/wiki/Limited_liability_partnership in its consideration of this sub-criterion.

⁹⁵ They are:

<http://dotregistry.org/#http://dotregistry.org/about>;

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, opposition.

Additional Research Materials Associated with .LLP

The working papers include one document that was not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its research concerning the .LLP CPE application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.⁹⁶

FTI notes that the CPE Provider referenced a “Google search” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion;

FTI notes that the CPE Provider referenced three “Web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion; and

FTI notes that the CPE Provider made four references to the “Applicant[’s] website” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion.

⁹⁶ The document is a one-page Adobe PDF file named “BusinessRegisterStatistics.pdf” containing weekly data for the month of February 2014 concerning registrations, liquidations, and dissolutions of companies in the United Kingdom.

D. Second .GAY Evaluation⁹⁷

1. Criterion 1: Community Establishment

1-A Delineation

The second final CPE report contains ten citations to research or reference material for sub-criterion 1-A, Delineation.⁹⁸

The working papers contain ten citations to research or reference material for this sub-criterion that are not otherwise cited in the second final CPE report.⁹⁹

⁹⁷ After completion by the CPE Provider of the first CPE in October 2014, through the Reconsideration process, a procedural error in the CPE was identified and the BGC determined that the application should be re-evaluated. See <https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>. At the BGC's direction, the CPE Provider then conducted a new CPE of the application ("second .GAY evaluation" and "second final CPE report," cited as ".GAY 2 CPE report"). For purposes of Scope 3 of the CPE Process Review, the second .GAY evaluation is subject to a pending Reconsideration Request and thus is the relevant evaluation.

⁹⁸ They are:

<http://www.hrc.org/campaigns/coming-out-center>;

http://www.lalgbtcenter.org/coming_out_support;

<http://www.glaad.org/form/come-outas-ally-join-allynetwork-today>;

<http://www.hrc.org/resources/entry/straight-guide-to-lgbt-americans>;

<http://community.pflag.org/page.aspx?pid=539> (This is no longer an active link);

<http://www.apa.org/topics/lgbt/orientation.pdf> (the CPE report notes that the applicant cited this as well);

<http://www.cnn.com/2013/06/27/world/asia/china-gay-lesbian-marriage/>;

<http://www.gaystarnews.com/article/guyana-urged-to-end-ban-on-gay-sex-at-un-human-rights-commission/>;

http://www.huffingtonpost.com/2011/10/18/argentina-gay-marriage_n_1018536.html; and

a reference to "ILGA's website" without specifying the URL or a webpage within the website.

⁹⁹ They are:

<http://dotgay.com>;

<http://ilga.org/about-us/>;

<http://ilga.org/what-we-do/>;

http://en.wikipedia.org/wiki/International_Lesbian,_Gay,_Bisexual,_Trans_and_Intersex_Association;

1-B Extension

The second final CPE report contains two citations to research or reference material for sub-criterion 1-B, Extension.¹⁰⁰

Additionally, the second final CPE report makes one reference to the CPE Provider's verification of data submitted by the Applicant but does not contain a corresponding citation in the report. The second final CPE report states: "The Panel has verified the applicant's estimates of the defined community's size and compared it with other estimates. Even smaller estimates constitute a substantial number of individuals especially when considered globally."¹⁰¹ The CPE Provider is referring to the Applicant Guidebook's requirement that the community be of considerable size.¹⁰² Size is a component of sub-criterion 1-B, Extension.¹⁰³

Because the second final CPE report does not provide a citation in support of the referenced research conducted by the CPE Provider to verify and compare the referenced estimates,¹⁰⁴ FTI analyzed the CPE Provider's working papers for the second .GAY evaluation to determine if the working papers reflected such research.

http://en.wikipedia.org/wiki/Gay_and_Lesbian_International_Sport_Association;
http://en.wikipedia.org/wiki/International_Gay_and_Lesbian_Travel_Association;
<http://en.wikipedia.org/wiki/Gay>;
<http://en.wikipedia.org/wiki/LGBT>;
http://en.wikipedia.org/wiki/LGBT_history; and
http://en.wikipedia.org/wiki/Timeline_of_LGBT_history.

¹⁰⁰ They are:

Haggerty, George E. "Global Politics." In *Gay Histories and Cultures: An Encyclopedia*. New York: Garland, 2000; and
<http://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>.

¹⁰¹ .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹⁰² See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹⁰³ *Id.*

¹⁰⁴ .GAY 2 CPE report Pg. 4 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

Based on FTI's investigation, FTI observed that the CPE Provider's working papers did not reflect research undertaken in connection with the Extension sub-criterion for the second .GAY evaluation. Specifically, with respect to sub-criterion 1-B, Extension, the database contains the following: "Question 1.2.1: Is the community of considerable size?" FTI observed no references to research or reference material in the corresponding "Source" field for this question.

However, because the CPE Provider performed two evaluations for the .GAY application, out of an abundance of caution, FTI also reviewed the CPE Provider's working papers associated with the first .GAY evaluation to determine if the referenced research was reflected in those materials. Based upon FTI's investigation, FTI finds that the supporting research may have been cited in the working papers associated with the first .GAY evaluation. FTI observed in the working papers for the first .GAY evaluation that the CPE Provider recorded two references in the database's "Source" field for Question 1.2.1.¹⁰⁵ Both citations addressed the size of the gay community nationally and worldwide, which may have been used by the CPE Provider to verify the size of the community defined in the application. Based on the similarity between the two evaluations, FTI finds it reasonable to conclude that the research referenced without citation in the second .GAY evaluation may have been the same research that was cited in the working papers associated with the first .GAY evaluation.

Finally, the working papers associated with the second .GAY evaluation contain four citations to research or reference material for this sub-criterion that were not otherwise cited in the second final CPE report.¹⁰⁶

¹⁰⁵ They are:

www.census.gov/popclock (This is no longer an active link. The correct link to the United States Census Bureau U.S. and World Population Clock is <https://www.census.gov/popclock/>);
<http://en.wikipedia.org/wiki/InterPride>.

¹⁰⁶ They are:

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The second final CPE report contains 14 citations to research or reference material for sub-criterion 2-A, Nexus.¹⁰⁷

Additionally, the second final CPE report makes one reference to the CPE Panel's research and four references to the Panel's "survey" or "review of representative samples" of media and news articles, but does not provide the corresponding citation to the media, articles, and research reviewed.¹⁰⁸ These references are contained in three excerpts of the second final CPE report, each of which addresses whether the proposed

<http://en.wikipedia.org/wiki/Gay>;
<http://en.wikipedia.org/wiki/LGBT>;
http://en.wikipedia.org/wiki/LGBT_history; and
http://en.wikipedia.org/wiki/Timeline_of_LGBT_history.

¹⁰⁷ They are:

"gay, adj., adv., and n." OED Online. Oxford University Press, June 2015. Web. 19 August 2015;
<http://time.com/135480/transgender-tipping-point/>;
<http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>;
<http://transgenderlawcenter.org/>;
<http://srlp.org/>;
<http://transequality.org/>;
<http://transequality.org/issues/resources/transgender-terminology>;
<http://oii-usa.org/1144/ten-misconceptions-intersex>;
http://dotgay.com/the-dotgay-team/#section=Jamie_Baxter (This is no longer an active link);
<http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;
<http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>;
<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;
<http://www.glaad.org/transgender/transfaq>; and
<http://www.glaad.org/about/history>.

¹⁰⁸ .GAY 2 CPE report Pgs. 5-8 (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

string identifies all members of the identified community. Because the references relate to the same sub-criterion, FTI analyzed all three excerpts together for this review.

First, the second final CPE report states:

The Panel has also conducted its own research. The Panel has determined that the applied-for string does not sufficiently identify some members of the applicant's defined community, in particular transgender, intersex, and ally individuals. According to the Panel's own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider "gay" to be their "most common" descriptor, as the applicant claims. These groups are most likely to use words such as "transgender," "trans," "intersex," or "ally" because these words are neutral to sexual orientation, unlike "gay".¹⁰⁹

In a footnote to the above text, the Panel added that: "While a comprehensive survey of the media's language in this field is not feasible, the Panel has relied on both the data in the applicant's own analysis as well as on the Panel's own representative samples of media."¹¹⁰

Second, the second final CPE report states that: "organizations within the defined community, when they are referring to groups that specifically include transgender, intersex or ally individuals, are careful not to use only the descriptor 'gay,' preferring one of the more inclusive terms."¹¹¹ The supporting footnote states: "While a survey of all LGBTQIA individuals and organizations globally would be impossible, the Panel has relied for its research on many of the same media organizations and community organizations that the applicant recognizes."¹¹²

¹⁰⁹ *Id.* at Pgs. 5-6.

¹¹⁰ *Id.* at Pg. 6 n.10. This footnote is repeated at page 7, note 19.

¹¹¹ *Id.* at Pg. 6.

¹¹² *Id.* at Pg. 6 n.12.

Third, the second final CPE report states that “researching sources from the same periods as the applicant’s analysis for the terms ‘transgender’ or ‘intersex’ shows again that these terms refer to individuals and communities not identified by ‘gay.’”¹¹³ The supporting footnote states: “[t]he Panel reviewed a representative sample of articles from the same time periods” as LexisNexis search results provided by the applicant.¹¹⁴

As noted, each of these references relates to whether the string “closely describes the community or the community members, without over-reaching substantially beyond the community.”¹¹⁵ The CPE Provider is referring to the requirement that “the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community.”¹¹⁶

Because the second final CPE report does not provide citations for the Panel’s research, FTI analyzed the CPE Provider’s working papers for the second .GAY evaluation to determine if the working papers reflected such research. Based on FTI’s investigation, FTI observed that the CPE Provider’s working papers reflect the research referenced in the final report.

Specifically, with respect to sub-criterion 2-A, Nexus, the database contains the following question: “Question 2.1.1: Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) a Google search on [REDACTED]; (2) the Wikipedia page for “Coming out”; (3) a Google search on

¹¹³ *Id.* at Pgs. 7-8.

¹¹⁴ *Id.* at Pg. 8 n.22.

¹¹⁵ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (cited in .GAY 2 CPE report Pg. 5) (<https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>).

¹¹⁶ See *id.* at Module 4.2.3 at Pgs. 4-13.

██████; (4) a second Google search on ██████ which included; (5) the Wikipedia page for “GAY” (cited two times).

Accordingly, FTI finds it reasonable to conclude that the research referenced in the second final CPE report refers to the research reflected in the working papers for the second .GAY evaluation identified above.

FTI observed 23 references to research or reference materials in a working paper entitled, “nexus research notes,” which also addresses this sub-criterion, that were not otherwise cited in the second final CPE report.¹¹⁷

¹¹⁷ They are:

<http://www.glaad.org/reference/transgender;>

[http://www.transpeoplespeak.org/trans-101/;](http://www.transpeoplespeak.org/trans-101/)

<http://www.out.com/news-opinion/2015/6/29/watch-john-olivers-breakdown-how-far-trans-rights-still-have-go;>

<http://www.lambdalegal.org/issues/transgender-rights;>

<https://www.aclu.org/issues/lgbt-rights/transgender-rights;>

http://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html?_r=1;

<http://www.newrepublic.com/article/politics/magazine/90519/transgender-civil-rights-gay-lesbian-lgbtq;>

[https://en.wikipedia.org/wiki/LGBT_community;](https://en.wikipedia.org/wiki/LGBT_community)

[http://www.tgijp.org/;](http://www.tgijp.org/)

[http://transgenderlawcenter.org/about/mission.](http://transgenderlawcenter.org/about/mission)

FTI notes that the CPE Provider referenced six “NYTimes” searches in the working papers. The CPE Provider described the searches in the working papers as follows: ██████ in year 2010: 16 results, ██████ Year 2014: 311 results, ██████ 2014: 106 results, “Gay community” 2010: 51 results, ██████ 2010: 4 results, “LGBT community” 2014: 88 results. The working papers do not provide a full citation for the searches. FTI included the six searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced two searches in the Washington Post in the working papers. The CPE Provider described the searches in the working papers as follows: ██████ (174 results in past 12 months, 529 results since 2005), ██████ (77 results in past 12 months, 632 results since 2005). The working papers do not provide a full citation for the searches. FTI included the two searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced two searches in the “UK Guardian” in the working papers. The CPE provider described the searches in the working papers as follows: ██████ (7160 results) and ██████ (6120 results). The working papers do not provide

2-B Uniqueness

The second final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers reflect three references to research or reference material for this sub-criterion.¹¹⁸

3. Criterion 3: Registration Policies

Neither the second final CPE report nor the working papers for the second .GAY evaluation reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

a full citation for the searches. FTI included the two searches among the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider referenced “HRC” in the working papers. The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion;

FTI further notes that the CPE Provider made one reference to the “Trans Advocacy Network” in the working papers. The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion; and

FTI further notes that the CPE Provider stated in the working papers that “The Panel’s research shows that there is a robust network of advocacy, support, and general organizations addressing issues specific to the intersex and transgender communities themselves.” The working papers do not provide a full citation for or any other information about this reference. FTI included this reference as one of the 23 references to research in this sub-criterion.

¹¹⁸ They are:

<http://en.wikipedia.org/wiki/Gay> (cited two times).

FTI notes that the CPE Provider referenced a “Google Search on [REDACTED]” in the working papers. The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the three references to research in this sub-criterion.

4. Criterion 4: Community Endorsement

4-A Support

The second final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers for the second .GAY evaluation reflect six references to research or reference material for this sub-criterion.¹¹⁹

4-B Opposition

The second final CPE report does not reflect any references to research or reference material for sub-criterion 4-B, Opposition, but the working papers for the second .GAY evaluation contain three citations to research or reference material for this sub-criterion.¹²⁰

Additional Research Materials Associated with .GAY

The working papers for the second .GAY evaluation include one document that was not otherwise cited in the final CPE report that the CPE Provider appears to have collected in the course of its evaluation process. Based on its examination, FTI could not discern

¹¹⁹ They are:

<http://www.spimarketing.com/team>;

<http://dotgay.com/faq/>; and

<http://dotgay.com/endorsements/> (This is no longer an active link) (cited three times).

FTI notes that the CPE Provider made one reference to “Organisation websites, including ILGA: <http://ilga.org/about-us/>” in the working papers. The working papers do not provide full citations or identify the URLs for the “Organisation websites” other than ILGA. FTI treated this reference as one of the six references to research in this sub-criterion.

¹²⁰ They are:

<http://www.pdxqcenter.org/about/>;

<http://www.pdxqcenter.org/interim-board-appointed-to-stabilize-q-center-engage-community-about-centers-future/>; and

<http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355>.

if the CPE Provider intended this document to pertain to any particular criterion or sub-criterion.¹²¹

E. .MUSIC (DotMusic Ltd.)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report reflects one citation to reference material for sub-criterion 1-A, Delineation.¹²²

Additionally, the final CPE report makes three references to the CPE Panel’s research, but does not provide citations to, or otherwise indicate the nature of, that research.¹²³

First, the final CPE report states: “The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the [Applicant Guidebook] calls ‘cohesion.’”¹²⁴ The CPE Provider is referring to the Applicant Guidebook’s requirement that a “community” demonstrate “more of cohesion than a mere commonality of interest.”¹²⁵

¹²¹ The document is a copy of an article titled “They do: Same-sex couples are choosing marriage over civil partnership,” *The Economist*, 27 June 2015, <http://www.economist.com/news/britain/21656197-same-sex-couples-are-choosing-marriage-over-civil-partnership-they-do2/> (This link does not lead to the *Economist* article cited by the CPE Provider).

¹²² The CPE report cites “Oxford dictionaries” for the definition of “cohesion.” .MUSIC (DotMusic Ltd.) CPE report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) Pg. 3.

¹²³ .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹²⁴ *Id.*

¹²⁵ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

Because the final CPE report does not provide citations supporting the “further research,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected such “further research.” FTI observed that the CPE Provider’s working papers reflected research undertaken in connection with the Delineation sub-criterion.

Specifically, as noted above, the database sets forth questions for each CPE sub-criterion. With respect to sub-criterion 1-A, Delineation, the database contains the following: “Question 1.1.1: Is the community clearly delineated?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the U.S. Census Bureau’s North American Industry Classification System (NAICS) codes;¹²⁶ (2) the United Nations International Standard Industrial Classification (ISIC) system;¹²⁷ and (3) the Wikipedia page for “Music.”¹²⁸ Accordingly, FTI finds it reasonable to conclude that the “further research” referenced in the final CPE report refers to the research reflected in the working papers.

Second, the final CPE report states:

based on the Panel’s research, there is no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories. Research showed that those organizations that do exist represent members of the defined community only in a limited geographic area or only in certain fields within the community.¹²⁹

The final CPE report also states: “based on . . . the Panel’s research, there is no entity that organizes the community defined in the application in all the breadth of categories

¹²⁶ <http://www.census.gov/eos/www/naics/>.

¹²⁷ http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf.

¹²⁸ <https://en.wikipedia.org/wiki/Music>.

¹²⁹ .MUSIC (DotMusic Ltd.) CPE report (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>) Pg. 3.

explicitly defined.”¹³⁰ In both instances, the CPE Provider is referring to the Applicant Guidebook’s requirement that a community be organized, which the Applicant Guidebook defines to mean that “there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”¹³¹ Organization is a component of Delineation,¹³² and this reference to “the Panel’s research” is noted in the final CPE report’s sub-section on “[o]rganization.”¹³³

Because the final CPE report does not provide citations supporting the “Panel’s research,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected the referenced research. FTI observed that the CPE Provider’s working papers reflect research undertaken in connection with the organization prong of the Delineation sub-criterion. Specifically, the database contains the following question: “Question 1.1.2: Is there at least one entity mainly dedicated to the community?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the website for the International Federation of Arts Councils and Culture Agencies (IFACCA);¹³⁴ (2) the Wikipedia page for “Music;”¹³⁵ (3) the Wikipedia page for “Recording Industry Association of America;”¹³⁶ and (4) the Wikipedia page for “American Federation of

¹³⁰ *Id.*

¹³¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

¹³² *Id.*

¹³³ .MUSIC (DotMusic Ltd.) CPE report Pg. 3 (<https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>).

¹³⁴ http://www.ifacca.org/vision_and_objectives/ (This is no longer an active link).

¹³⁵ <https://en.wikipedia.org/wiki/Music>.

¹³⁶ https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America.

Musicians.”¹³⁷ Accordingly, FTI finds it reasonable to conclude that the research referenced in the final CPE report refers to the research reflected in the working papers.

Including the citations listed above, the working papers contain 13 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹³⁸

1-B Extension

The final CPE report does not reflect any references to research or reference material for sub-criterion 1-B, Extension, but the working papers contain three citations to research or reference material for this sub-criterion.¹³⁹

¹³⁷ https://en.wikipedia.org/wiki/American_Federation_of_Musicians.

¹³⁸ They are:

<https://en.wikipedia.org/wiki/Music> (cited three times);

<http://www.census.gov/eos/www/naics/>;

http://unstats.un.org/unsd/publication/seriesM/seriesm_4rev4e.pdf;

https://en.wikipedia.org/wiki/Recording_Industry_Association_of_America (cited two times);

https://en.wikipedia.org/wiki/American_Federation_of_Musicians (cited two times);

http://www.ifacca.org/vision_and_objectives/ (This is no longer an active link);

http://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf;

http://www.ifacca.org/ifacca_events/ (This is no longer an active link); and

https://en.wikipedia.org/wiki/History_of_music.

¹³⁹ They are:

https://en.wikipedia.org/wiki/History_of_music (cited two times); and

http://media.ifacca.org/files/IFACCA_Stratplan_english_web_July2015FINAL.pdf.

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 2-A, Nexus.

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁴⁰

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain one citation to research or reference material for this sub-criterion.¹⁴¹

¹⁴⁰ They are:
https://en.wikipedia.org/wiki/Definition_of_music; and
Oxford English Reference Dictionary.

¹⁴¹ It is: <http://music.us/about/>.

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

F. .CPA (Australia)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report contains four citations to research or reference material in sub-criterion 1-A, Delineation.¹⁴²

The working papers contain 14 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴³

¹⁴² They are:

<https://www.cpaaustralia.com.au/member-services/fees/australia>;
<https://www.cpaaustralia.com.au/training-and-events>;
<https://www.cpaaustralia.com.au/training-and-events/conferences>; and
<https://www.cpaaustralia.com.au/about-us/ourhistory/archives> (This is no longer an active link).

¹⁴³ They are:

<http://www.cpaaustralia.com.au/> (cited three times);
<https://www.cpaaustralia.com.au/about-us> (cited two times);
<https://www.cpaaustralia.com.au/about-us/ourhistory> (This is no longer an active link);
<https://www.cpaaustralia.com.au/about-us/ourhistory/our-timeline> (cited two times) (This is no longer an active link);
<https://www.cpaaustralia.com.au/member-services>;
<http://www.cpaaustralia.com.au/member-services/renew-my-membership>;
http://en.wikipedia.org/wiki/CPA_Australia (cited three times); and
<http://www.cimaglobal.com/Members/Membershipinformation/> (identified as the result of “A web search on [REDACTED]” (This is no longer an active link).

1-B Extension

The final CPE report contains three citations to research or reference material in sub-criterion 1-B, Extension.¹⁴⁴

The working papers contain five citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴⁵

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report contains two citations to research or reference material in sub-criterion 2-A, Nexus.¹⁴⁶

The working papers contain seven citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁴⁷

¹⁴⁴ They are:

<https://www.cpaaustralia.com.au/about-us>; and

http://docs.employment.gov.au/system/files/doc/other/2211accountantaus_1.pdf (cited two times)
(This is no longer an active link).

¹⁴⁵ They are:

http://en.wikipedia.org/wiki/CPA_Australia (cited two times);

<https://www.cpaaustralia.com.au/about-us/ourhistory/our-timeline> (cited two times) (This is no longer an active link); and

<https://www.cpaaustralia.com.au/training-andevents/conferences> (This is no longer an active link).

¹⁴⁶ They are:

<http://www.forbes.com/sites/peterjreilly/2013/06/26/enrolled-agents-deserve-more-respect/>; and

<http://nasba.org/blog/2010/01/07/january-2010-nasba-addresses-aicpa-sec-conference/>.

¹⁴⁷ They are:

<http://www.cpaaustralia.com.au/about-us>;

<http://www.cpaaustralia.com.au/become-a-cpa/about-the-program> (This is no longer an active link);

http://en.wikipedia.org/wiki/CPA_Australia;

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for criterion 2-B, Uniqueness, but the working papers reflect nine references to research or reference material for this sub-criterion.¹⁴⁸

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

<http://www.cimaglobal.com/Members/Membershipinformation/Global-alliances/CIMA-into-CPA/> (This is no longer an active link);

<http://www.aicpa.org/Pages/default.aspx>;

<http://www.acpa.org.uk>; and

<http://www.aicpa.org/About/Pages/About.aspx/> (This is no longer an active link).

¹⁴⁸ They are:

<http://www.cpahq.org/cpahq/Main/Home/Main/Home.aspx?hkey=98e6b3f2-25d9-4d37-8f03-9ac0745ce845>;

<http://www.cpa.org.au/>;

<https://www.cdnpay.ca/> (This is no longer an active link);

<http://www.cpa-acp.ca/>;

<http://www.cpa.gov.cy/CPA/page.php?pageID=31&langID=0>;

<http://www.cpa.de/en/products.htm> (This link does not lead to the “Products” page of CPA SoftwareConsult GmbH’s website);

http://en.wikipedia.org/wiki/Certified_Public_Accountant; and

<http://en.wikipedia.org/wiki/CPA>;

FTI notes that the CPE Provider referenced a “Google Search on [REDACTED]” in one of the working papers. The working paper does not provide a full citation or identify the URL for the search. FTI included this search as one of the nine references to research in this sub-criterion.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁴⁹

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

G. .HOTEL

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report reflects one reference to research or reference material in sub-criterion 1-A, Delineation.¹⁵⁰ Additionally, the final CPE report states that the Panel observed documented evidence of community activities on the International Hotel and Restaurant Association (“IH&RA”) website and “information on other hotel association websites,” without identifying the websites referenced. The CPE Provider is addressing the Applicant Guidebook’s provision that states that “‘organized’ implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.”¹⁵¹

¹⁴⁹ They are:

<http://www.aicpa.org/Pages/default.aspx>; and

http://www.aicpa.org/about/leadership/pages/melancon_bio.aspx.

¹⁵⁰ The final CPE report references “International Hotel & Restaurant Association’s website.” International Hotel & Restaurant Association’s website is <http://ih-ra.com>, and is cited three times in the working papers.

¹⁵¹ See Applicant Guidebook, Module 4.2.3 at Pgs. 4-11 (<https://newgtlds.icann.org/en/applicants/agn/string-contention-procedures-04jun12-en.pdf>).

Because the final CPE report does not provide citations for the “other hotel association websites,” FTI analyzed the CPE Provider’s working papers to determine if the working papers reflected the “other hotel association websites.” FTI observed that the CPE Provider’s working papers reflect research concerning hotel association websites in connection with the Delineation sub-criterion.

Specifically, with respect to sub-criterion 1-A, Delineation, FTI observed that the database contains the following: “Question 1.1.3: Does the entity . . . have documented evidence of community activities?” FTI observed that the corresponding “Source” field for this question cited the following references that were not otherwise cited in the final CPE report: (1) the Applicant’s website,¹⁵² (2) a webpage on the IH&RA website,¹⁵³ (3) four websites for HOTREC,¹⁵⁴ which the working papers identify as an organization of European hotels and restaurants; (4) a press release from the United Nations World Tourism Organization about its Memorandum of Understanding with IH&RA,¹⁵⁵ (5) a webpage from ETurbo news¹⁵⁶ which, according to the working papers, indicates that HOTREC signed a Memorandum with IH&RA; (6) the Hotel News Resource website;¹⁵⁷ and (7) the website for Green Hotelier,¹⁵⁸ which the working papers indicate is the

¹⁵² <http://www.dothotel.info/>.

¹⁵³ <http://ih-ra.com/achievements-in-advocacy/>.

¹⁵⁴ They are:

<http://www.hospitalitynet.org/news/4064407.html>;

<http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-signmemorandum-of-understanding.aspx> (This is no longer an active link);

<http://www.hotrec.eu/policy-issues/tourism.aspx>; and

<http://www.hotrec.eu/publications-positions.aspx>.

¹⁵⁵ <http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-signmemorandum-Understanding>.

¹⁵⁶ <http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandumunderstanding> (This is no longer an active link).

¹⁵⁷ <http://www.hotelnewsresource.com/article70606.html>.

¹⁵⁸ <http://www.greenhotelier.org/category/our-destinations/>.

magazine for the International Tourism Partnership. Accordingly, FTI finds it reasonable to conclude that the “other hotel association websites” referenced in the final CPE report refer to the websites listed in the working papers.

Including the citations listed above, the working papers contain 29 citations to research or reference material for this sub-criterion that are not otherwise cited in the final CPE report.¹⁵⁹

¹⁵⁹ They are:

<http://ehotelier.com/directory/?associations> (cited two times)
<http://www.gha.com/> (cited three times)
http://www.theindependents.co.uk/en/hotel/location/united_kingdom (cited two times)
<http://hotel-tld.de/> (cited two times)
http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association (cited two times)
[http://ih-ra.com/who-are-our-members/;](http://ih-ra.com/who-are-our-members/)
[http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding;](http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding)
[http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandum-understanding;](http://www.eturbonews.com/44710/hotrec-and-ihra-sign-memorandum-understanding)
[http://www.hotelnewsresource.com/article70606.html;](http://www.hotelnewsresource.com/article70606.html)
[http://www.greenhotelier.org/category/our-destinations/;](http://www.greenhotelier.org/category/our-destinations/)
<http://www.dothotel.info/> (cited three times);
[http://ih-ra.com/ihra-today/;](http://ih-ra.com/ihra-today/)
[http://www.hospitalitynet.org/organization/17000749.html;](http://www.hospitalitynet.org/organization/17000749.html)
[http://ih-ra.com/achievements-in-advocacy/;](http://ih-ra.com/achievements-in-advocacy/)
[http://www.hospitalitynet.org/news/4064407.html;](http://www.hospitalitynet.org/news/4064407.html)
[http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-sign-memorandum-of-understanding.aspx;](http://www.hotrec.eu/newsroom/press-releases-1714/hotrec-and-ihra-sign-memorandum-of-understanding.aspx)
[http://www.hotrec.eu/policy-issues/tourism.aspx;](http://www.hotrec.eu/policy-issues/tourism.aspx)
[http://www.hotrec.eu/publications-positions.aspx;](http://www.hotrec.eu/publications-positions.aspx)
[http://ih-ra.com/ihra-history/;](http://ih-ra.com/ihra-history/)
<http://en.wikipedia.org/wiki/Hotel#History>; and
<http://en.wikipedia.org/wiki/Hotel>.

1-B Extension

The final CPE report did not reflect any references to research or reference material for sub-criterion 1-B, Extension, but the working papers contain ten citations to research or reference material for this sub-criterion.¹⁶⁰

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain one citation to research or reference material for this sub-criterion.¹⁶¹

¹⁶⁰ They are:

<http://www.dothotel.info/> (cited two times);

<http://hotel-tld.de/>;

<http://ih-ra.com/ihra-today/>;

http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association;

<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;

<http://www.tnooz.com/article/how-many-hotels-in-the-world-are-there-anyway-booking-com-keeps-adding-them/>;

http://wiki.answers.com/Q/How_many_hotels_exist_in_the_world?#slide=1;

<http://travel.usatoday.com/hotels/post/2012/04/worldwide-hotel-rooms-2012-smith-travel-research/677093/1> (This is an active link to the website of USA Today, but it leads directly to the publication's "Travel" section, rather than to hotel-related content); and

<http://en.wikipedia.org/wiki/Hotel>.

¹⁶¹ The working papers cite <http://hotel-tld.de/>.

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers reflect two references to research or reference material for this sub-criterion.¹⁶²

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers reflect 12 references to research or reference material for this sub-criterion.¹⁶³

¹⁶² They are:

<http://en.wikipedia.org/wiki/Hotel>; and

FTI notes that the CPE Provider stated in the working papers that an “Internet search on [REDACTED] and [REDACTED] turns up mainly sites discussing the domain name and actual hotels, hotel chains etc[.]” The working papers do not provide a full citation or identify the URL for the search. FTI included this search as one of the two references to research in this sub-criterion.

¹⁶³ They are:

<http://www.dothotel.info/> (cited three times);

<http://ih-ra.com/ihra-today/>;

<http://domainincite.com/10101-big-hotel-chains-pick-a-side-in-hotel-gtld-fight>;

<http://media.unwto.org/press-release/2014-03-12/unwto-and-ihra-sign-memorandum-understanding>;

http://en.wikipedia.org/wiki/International_Hotel_%26_Restaurant_Association;

<http://ih-ra.com/message-from-the-ihra-president/>;

<http://www.tnooz.com/article/how-many-hotels-in-the-world-are-there-anyway-booking-com-keeps-adding-them/>; and

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

Additional Research Materials Associated with .HOTEL

The working papers provided to FTI by the CPE Provider include six documents that were not otherwise cited in the final CPE report that the CPE Provider appears to have created or collected during its evaluation of the Hotel application. Based on its examination, FTI could not discern if the CPE Provider intended these documents to pertain to any particular criterion or sub-criterion.¹⁶⁴

<http://www.otusco.com/Otus%20Hotel%20Analyst%20Size%20and%20Structure%201.pdf>.

FTI notes that the CPE Provider referenced two “web search[es]” in the working papers. The working papers do not provide a full citation or identify the URL for the searches. FTI included these searches as two of the 12 references to research in this sub-criterion.

¹⁶⁴ The documents are five Adobe PDF files and one Microsoft Excel file:

A report by Mintel Group Limited: Hotel Trends – TTA. No. 1 February 2014;

A printout of www.marketline.com’s report on “Global Hotels & Motels October 2012”;

A printout of www.marketline.com’s report on “Global Hotels, Resorts & Cruise Lines July 2013”;

A printout of <http://www.eturbonews.com/22544/nepal-host-international-hotelioers-meets>, “International Hotel and Restaurant Association World Congress: Nepal to Host International Hoteliers’ Meets,” April 28, 2011 (This link does not lead to the article entitled Nepal’s hosting of international hoteliers);

A page which appears to be from a book published by the American Hotel and Lodging Association describing the history and current status of that association; and

A Microsoft Excel spreadsheet named “20140521 hotels research.xls” containing market information about the global and national hotel businesses.

H. .MERCK (KGaA)

1. Criterion 1: Community Establishment

1-A Delineation

The final CPE report does not reflect any references to research or reference material for sub-criterion 1-A, Delineation, but the working papers contain three citations to research or reference material for this sub-criterion.¹⁶⁵

1-B Extension

The final CPE report reflects two references to research or reference material for sub-criterion 1-B, Extension.¹⁶⁶

The working papers contain one citation to research or reference material for this sub-criterion that is not otherwise cited in the final CPE report.¹⁶⁷

¹⁶⁵ The working papers cite <http://www.merckgroup.com/en/index.html> three times under this sub-criterion.

¹⁶⁶ They are:
http://www.emdgroup.com/m.group.us/emd/images/Merck-Infographic-USA_v3_tcm2252_143783.pdf?Version=; and
“Applicant’s website.”

¹⁶⁷ It is: www.who.int/trade/glossary/story073/en/ (This is no longer an active link).
FTI notes that the working papers also reflect one reference to Merck KGaA’s “company website,” which FTI understands to be synonymous with the “Applicant’s website” referenced in the final CPE report. Because the final CPE report references Merck KGaA’s website, FTI included that citation in its analysis of the final CPE report (even though the Panel did not include the URL in the final report); therefore, this reference to the company website was referenced in the final CPE report.

2. Criterion 2: Nexus between Proposed String and Community

2-A Nexus

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-A, Nexus, but the working papers contain four citations to research or reference material for this sub-criterion.¹⁶⁸

2-B Uniqueness

The final CPE report does not reflect any references to research or reference material for sub-criterion 2-B, Uniqueness, but the working papers contain four citations to research or reference material for this sub-criterion.¹⁶⁹

3. Criterion 3: Registration Policies

Neither the final CPE report nor the working papers reflects any reference to research or reference material for criterion 3, Registration Policies, or any of its sub-criteria (3-A, Eligibility, 3-B, Name Selection, 3-C, Content and Use, and 3-D, Enforcement).

¹⁶⁸ They are:

https://en.wikipedia.org/wiki/Merck_%26_Co (cited two times);
https://en.wikipedia.org/wiki/Merck_Group; and
<http://www.merckgroup.com/en/index.html>.

¹⁶⁹ They are:

<http://www.bloomberg.com/news/articles/2014-02-10/a-tale-of-two-mercks-as-protesters-takeonwrong-company> (This is no longer an active link);
https://en.wikipedia.org/wiki/Merck_%26_Co;
https://en.wikipedia.org/wiki/Merck_Group; and
<http://www.merck.com/index.html>.

4. Criterion 4: Community Endorsement

4-A Support

The final CPE report does not reflect any references to research or reference material for sub-criterion 4-A, Support, but the working papers contain two citations to research or reference material for this sub-criterion.¹⁷⁰

4-B Opposition

Neither the final CPE report nor the working papers reflects any reference to research or reference material for sub-criterion 4-B, Opposition.

VI. Conclusion

FTI observed that of the eight relevant CPE reports, two (.CPA and .MERCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced

¹⁷⁰ They are:
www.merckgroup.com/; and
https://en.wikipedia.org/wiki/Merck_Group.

was cited in the CPE Provider's working papers associated with the first .GAY evaluation.

**ROADMAP FOR CONSIDERATION OF PENDING RECONSIDERATION REQUESTS
RELATING TO COMMUNITY PRIORITY EVALUATION (CPE) THAT WERE PLACED
ON HOLD PENDING COMPLETION OF THE CPE PROCESS REVIEW**

Pending Reconsideration Requests

The Board Governance Committee (BGC) previously determined that the following Reconsideration Requests relating to the CPE process that were pending at the time the CPE Process Review commenced would be on hold until the CPE Process Review was completed.¹

- Request 14-30: Dot Registry, LLC (.LLC), filed 25 June 2014, withdrawn 7 December 2017;
- Request 14-32: Dot Registry, LLC (.INC), filed 16 June 2016, withdrawn 11 December 2017;
- Request 14-33: Dot Registry, LLC (.LLP), filed on 26 June 2014, withdrawn on 15 February 2018.
- Request 16-3: dotgay LLC (.GAY), filed on 17 February 2016;
- Request 16-5: DotMusic Limited (.MUSIC), filed on 24 February 2016;
- Request 16-8: CPA Australia Limited (.CPA), filed on 15 July 2016;
- Request 16-11: Travel Reservations SRL, Spring McCook, LLC, Minds + Machines Group Limited, Famous Four Media Limited, dot Hotel Limited, Radix FZC, dot Hotel Inc., Fegistry, LLC (.HOTEL), filed on 25 August 2016; and
- Request 16-12: Merck KGaA (.MERCK), filed on 25 August 2016

Each of the foregoing requests was filed before the Bylaws were amended in October 2016 and are subject to the Reconsideration standard of review under the Bylaws that were in effect at the time that the requests were filed. Under the Bylaws that were in effect prior to October 2016, the Board delegated to the Board Governance Committee (BGC) the authority to make a final determination on requests regarding staff action; Board consideration of the BGC's determination was not required, but optional if the BGC deemed it appropriate for a full Board determination. As noted above, Requests 14-30, 14-32, and 14-33 were withdrawn on 7 December 2017, 11 December 2017, and 15 February 2018, respectively. Of the remaining five pending requests, the following relate to staff action and would not require Board action: 16-5, 16-8, and 16-12. However, given the public nature of the CPE Process Review, the Board Accountability Mechanisms Committee (BAMC) may choose to make recommendations to the Board rather than make Final Determinations.

¹ See Letter from Chris Disspain to All Concerned Parties, 17 April 2017, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

Roadmap for Consideration of Pending Reconsideration Requests

1. Offer the requestors of the pending Reconsideration Requests the opportunity to submit additional information relating to their requests, provided that the submission is limited to any new information/argument based upon the CPE Process Review Reports. Any such additional submission shall be limited to ten pages. Allow two weeks for requestors to submit any such supplemental materials.
2. Offer the requestors of the pending Reconsideration Requests the opportunity to make an oral presentation to the BAMC, including the requestors who previously presented to the BGC.
3. Consider the pending requests once the requestors have presented to the BAMC (or provided confirmation that they do not intend to present to the BAMC) in the order in which the requests were filed, if possible. The following is a proposed schedule:
 - a. Schedule two presentations per BAMC meeting, perhaps by setting a couple of meetings as soon as possible after ICANN61.
 - b. Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions (as outlined in para. 1, above), materials presented in the oral presentations (as outlined in para. 2, above), any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.

ARIF HYDER ALI

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January 15, 2018

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: FTI Consulting’s Evaluation and Findings Regarding the Community Priority Evaluation Process

Dear Members of the ICANN Board:

We write on behalf of our client, dotgay LLC (“dotgay”), regarding FTI Consulting’s (“FTI”) recent reports addressing: (1) ICANN’s interactions with the Community Priority Evaluation (“CPE”) Provider;¹ (2) the CPE Provider’s consistency in applying the CPE criteria;² and (3) the reference materials relied upon by the CPE Provider for the eight evaluations with pending reconsideration requests.³ (We refer to FTI’s three reports collectively herein as the “Report.”)

To put it simply, the Report can only be described as a “whitewash.” We strongly urge the Board to review it with a skeptical eye and to not rely on the purported analyses it contains or its conclusions. Basic decency requires this; ICANN’s organizational integrity rests on it; and critical social, cultural, and economic rights that are vital to the gay community could be seriously impaired were the Board to proceed otherwise. Even a cursory review of the Report should lead the Board to conclude that the Report is methodologically flawed and substantively incomplete, and that the FTI personnel who conducted the review did

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

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

³ FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017) (“Scope 3 Report”), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

not have the requisite qualifications to perform certain parts of the review. The lack of transparency that shrouded the purported investigation is equally troubling.

We recall full well the circumstances (*i.e.*, the decision of the IRP Panel in *Dot Registry LLC v. ICANN*) that precipitated the Board's commissioning of the investigation, as well as the fanfare with which ICANN announced that it was conducting "an **independent review**" of the CPE Process.⁴ The following statements by ICANN's General Counsel during a public forum organized at ICANN's March 2017 meeting in Copenhagen are but a few examples of what ICANN stakeholders and affected parties like dotgay were led to believe by ICANN about the investigation:

- FTI will be "digging in very deeply" and that there will be "a full look at the community priority evaluation;"⁵
- ICANN instructed FTI "to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators' approach to it, and they're digging in very deeply and . . . trying to understand the complex process of the new gTLD program and the community priority evaluation process;"⁶ and
- "when the Board Governance Committee and the board's discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved."⁷

⁴ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁵ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁶ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁷ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

To put it bluntly: FTI did not “dig[] in very deeply,” or “try to understand the complex process” of the CPE process, or undertake a “full look” at it.

ICANN did not seek any input from ICANN stakeholders and affected parties regarding the scope or methodology for the investigation; did not reveal upfront the identity of the investigator so that, for example, the community could provide input on potential conflicts of interest; was not at all transparent about what information would be reviewed by FTI; did not instruct FTI to evaluate the substantive correctness or sufficiency of the research undertaken by the CPE Provider; and did not instruct the investigator to interact with the parties that would be impacted by the outcome of the investigation, or review the information that they provided.

FTI was tasked with performing a “full look” at the CPE Process as part of its independent review.⁸ Its investigative team was required to exercise “diligence, critical analysis, and professional skepticism in discharging professional responsibilities” and to ensure that its conclusions are “supported with evidence that is relevant, reliable and sufficient.”⁹ By any objective measure, this did not happen. Indeed, FTI itself states that it did not: (1) re-evaluate the CPE applications; (2) rely upon the substance of the reference material; (3) assess the propriety or reasonableness of the research undertaken by the CPE Provider; (4) interview the CPE applicants; or (5) take in to consideration the information and materials provided by applicants.

The report reveals that FTI’s investigation was cursory at best; its narrow mandate¹⁰ and evaluation methodology were designed to do little more than vindicate ICANN’s

⁸ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://schr.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁹ Association of Certified Fraud Examiners, CFE Code of Professional Standards (10 Sep. 2014), p. 2, https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/Code-of-Standards-2014.pdf. FTI “followed the internal investigative methodology . . . codified by the Association of Certified Fraud Examiners (ACFE).” Scope 1 Report, p. 3.

¹⁰ FTI failed to address other significant issues with the CPE process, including that: (1) the CPE Provider, the Economist Intelligence Unit (“EIU”), improperly implemented and applied additional processes and CPE criteria *after* receiving the community applications; (2) the EIU acted contrary to the New gTLD Applicant Guidebook (“AGB”) when collecting and interpreting information for the CPE; (3) the EIU permitted third parties to perform substantive tasks in the CPE process for community applications, in contravention of the AGB and the EIU’s own additional processes; (4) the EIU implemented the CPE contrary to human rights principles; (5) the EIU and ICANN failed

administration of the CPE process. FTI received almost no input from the CPE Provider and made no effort to evaluate the substance of the research upon which the CPE Provider relied in drawing its conclusions. Mere cite counting and cite checking is not “digging deeply,” or by any stretch of the imagination a “full look.” Moreover, serious questions must be asked about the qualifications of the individual investigators who undertook the Scope 2 review.

It is evident that FTI engaged in a seemingly advocacy-driven investigation to reach conclusions that would absolve ICANN of the demonstrated and demonstrable problems that afflicted the CPE process.

Accordingly, we request that the ICANN Board take *no* action with respect to the conclusions reached by FTI, until dotgag, and indeed all concerned parties, have had an opportunity to provide comments on the FTI Report and to be heard.

dotgag reserves all of its rights and remedies all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali

AAA

to properly consider documentation supporting community applications, including expert reports; (6) ICANN and the EIU permitted panelists with clear conflicts of interest to participate in the evaluation of community applications; (7) ICANN improperly accepted and adopted the EIU's determinations, with all of the aforementioned problems, without question and without possibility of appeal; (8) the CPE process developed and enforced by ICANN does not conform with ICANN's core principles; and (9) ICANN's actions related to the CPE process violated its own Bylaws.

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January 20, 2018

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: ICANN Board Determination Regarding dotgay

Dear Members of the ICANN Board:

We write on behalf of our client, dotgay LLC (“**dotgay**”) with reference to our letter of 15 January 2018, in which we requested that the ICANN Board take no action with respect to the conclusions set out in FTI Consulting reports prior to receiving dotgay’s detailed comments on the reports’ methodological and substantive flaws.

We further request that before the Board places any reliance on the FTI reports, it carefully review and consider dotgay’s previous submissions prior to making a decision relating to dotgay’s community application and Reconsideration Request 16-3.¹ We direct the Board, in particular, to the following – which independently and collectively confirm the arbitrary and discriminatory manner in which dotgay’s application was treated by the EIU and ICANN:

- (i) the Council of Europe’s Report on “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective;”²
- (ii) the ICANN Ombudsman Chris LaHatte’s Report;³

¹ Reconsideration Request 16-3 (17 Feb. 2016), <https://www.icann.org/en/system/files/files/reconsideration-16-3-dotgay-request-17feb16-en.pdf>.

² Council of Europe, “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

³ Chris LaHatte, Dot Gay Report (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>.

- (iii) the ICC Expert's Determination regarding .LGBT;⁴
- (iv) the Expert Opinion of Professor William N. Eskridge of Yale Law School;⁵ and
- (v) the Expert Opinion of Professor M.V. Lee Badgett, Professor of Economics and Director of the School of Public Policy at the University of Massachusetts.⁶

Dotgay reserves all of its rights in law and equity in any forum worldwide.

Sincerely,



Arif Hyder Ali
Partner

⁴ *The International Lesbian Gay Bisexual Trans and Intersex Association v. Afiliat Limited*, ICC Case No. EXP/390/ICANN/7, Expert Determination (16 Nov. 2013), ¶ 22, <https://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-868-8822-en.pdf>.

⁵ Letter to ICANN Board from A. Ali, enclosing the Eskridge Report (13 Sept. 2016), pp. 2-3, <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-13sep16-en.pdf>.

⁶ Letter to ICANN Board from A. Ali, enclosing the Badgett Report (17 Oct. 2016), pp. 1-2, <https://www.icann.org/en/system/files/correspondence/ali-badgett-to-icann-board-17oct16-en.pdf>.

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January 16, 2018

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
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Re: FTI's Reports

Dear ICANN Board and Board Accountability Mechanisms Committee members:

We write on behalf of our client, DotMusic Limited (“DotMusic”), regarding FTI Consulting’s (“FTI”) evaluation and the FTI Report (the “Report”).

The Report was clearly designed as a “fig leaf” to protect ICANN and the CPE provider from being accountable for flaws that were endemic to the CPE process. ICANN’s Board should conclude that the Report has methodological flaws and is incomplete. ICANN’s Board should critically evaluate the Report and not accept its wholesale conclusions. It speaks volumes that the investigation lacks transparency and the identities of the personnel involved are shrouded in mystery.

In late 2016, ICANN announced that it was conducting “an *independent review*” of the CPE Process.¹ During a public forum organized at ICANN’s March 2017 meeting in Copenhagen, John Jeffrey, ICANN’s General Counsel, confirmed that:

- FTI will be “digging in very deeply” and that there will be “a full look at the community priority evaluation;”²

¹ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

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

- ICANN instructed FTI “to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and . . . trying to understand the complex process of the new gTLD program and the community priority evaluation process;”³ and
- “when the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”⁴

Despite these assurances, the opposite occurred. FTI did not “dig [] in very deeply” or “try to understand the complex process” of the CPE or conduct a “full look” into it. For nearly a year, ICANN continued to stonewall behind its assertion that it was undertaking a purported “independent review” of the CPE process,⁵ while at the same time concealing FTI’s true mandate and narrow evaluation methodology from the CPE applicants. It was only on 13 December 2017, *after* FTI completed its investigation of the CPE process (without inviting comments from a single CPE applicant), that ICANN published FTI’s evaluation and findings regarding the CPE process.

FTI was tasked to perform a “full look” at the CPE Process as part of its independent review.⁶ Its investigative team was required to exercise “diligence, critical analysis and

³ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁴ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

⁵ Adopted Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁶ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

professional skepticism in discharging professional responsibilities” and to ensure that its conclusions are “supported with evidence that is relevant, reliable and sufficient.”⁷ The FTI’s investigation did not live up to its instructions to perform a comprehensive look at the CPE process; its narrow mandate⁸ and evaluation methodology were deliberately designed to protect ICANN. FTI admitted it did not re-evaluate the CPE applications or rely upon the substance of the reference material or even assess the propriety or reasonableness of the research undertaken by the CPE Provider. Fundamentally, it refused to interview the CPE applicants. In fact, the FTI deliberately ignored the information and materials provided by the applicants.

On 18 January 2017, Article 19,⁹ a U.K. based human rights organization, and the Council of Europe organized a webinar on Community Top-level Domains (TLDs) and Human Rights to discuss community objections, the CPE process, ICANN’s accountability mechanisms, and concepts for the next gTLD application rounds. The speakers included Cherine Chalaby, (then an ICANN Board Member and current Chairman of ICANN); Mark

⁷ Association of Certified Fraud Examiners, CFE Code of Professional Standards (10 Sep. 2014), p. 2, https://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/Code-of-Standards-2014.pdf. FTI “followed the internal investigative methodology . . . codified by the Association of Certified Fraud Examiners (ACFE).” Scope 1 Report, p. 3.

⁸ FTI failed to address other significant issues with the CPE process, including that: (1) the CPE Provider, the Economist Intelligence Unit (“EIU”), improperly implemented and applied additional processes and CPE criteria *after* receiving the community applications; (2) the EIU acted contrary to the New gTLD Applicant Guidebook (“AGB”) when collecting and interpreting information for the CPE; (3) the EIU permitted third parties to perform substantive tasks in the CPE process for community applications, in contravention of the AGB and the EIU’s own additional processes; (4) the EIU implemented the CPE contrary to human rights principles; (5) the EIU and ICANN failed to properly consider documentation supporting community applications, including expert reports; (6) ICANN and the EIU permitted panelists with clear conflicts of interest to participate in the evaluation of community applications; (7) ICANN improperly accepted and adopted the EIU’s determinations, with all of the aforementioned problems, without question and without possibility of appeal; (8) the CPE process developed and enforced by ICANN does not conform with ICANN’s core principles; and (9) ICANN’s actions related to the CPE process violated its own Bylaws.

⁹ Article 19 (last visited 10 Jan. 2018), <https://www.article19.org/>.

Carvell, GAC Vice-Chair & Co-Chair of the GAC Working Group on Human Rights and International Law, and Chris Disspain, ICANN Board Member.

During the webinar, the Board members admitted that the CPE Provider inconsistently applied the AGB and unfairly treated the community priority applicants. For example, Cherine Chalaby stated:

In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE and that's a personal observation and there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases. So this is one of the recommendations, the recommendation of fixing that area, I think that it is an important recommendation that ought to be taken into account very seriously.¹⁰

Likewise, Mark Carvell stated that:

But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.

...

The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would

¹⁰

ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

operate fairly. *That was not happening.* Became as I say an issue of increasing concern for many of us on the GAC.¹¹

Therefore, the Board's adoption of the FTI's findings will be fundamentally inconsistent with the unfairness and inconsistency issues that Board itself recognized in the CPE process.

As neutral investigator hired by ICANN to pursue a "*independent review*" of the CPE Process, FTI should have also attempted 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. Instead, FTI sheltered the EIU's decisions, no matter how irrational or arbitrary, thus seriously calling into question its own credibility. As a result, FTI's findings are unreliable, unfair, and incorrect, while at the same time raising potential serious conflict of interest, bias and collusion concerns.

Accordingly, we request that the ICANN Board take no action with respect to the conclusions reached by FTI, until DotMusic, and indeed all affected parties, have been provided with the underlying materials reviewed by the FTI, and subsequently had an opportunity to respond to the FTI Report. To do otherwise would violate DotMusic's right to be heard.

DotMusic reserves all of its rights and remedies in all available fora whether within or outside of the United States of America.



Sincerely,

Arif Hyder Ali

¹¹ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), p. 12, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 and (emphasis added).

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January 31, 2018

VIA E-MAIL

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Re: Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process

Dear Members of the ICANN Board:

On behalf of our client, dotgay LLC (“dotgay”), please find attached the Second Expert Opinion of Professor William N. Eskridge, Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, addressing FTI’s purported “independent” review of the CPE process.

Professor Eskridge’s Second Expert Opinion unequivocally concludes that FTI Consulting, Inc.’s (“FTI”) findings are based on a superficial investigative methodology wholly unsuited for the purpose of an independent review. His Opinion confirms that the Economist Intelligence Unit’s (“EIU”) evaluation of dotgay’s application was incorrect, superficial, and discriminatory. In fact, a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind.

We urge – indeed beseech – the Board (i) to not rely on the FTI Reports in determining how to proceed with dotgay’s application; (ii) to not hide behind technicalities and process; (iii) to carefully review Professor Eskridge’s two detailed expert opinions; (iv) to act in accordance with the spirit and letter of ICANN’s Articles of Incorporation, Bylaws, gTLD Applicant Guidebook (“AGB”), and the most basic principles of fairness, decency, and morality; and, on these bases, (v) to approve dotgay’s community priority application.

If the Board needs expert support for its consideration of dotgay’s application, we respectfully submit that it has Professor Eskridge. Professor Eskridge is a renowned expert in both legal interpretation and in sexuality, gender, and the law. He is, according to recent empirical ranking of law review citations, among the ten most-cited legal scholars in American history. He has delved in to the AGB and the Community Priority Evaluation (“CPE”) Process, and has provided empirical evidence as to why dotgay’s application

should be granted community priority status. He has demonstrated that to do otherwise would be discriminatory and unfair, and he has laid bare a number of fundamental flaws in FTI's investigation and analysis. He is available at any time to present his findings to ICANN's General Counsel, ICANN's outside counsel, and to the Board.

Professor Eskridge analyzes two of the three reports drafted by FTI: the "Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports" ("Scope 2 Report"), and the "Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests" ("Scope 3 Report"). As part of this analysis, Professor Eskridge identifies the reports' fundamental errors, performs a substantive review of dotgay's application, and explains why dotgay should receive community priority status based upon a proper application of the CPE criteria to its application.

Professor Eskridge disagrees with the Scope 2 Report's conclusion that the EIU consistently applied the CPE criteria throughout the CPE process. After determining that the "Scope 2 Report is long on description and conclusory statements and short on actual evaluation,"¹ Professor Eskridge demonstrates several flaws in FTI's Scope 2 Report:

1. FTI "failed to recognize or engage the many criticisms of the EIU Panel's application of ICANN's and CPE's guidelines to the dotgay and other applications."²
2. FTI's conclusion, that "the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements,"³ "was supported by no independent analysis."⁴ In fact, "the approach followed by FTI was a 'description' of the CPE Reports, but not an 'evaluation' to determine whether the CPE Reports were actually following the applicable guidelines."⁵
3. "Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of

¹ Second Eskridge Opinion, ¶ 3.

² Second Eskridge Opinion, ¶ 37.

³ Second Eskridge Opinion, ¶ 38.

⁴ Second Eskridge Opinion, ¶ 38.

⁵ Second Eskridge Opinion, ¶ 38.

ICANN’s guidelines, FTI made the same separate but interrelated mistakes” as in the CPE Reports.⁶

4. FTI “completely failed to examine the EIU Panel’s analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.”⁷

Professor Eskridge likewise examines the Scope 3 Report and concludes that the report “provides evidence that undermines the factual bases for the CPE Report’s conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).”⁸ His study of the sources referenced in the Scope 3 Report, the very sources to which the EIU cited in support of its adverse findings against dotgay, reveals that “some of those sources directly support dotgay’s position.”⁹ For instance, one of the EIU’s major sources confirms that the term “gay” is in fact a well-recognized umbrella term for the entire LGBT community – completely contrary to the EIU’s determination in dotgay’s CPE. How could FTI have missed this? Is such a blatant omission, coupled with FTI’s superficial analysis, evidence of intentional discrimination against the gay community by ICANN, the EIU and FTI?

We respectfully submit that the best interests of ICANN as an organization would not be served by letting this matter go to an Independent Review Process. Accordingly, pursuant to the Board’ obligation to exercise due diligence, due care, and independent judgment, we sincerely hope that the Board will (1) review and agree with Professor Eskridge’s expert opinions; (2) reject the findings made by FTI in the FTI Reports; and (3) grant dotgay’s community priority application without any further delay.

Sincerely,



Arif Hyder Ali

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⁶ Second Eskridge Opinion, ¶ 42.
⁷ Second Eskridge Opinion, ¶ 76.
⁸ Second Eskridge Opinion, ¶ 37.
⁹ Second Eskridge Opinion, ¶ 88.

SECOND EXPERT REPORT

PROFESSOR WILLIAM N. ESKRIDGE, JR.

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY1

II. QUALIFICATIONS OF THE EXPERT4

III. BACKGROUND AND RELEVANT ICANN DIRECTIVES5

A. DOTGAY’S APPLICATION AND THE CPE REPORT 5

B. THE GOVERNING DIRECTIVES: ICANN’S BYLAWS AND ITS APPLICANT GUIDEBOOK..... 6

C. THE ICANN COMMUNITY NEXUS CRITERION AND ITS APPLICATION IN THE CPE REPORT7

D. THE ICANN COMMUNITY ENDORSEMENT CRITERION AND ITS APPLICATION IN THE CPE REPORT12

E. RECONSIDERATION OF THE CPE REPORT AND THE CPE PROCESS REVIEW BY FTI.....13

IV. THE FTI SCOPE 2 REPORT COMPLETELY MISSED THE IMPORTANT WAYS THE CPE REPORT MISINTERPRETED OR IGNORED THE ESTABLISHED DIRECTIVES FOR EVALUATING APPLICATIONS.....16

A. IN ITS ANALYSIS OF THE NEXUS CRITERION, THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS17

1. The EIU Panel and FTI Substantially Ignored The Primary Test for Nexus: Is the Proposed String a “Well Known Short-Form or Abbreviation of the Community”?.....18

2. The EIU Panel and FTI Created an “Under-Reach” Criterion for Nexus That Is Inconsistent with the Applicant Guidebook and Applied the Novel Criterion to Create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws20

3. The CPE Report Ignored and Is Inconsistent with ICANN’s Bylaws24

B. IN ITS APPLICATION OF THE NEXUS CRITERION, THE CPE REPORT WAS INCONSISTENT WITH THE CPE GUIDELINES AND PREVIOUS CPE REPORTS AND VIOLATED ICANN’S NON-DISCRIMINATION DIRECTIVE26

1.	The CPE Report Was Inconsistent with the CPE Guidelines.....	27
2.	The CPE Report Was Inconsistent with the EIU’s Own Previous Reports	32
C.	IN ITS ANALYSIS OF THE COMMUNITY ENDORSEMENT CRITERION, THE CPE REPORT MISAPPLIED ICANN’S APPLICANT GUIDEBOOK, IGNORED ITS BYLAWS, AND EVALUATED THE REQUIREMENT LESS GENEROUSLY THAN IN OTHER CPE REPORTS	34
V.	THE FTI SCOPE 3 REPORT CONFIRMS DOTGAY’S CLAIM THAT THE EIU PANEL IGNORED IMPORTANT EVIDENCE THAT SUPPORTS FULL CREDIT UNDER THE NEXUS CRITERION.....	39
A.	FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER NONCONFORMISTS, AND NOT JUST A TERM FOR HOMOSEXUAL MEN	44
B.	“GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND “ALLIED” PERSONS	58
VI.	CONCLUSION AND SIGNATURE.....	65

APPENDICES

APPENDIX 1

**CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF
JURISPRUDENCE, YALE LAW SCHOOL**

APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

I. EXECUTIVE SUMMARY

- 1 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures and standards established by the Internet Corporation for Assigned Names and Numbers (ICANN). A Community Priority Evaluation (CPE) Report, authored by the Economist Intelligence Unit (EIU), identified by FTI Consulting, Inc. as the CPE Provider, recommended that the application be denied. The predominant reason given was that dotgay did not meet the nexus requirement between the applied-for string (“.gay”) and the community of people who do not conform to traditional norms of sexuality and gender, namely, the community to be served by the string. Also, the EIU Panel authoring the Report incorrectly awarded dotgay only partial scores for the community endorsement requirement. Dotgay promptly requested reconsideration of and objected to the conclusions of its CPE Report, on the grounds that it did not properly follow the directives of the ICANN Guidebook and the principles of the ICANN Bylaws, was inconsistent with the CPE Reports for other applications, and rested upon an incomplete understanding of the facts.
- 2 Responding to the objections that dotgay and other community applicants that were raised against the CPE process, as well as certain findings of the IRP Panels in the Dot Registry and Despegar proceedings, the ICANN Board of Directors ordered a CPE Process Review. FTI Consulting, Inc. (FTI) was retained to conduct the Review. Scope 2 of the Review was supposed to be an “evaluation of whether the CPE criteria were applied consistently throughout each CPE Report.” Scope 3 was supposed to be a “compilation of the reference material relied upon by the CPE Provider * * * for the evaluations which are the subject of pending

Reconsideration Requests,” such as that of dotgay. On December 13, 2017, ICANN published FTI’s Scope 2 and Scope 3 Reports, as well as its Scope 1 Report. This Second Expert Report focuses on the Scope 2 and Scope 3 FTI Reports.

- 3 The **FTI Scope 2 Report** “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner” (p. 3). Unfortunately, the FTI Scope 2 Report is long on description and conclusory statements and short on actual evaluation. At best, it is superficial; at worst, it echoes the errors and confusion of the CPE Report for dotgay’s application. As I show in this Second Expert Report, the FTI Scope 2 Report (a) not only fails to correct the EIU Panel’s many erroneous interpretations of ICANN’s fundamental directives, but sometimes adds new mistakes of its own (such as FTI’s own erroneous statements about the requirements reflected in Criterion #2, Nexus); (b) fails to engage with the evident inconsistencies in the EIU Panel’s application of the standards to the .RADIO, .HOTEL, .OSAKA, and .SPA applications and to the .GAY application; and (c) tries to paper over the demonstrable fact that the EIU Panel showed no interest in or knowledge of gay history, made no serious attempt to gain such knowledge, misunderstood the deep interrelationship among sexual and gender minorities historically and currently, and had no systematic method for determining how the general population refers to LGBTQUIA people and their community.
- 4 The **FTI Scope 3** Report describes FTI’s compilation of the reference materials relied upon by the EIU for each of the eight pending Reconsideration Requests, including that of dotgay’s

second evaluation (p. 3 & note 11). A review of the FTI Scope 3 Report confirms the substantive criticisms of the EIU Panel’s CPE Report on the dotgay application, as outlined in the previous paragraph. Specifically, the FTI Scope 3 Report reveals that most of the evidence relied upon by the EIU Panel was not actually identified in the CPE Report (pp. 35-37), and confirms that the Panel employed no systematic methodology to determine whether, in fact, “gay” is a term that describes the broad community that includes transgender and intersex persons. Moreover, much of the evidence FTI found in the Panel’s working papers actually supports dotgay’s objections to the CPE Report’s scores for Nexus and Community Endorsement. This raises serious red flags because it calls into question whether anyone actually read the sources that the EIU Panel says it consulted.

- 5 The only proper methodological response to the many failures of the EIU Panel’s determinations would have been a substantive review of the affected applications, namely, a review that considered dotgay’s and other applicants’ objections to the EIU Panel’s interpretations of ICANN directives, its implementation of those directives for different applications, and the research methodology and findings of the EIU staff.¹ FTI chose to conduct a different kind of review—one that can only be described as superficial and far from fit for its assigned purpose. Accordingly, in my expert opinion, I do not see how the Board can rely on FTI’s review and still comply with the requirement of ICANN’s Bylaws that

¹ As part of this methodological response, for example, FTI should have taken into consideration my Expert Report of September 2016, Professor Lee Badgett’s Expert Report, the Council of Europe Report, the Recommendation from ICANN’s Ombudsman, and the ICC Independent Expert Determination. It does not appear to have done any of this.

decisions must be made by applying documented policies neutrally and objectively, with integrity and fairness, as well without discrimination.

II. QUALIFICATIONS OF THE EXPERT

6 I, the undersigned Professor William N. Eskridge Jr., the John A. Garver Professor of Jurisprudence at the Yale Law School, have been retained as an expert by dotgay LLC, to provide an independent expert opinion on the validity of the ICANN Community Priority Evaluation (CPE) Report prepared by the Economist Intelligence Unit (EIU), which evaluated dotgay’s community-based application ID 1-1713-23699 for the proposed generic Top-Level Domain (gTLD) string “.gay”, as well as FTI’s review of the CPE process.

7 I offer myself as an expert both in legal interpretation and in sexuality, gender, and the law. In both areas, I have published field-establishing casebooks,² leading monographs,³ and dozens

² William N. Eskridge Jr. & Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 1988, now in its fifth edition); William N. Eskridge Jr. & Nan D. Hunter, *Sexuality, Gender, and the Law* (Foundation 1997, now in its fourth edition). See generally Richard A. Posner, Book Review, 74 Va. L. Rev. 1867 (1988) (reviewing the Eskridge and Frickey casebook and declaring it the best set of materials, “by far,” ever published in the field of legislation and suggesting that it would “alter the law school curriculum”).

³ For interpretation, consult William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (Foundation 2016), and *Dynamic Statutory Interpretation* (Harvard 1994), as well as William N. Eskridge Jr., *A Republic of Statutes: The New American Constitution* (Yale 2010) (with John Ferejohn). For sexuality, gender, and the law, see William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard 1999), and *Dishonorable Passions: Sodomy Law in America, 1861-2003* (Viking 2008), and *Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence* (Oxford 2006) (co-authored with Darren Spedale).

of law review articles (most of them cited in my curriculum vitae, which is Appendix 1 to this Expert Report). According to recent empirical rankings of law review citations, I am among the ten most-cited legal scholars in American history.⁴

- 8 My expert opinion is based on the: (i) background and relevant facts presented herein; (ii) study of ICANN’s gTLD Applicant Guidebook (AGB), especially Module 4.2.3, “Criterion #2: Nexus Between Proposed String and Community” and “Criterion #4 Community Endorsement”; (iii) the history of the terminology in dispute, especially the term “gay” and its applicability to the community of sexual and gender nonconformists and their allies; and (iv) standard practices and empirical analyses to determine popular understanding of relevant terms.

III. BACKGROUND AND RELEVANT ICANN DIRECTIVES

A. DOTGAY’S APPLICATION AND THE CPE REPORT

- 9 Dotgay LLC filed a community-based generic Top-Level Domain (gTLD) application for the string “.gay”, under procedures established by ICANN (the Internet Corporation for Assigned Names and Numbers).

⁴ According to the 2013 Hein-Online study, I was the sixth most-cited scholar in American history. See <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> (most recently viewed January 23, 2018).

10 The EIU Panel completed its first evaluation and report on the dotgay application in October 2014, but a procedural error was identified and the BGC determined that the application should be reevaluated. A second evaluation and report were completed on October 15, 2015. References in this Second Expert Report will be to the second CPE evaluation and report, which I shall refer to as the CPE Report.

B. THE GOVERNING DIRECTIVES: ICANN’S BYLAWS AND ITS APPLICANT GUIDEBOOK

11 The governing legal materials include ICANN’s Bylaws and its Applicant Guidebook. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

12 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

13 ICANN’s Applicant Guidebook sets forth procedures and standards for applications, including applications for community-based applications such as dotgay’s application. *See* AGB, Module 4.2. There are four community priority evaluation criteria: definition of the relevant “community,” nexus between the proposed string and the community, registration policies, and community endorsement. AGB, Module 4.2.3. Each criterion carries with it a possible score of 4 points, for a potential total of 16 points. To secure approval, the applicant must achieve a score of 14 of 16 points. The EIU Panel awarded dotgay a score of 10 out of 16 points, including a score of 0 out of 4 points for Criterion #2, the community nexus requirement, and a score of 2 out of 4 points for Criterion #4, the community endorsement requirement.

C. THE ICANN NEXUS CRITERION AND ITS APPLICATION IN THE CPE REPORT

14 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications, such as dotgay’s application. Dotgay’s petition lost 4 of 4 possible points on Criterion #2, “Nexus Between Proposed String and Community (0-4 Points).” In this part of this Second Expert Report I focus on the nexus element, which is responsible for 3 of the 4 points. (A uniqueness element accounts for the other point; it was automatically lost when the EIU Panel awarded 0 of 3 points for the nexus requirement.)

15 An application merits **3 points** for the nexus element if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p.4-12 (emphasis added). “Name” of the community means “the established name by which the community is commonly known by others.” AGB, p. 4-13. “[F]or a score of 3, the essential

aspect is that the applied-for string is commonly known by others as the identification/name of the community.” AGB, p. 4-13.

- 16 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.
- 17 An application merits **1 point** (in addition to the 2 or 3 above) if it demonstrates that there is a nexus between string and community and, further, that the “[s]tring had no other significant meaning beyond identifying the community described in the application.” AGB, p. 4-13.
- 18 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus element. CPE Report, pp. 4-6. Because dotgay secured 10 points from the remaining criteria and needed 14 points for approval, Criterion #2 was the main reason for its shortfall. If dotgay had secured all 4 points for Criterion #2, its application would have been approved.
- 19 Recall that an application merits 3 points if “[t]he string matches the name of the community or is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. The CPE Report dismissed this possibility: “The string does not identify or match the name of the

community as defined in the application, nor is it a well known short-form or abbreviation of the community.” CPE Report, p. 5. As I demonstrate below, this is demonstrably not correct.

20 The CPE Report did not identify precisely what evidence the EIU Panel relied on to conclude that “gay” is not “a well known short-form or abbreviation of the community” defined in dotgay’s application, but it did read into the explicit requirement (“a well known short-form or abbreviation of the community”) an implicit requirement that the string **also** “identify” the community and its members. This implicit requirement was taken from the Applicant Guidebook’s explanation for a partial nexus score. Recall that an application merits 2 points if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. It is not clear to me what legal reasoning or prior practice the EIU Panel relied on to import the “identify” requirement (used in the 2-point evaluation) into the 3-point evaluation. Neither the EIU Panel nor FTI provided any explanation in this regard.

21 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. The CPE Report rephrased the ICANN definition to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’ ” CPE Report, p. 5. Based upon this narrowing revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel

“determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the EIU Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6. I will return to the EIU Panel’s representation regarding the “review” it claims to have conducted “of the language used in the media as well as by organizations that work within the community” below.

22 The CPE Report did not identify the methodology the EIU Panel followed to support these sweeping empirical statements. Instead, the CPE Report asserted that “a comprehensive survey of the media’s language in this field is not feasible,” CPE Report, p. 5 note 10, and that “a survey of all LGBTQIA organizations globally would be impossible.” CPE Report, p. 5 note 12. While this may be true to a certain extent, there is a significant and material gap between what the EIU Panel did and what is in fact feasible and indeed easily doable.

23 Dotgay’s application relied on the common use of “gay” as an umbrella term for the community of sexual and gender nonconformists. Thus, homosexual men and women, transgender and intersex persons, and their allies all march in “gay pride” parades, support “gay rights,” and follow the “gay media.” The EIU Panel conceded this point (CPE Report, p. 7) but nevertheless took the position that “gay” is “most commonly used to refer to both men and women who identify as homosexual, and not necessarily to others.” CPE Report, p. 6. Citing two articles (one in *Time* and the other in *Vanity Fair*), the Report found that there are

“many similar transgender stories in the media where ‘gay’ is not used to identify the subject.”
CPE Report, pp. 6-7 and note 14.

24 The CPE Report also conceded that “gay” is used in the media much “more frequently than terms such as ‘LGBT’ or ‘LGBTQIA’ in reference to both individuals and communities.” CPE Report, p. 7. Nonetheless, the EIU Panel asserted that there is no evidence that “when ‘gay’ is used in these articles it is used to identify transgender, intersex, and/or ally individuals or communities.” CPE Report, p. 7. But, the Panel’s “own review of the news media” (footnote: the Panel said that “a comprehensive survey of the media’s language is not feasible”) found that although “gay” is “more common than terms such as ‘LGBT’ or ‘LGBTQIA’, these terms are now more widely used than ever.” CPE Report, p. 7 and note 19. This inconsistency is not addressed anywhere in the CPE Report or by FTI.

25 The CPE Report conceded that many organizations representing sexual and gender minorities submitted letters supporting the idea that “gay” is a term describing the community. But the EIU Panel found significant that some of these same organizations have revised their names to list various subgroups, usually through the acronym LGBT and its ever-expanding variations. CPE Report, p. 8.

26 Based upon this reasoning, the EIU Panel awarded 0 of 3 points for nexus between the applied for string and the community. As there was no nexus, the Panel awarded 0 of 1 points for uniqueness. CPE Report, p. 8.

D. THE ICANN COMMUNITY ENDORSEMENT CRITERION AND ITS APPLICATION IN THE CPE REPORT

- 27 Module 4.2.3 of the ICANN AGB sets forth four criteria for scoring community-based applications; Criterion #4 is “Community Endorsement.” As many as 2 points are awarded based upon support within the relevant community; as many as 2 points are awarded based upon lack of opposition within the relevant community. Dotgay’s petition lost 1 of 2 possible points on each element of Criterion #4.
- 28 Under the support element of the community endorsement criterion, **2 points** are awarded if the “[a]pplicant is, or has documented support from, the recognized community institution(s)/member organization(s) **or** has otherwise documented authority to represent the community.” AGB, p. 4-17 (emphasis added). **1 point** is awarded if there is “[d]ocumented support from at least one group with relevance, but insufficient support for a score of 2.” AGB, p. 4-17. An applicant will be awarded 1 rather than 2 points if “it does not have support from a majority of the recognized community institutions/member organizations.” AGB, p. 4-18.
- 29 Under the opposition prong of the community endorsement criterion, **2 points** are awarded if there is “[n]o opposition of relevance.” AGB, p. 4-17. **1 point** is awarded if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 30 In the CPE Report of October 8, 2015, the EIU Panel awarded dotgay 2 out of 4 possible points for Criterion #4, including 1 out of 2 possible points for support and one out of 2 possible points for opposition. CPE Report, pp. 10-11.

31 The EIU Panel awarded dotgay a partial score (1 point) for support, even though dotgay submitted strong statements of support from dozens of relevant organizations, including the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), which the EIU Panel identified as perhaps the only “entity mainly dedicated to the entire global community as defined.” CPE Report, p. 3. The Panel, however, “determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have the documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s).” CPE Report, p. 11.

32 The EIU Panel awarded dotgay a partial score (1 point) for opposition. The reason was that “there is opposition to the application from one group of non-negligible size.” CPE Report, p. 11. Although the CPE Report did not identify the group, it was the Q Center in Portland, Oregon. The Q Center is a small, local community center. It is a member of CenterLink, a national association of around 200 community centers. CenterLink endorsed dotgay’s application; the Q Center was the only one of its 200 members to oppose the dotgay application.

E. RECONSIDERATION OF THE CPE REPORT AND THE CPE PROCESS REVIEW BY FTI

33 Dotgay objected to the conclusions reached by the CPE Report and requested a Reconsideration. Specifically, dotgay objected that its application deserved an award of all 4 possible points under Criterion #2, Nexus with the Community. Awarding 0 points, the EIU Panel made three different errors of legal or factual analysis: (i) interpretive errors, namely, misreading the explicit criteria laid out in ICANN’s Applicant Guidebook and ignoring

ICANN’s mission and core values; (ii) errors of inconsistency and discrimination, namely, failure of the EIU to follow its own guidelines for applying Criterion #2 and its discriminatory application to dotgay’s application when compared with other applications; and (iii) errors of fact, namely, a misstatement of the empirical evidence (supplied in abundance below) and a deep misunderstanding of the cultural and linguistic history of sexual and gender minorities in the world. On September 15, 2016, I submitted an Expert Report documenting these three errors. In addition, dotgay objected that its application deserved an award of all 4 possible points under Criterion #4, Community Endorsement.

34 On October 18, 2016, the ICANN Board Governance Committee responded to the pending Reconsideration Requests with a CPE Process Review. Scope 2 of that Review was supposed to be an evaluation of whether the CPE criteria were applied consistently throughout each CPE Report. Scope 3 was supposed to be a compilation of reference materials relied upon by the EIU Panel for its evaluations of the applications of the pending Requests, including that of dotgay. Through counsel, ICANN retained FTI Consulting, Inc.’s Global Risk and Investigations and Technology Practice (FTI) to conduct the CPE Process Review. On December 13, 2017, FTI released its three Reports on Scopes 1-3. (This Second Expert Report will not discuss or analyze the FTI Report on Scope 1, which evaluates the EIU Panel’s communications.)

35 FTI’s Report on Scope 2, “Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports,” determined “whether the CPE Provider consistently applied the CPE criteria throughout each CPE.” FTI Scope 2 Report, p. 2. “FTI

found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner." FTI Scope 2 Report, p. 3.

36 FTI's Report on Scope 3, "Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations Which Are the Subject of Pending Reconsideration Requests," examined the EIU Panel's "working papers" associated with each evaluation. FTI Scope 3 Report, p. 3. On the nexus criterion, FTI observed as many as "23 references to research or reference materials" in the working papers that were not cited in the CPE Report. FTI Scope 3 Report, pp. 38-39 & note 117. The FTI Report made no effort to evaluate these materials and so made no determination whether they supported the conclusions and generalizations of the CPE Report. On the community endorsement criterion, FTI reported three sources of information about the Q Center, which was the only opposition to the dotgay application. FTI Scope 3 Report, p. 40 & note 120.

37 This Second Expert Report addresses the FTI Scope 2 and Scope 3 Reports as they relate to the CPE Report for dotgay's application. This Report will focus on the FTI Reports as they relate to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement). In my expert opinion, the FTI Scope 2 Report is not a serious analysis of the many interpretive and factual problems with the CPE Report. FTI failed to recognize or engage the many criticisms of the EIU Panel's application of ICANN's and CPE's guidelines to the dotgay and other applications. Indeed, nothing in the FTI Scope 2 Report rescues the CPE Report from a variety of logical and analytical flaws or from its documented inconsistency with other CPE reports.

I shall set forth those criticisms in detail below. In my expert opinion, the FTI Scope 3 Report provides evidence that undermines the factual basis for the CPE Report's conclusions as to Criterion #2 (Nexus) and Criterion #4 (Community Endorsement).

IV. The FTI Scope 2 Report Completely Missed the Important Ways the CPE Report Misinterpreted or Ignored the Established Directives for Evaluating Applications

38 The FTI Scope 2 Report “found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines.” FTI Scope 2 Report, p. 3. The Report quoted the applicable guidelines and claimed to have considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. The conclusion was supported by no independent analysis, however. The Report uncritically repeated the conclusions found in the EIU Panel’s reports and did not ask whether the criteria the EIU Panel claimed to apply were the criteria laid out in the Applicant Guidebook and other authorities, some of which the EIU Panel and FTI ignored altogether. E.g., FTI Scope 2 Report, pp. 37-41 (Nexus). The approach followed by FTI was a “description” of the CPE Reports, but not an “evaluation” to determine whether the CPE Reports were actually following the applicable guidelines. As regards the dotgay application, they were decidedly **not**.

A. IN ITS ANALYSIS OF THE NEXUS CRITERION, THE CPE REPORT MISREAD ICANN’S APPLICANT GUIDEBOOK AND IGNORED ITS BYLAWS

- 39 The FTI Scope 2 Report says that EIU personnel “stated that they were strict constructionists and used the Applicant Guidebook as their ‘bible.’” FTI Scope 2 Report, p. 10. If it were true that the EIU considered the Guidebook to be its “Bible,” its personnel were far from strict constructionists—they were heretics who rewrote rather than interpreted the Guidebook’s rules for Criterion #2, especially its nexus element.
- 40 Recall the requirements ICANN has set forth, explicitly, for the nexus element in its Applicant Guidebook: An application merits **3 points** if “[t]he string matches the name of the community **or** is a well-known short-form or abbreviation of the community.” AGB, p. 4-12 (emphasis added). “Name” of the community means ‘the established name by which the community is commonly known by others.’” AGB, p. 4-13. “[F]or a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”
- 41 An application merits **2 points** if the “[s]tring identifies the community, but does not qualify for a score of 3.” AGB, p. 4-12. “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13.

42 As a matter of standard legal interpretation, one must focus on the ordinary meaning of the legal text, as understood in the context of the principles and purposes of the legal document.⁵ As a matter of ordinary meaning, and therefore proper legal interpretation, the CPE Report made three separate but interrelated mistakes. Because its personnel simply repeated the analysis announced by the EIU for the dotgay and other applications, and did not independently check that analysis against the text and structure of ICANN’s guidelines, FTI made the same separate but interrelated mistakes. FTI Scope 2 Report, pp. 37-41.

1. The EIU Panel and FTI Substantially Ignored the Primary Test for Nexus: Is the Proposed String “a Well Known Short-Form or Abbreviation of the Community”?

43 To begin with, the EIU Panel and FTI systematically ignored the Applicant Guidebook’s focus on whether the proposed string (“.gay”) is “**a well known short-form or abbreviation of the community**” (3 points) or “closely describes **the community**” (2 points) (emphasis added in both quotations). Notice the precise language, especially the language set **in bold**. The proposed string does not have to be “**the only** well known short-form or abbreviation of the community” and does not have to be “**the only term that** closely describes the community”

⁵ The proposition in text is explained and defended in virtually all the leading books on statutory, treaty, and contract interpretation, including such works as Aharon Barak, *Purposive Interpretation in Law* (2005); William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 37–38 (2012); Antonin Scalia, *A Matter of Interpretation* (1997); Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (2015).

(bold type for language added for contrast). More important, the primary focus is “the community,” not just “community members” (an alternative focus for the 2-point score).

44 For dotgay’s application, the overall community is sexual and gender nonconformists. As set forth in more detail in Part V below, this is a community that shares a history of state persecution and private discrimination and violence because its members do not conform to the widely asserted natural law norm that God created men and women as opposite and complementary sexes, whose biological and moral destiny is to engage in procreative sex within a marriage. “Gay” is “a well known short-form or abbreviation of the community” (the requirement for 3 points) and also “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be the only umbrella term for the community or even that it be the most popular term—but in fact “gay” remains the most popular term in common parlance, as illustrated by the empirical use depicted in Figure 1 below. Figure 1 not only establishes that “gay” has been a popular word for more than a century, but also

demonstrates that once “gay rights” became ascendant in the 1990s, the term’s dominance increased and consolidated. (Appendix 2 describes the methodology underlying Figure 1.)

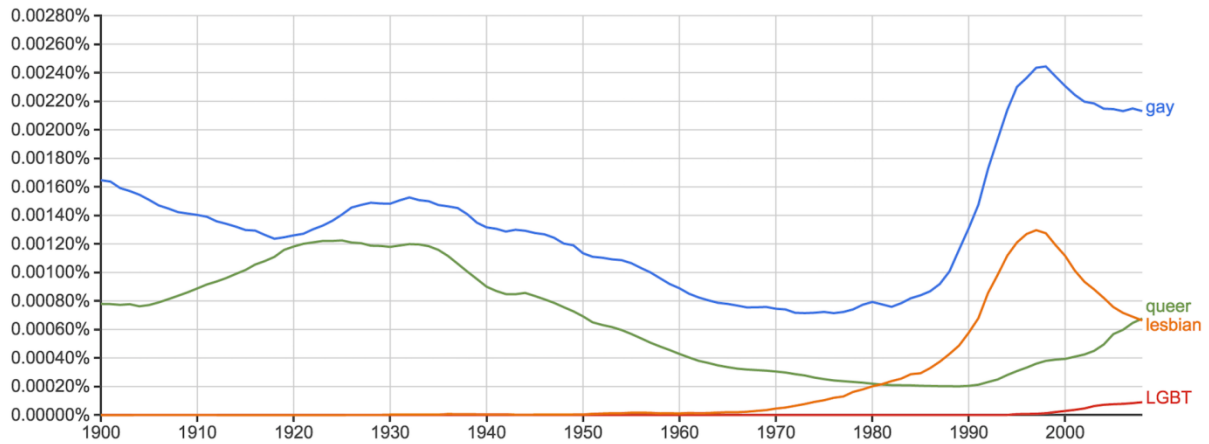


Figure 1. A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008

2. The EIU Panel and FTI Created an “Under-Reach” Test for Nexus That Is Inconsistent with the Applicant Guidebook and Applied the New Test to Create a Liberum Veto Inconsistent with ICANN’s Rules and Bylaws

45 In another major departure from ICANN’s Applicant Guidebook and its Bylaws, the EIU Panel has introduced a **Liberum Veto** (Latin for “free veto”) into ICANN’s nexus element. In the seventeenth and eighteenth-century Polish-Lithuanian Commonwealth, any single legislator could stop legislation that enjoyed overwhelming majority support, a practice that paralyzed the Commonwealth’s ability to adopt needed laws and probably contributed to its dismantlement at the hands of Prussia, Austria, and Russia in the latter half of the eighteenth century. The EIU Panel created a similar Liberum Veto, by importing a requirement that the applied-for string (“.gay”) can be vetoed if it “does not sufficiently identify **some members** of the applicant’s defined community, in particular transgender, intersex, and ally individuals.”

CPE Report, p. 5 (emphasis added). In its uncritical presentation, FTI simply repeated the error. FTI Scope 2 Report, pp. 37-39.

- 46 Where did this Liberum Veto come from? It was not taken from the Applicant Guidebook’s explicit instructions for the nexus requirement, AGB, p. 4-12, nor was it taken from the Guidebook’s definitions of “Name” or “Identify,” AGB, p. 4-13. Yet the EIU Panel and FTI cited the Applicant Guidebook for their misunderstanding of the governing test for the nexus requirement. Let me walk through the process by which the EIU Panel introduced this mistake, a mistake completely missed by FTI.
- 47 According to the Applicant Guidebook, “Identify,” a key term in the 2-point test, means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, p. 4-13. For the dotgay application, the EIU Panel recast this Guidebook criterion to require that the applied-for string “must [1] ‘closely describe the community or the community members’, i.e., the applied-for string is what [2] ‘the typical community member would naturally be called.’ ” CPE Report, p. 5 (quoting the AGB). Notice that the first part [1] of the Report’s requirement is taken from the Guidebook’s 2-point nexus requirement and the second part [2] is quoted from an illustration of **one** example where the Guidebook’s criterion would be satisfied. Just as the EIU Panel all but ignored the Applicant Guidebook’s focus on “the community” and refocused only on “members of the community,” so it ignored the Applicant Guidebook’s focus on an **objective** view of the community and refocused only on **subjective** usages by some members of the community. And it took subjective usages pretty far by creating a Liberum Veto.

48 Moreover, the EIU Panel’s Liberum Veto is contrary to the explicit requirement of the Applicant Guidebook. Recall that, for its 2-point score, the Guidebook defines “Identify” to mean that “the applied-for string closely describes the community or the community members, **without over-reaching substantially beyond the community.**” AGB, p. 4-13 (emphasis added). Thus, the Guidebook is concerned with applied-for strings that are much broader than the community defined in the application:

ICANN AGB Concern: Applied-For String > Community Defined in Application

But that’s not the concern identified by the EIU Panel’s Liberum Veto analysis, which claims that the applied-for string (“gay”) “under-reaches” substantially short of the whole community. The EIU Panel’s “under-reaching” concern flips the “over-reaching” concern of the Applicant Guidebook. In evaluating the dotgay application, the EIU Panel worried that the applied-for string is narrower than the community defined in the application:

EIU Panel Concern: Applied-For String < Community Defined in Application

49 The EIU Panel imported its “under-reaching” concern into the Applicant Guidebook, but in the teeth of the ordinary meaning of its text. The Liberum Veto for “under-reaching” is a regulatory addition to the Guidebook and not a proper interpretation of the Guidebook, which only requires that the proposed string be “a well known short-form or abbreviation of the community” (3 points) or “closely describes the community” (the requirement for 2 points). There is no requirement that “gay” must be only term, or even the most popular term, that would be used by every member of the community. On the other hand, the Applicant

Guidebook does say, for a 2-point score, that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community.” AGB, p. 4-13 (2 points). The explicit concern of the Applicant Guidebook is that the proposed string not “over-reach”; by omitting parallel language for “under-reach,” the Applicant Guidebook should be interpreted to allow more latitude for under-reaching.⁶ It is a widely accepted canon of contract, statutory, and even constitutional interpretation that the expression of one exception suggests the exclusion of others.⁷

50 Stating the matter more simply, and even more at odds with ICANN’s Applicant Guidebook, the FTI’s Scope 2 Report identified eight applications (including dotgay’s) where the proposed “string identified the name of the core community members,” but “failed to match or identify the **peripheral industries and entities** included in the definition of the community set forth in the application.” FTI Scope 2 Report, p. 38 & note 133 (emphasis added). To impose upon applicants the duty to carefully match each and every conceivable “peripheral” entity or subgroup to the proposed string would be absurd, and the FTI’s overstatement helps us see why the Applicant Guidebook avoids this requirement. In our dynamic culture, groups tend to expand and subdivide. If an applicant had to come up with a term that embraced every

⁶ The EIU Panel and FTI read the Applicant Guidebook as if it said that the proposed string must “closely describe[e] the community, without over-reaching substantially beyond the community **and without under-reaching substantially within the community.**” AGB, p. 4-13 (new language, implicitly added by the EIU Panel, **in bold**).

⁷ Antonin Scalia & Bryan Garner, *Reading Law* 107-11 (2012); 2A *Sutherland Statutes and Statutory Construction* § 47.23 (7th ed. 2015).

“peripheral” entity that might be included in its community, ICANN would be pushing those applicants toward increasing complexity—such as LGBTQIA, “Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Allied.” That is too complicated a domain name—and it, too, would be subject to an “under-reaching” objection because it might not adequately describe “Asexuals,” a significant portion of the population, or even “Pansexuals,” perhaps a “peripheral” subgroup, but one that the FTI analysis would consider.

51 I shall document, in Part V, how the EIU Panel was mistaken in its application of its “under-reaching” analysis, another clear error missed by the uncritical analysis by FTI. Here, my point is that the new Librum Veto based upon the proposed string’s “under-reach” is a strong example where the “CPE Provider’s evaluation process or reports deviated * * * from the applicable guidelines,” contrary to the uncritical assumption of the FTI Scope 2 Report, p. 3. The “under-reach” analysis and the Librum Veto are also inconsistent with the CPE Guidelines, Version 2.0. *See* EIU, CPE Guidelines, pp. 7-8 (Version 2.0), analyzed below.

3. In Evaluating the Nexus Criterion, the CPE Report Ignored and Violated ICANN’s Bylaws

52 Overall, the CPE Report was oblivious to the purposes of the project of assigning names and to ICANN’s mission and core values. Like dotgay, the EIU Panel fully agreed that there is a coherent, substantial, and longstanding community of sexual and gender nonconformists who would benefit from a community-based domain on the Internet. A core value for ICANN is to support “broad, informed participation reflecting the * * * cultural diversity of the Internet.” ICANN Bylaws, Art. I, § 2(4). A core value in interpretation is to apply directives like those

in the nexus requirement with an eye on the overall purposes and principles underlying the enterprise.⁸

53 There can be no serious dispute that there is a strong and dynamic community of gender and sexual minorities, that the members of the community would benefit from a cluster of related websites, and that dotgay is a community-based group with a rational plan to develop these websites in a manner that will greatly benefit the public. And the string dotgay proposes—“.gay”—is ideally suited for these purposes. Conversely, no other string would bring together all the websites of interest to sexual and gender minorities as comprehensively as “.gay.” Certainly, a longer string—like “.LGBTQIA”—would be less accessible for the general population or, as I shall demonstrate below, even for the various subgroups within the larger gay community.

54 Consider an example. If I asked you to look for data and stories about the suicides of gender and sexual minorities (a big problem in the world), “suicide.gay” (one of the community-operated websites proposed in the dotgay application) would be the first thing most people would think of. Even most politically correct observers (such as the author of this Second Expert Report) would think “suicide.gay” before they would think “suicide.lgbt” or “suicide.lgbtqia.” See Figure 1, above. Indeed, many educated people (including the author of this Second Expert Report) cannot easily remember the correct order of the letters in the

⁸ See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 85 (2006); William Eskridge Jr., *Interpreting Law* 3-11, 105-08 (2016); Robert Katzmann, *Judging Statutes* (2015); Antonin Scalia & Bryan Garner, *Reading Law* 63-66 (2012).

latter string (“lgbtqia”). Does a Librum Veto based on “under-reach” make sense, in light of these purposes? No, it does not, especially in light of the alternative strings (such as “lgbtqia”). As I documented in my earlier Expert Report, “gay suicide” is a common locution; the search of books published between 1950 and 2008 did not register any significant usage for “LGBT suicide” or “LGBTQIA suicide.”

55 Not least important, “non-discriminatory treatment” is a fundamental principle identified in ICANN’s Bylaws. As I shall now show, the EIU Panel’s Librum Veto based upon a made-up “under-reaching” test has been fabricated without any notice in its own guidelines. Needless to say, other CPE evaluations have ignored that fabricated test in cases where it is much more obviously relevant. Moreover, even if the Applicant Guidebook included an “under-reaching” test in its nexus requirement, the EIU Panel here has applied it in a most draconian manner, namely, creating a Librum Veto wielded apparently just for the purposes of this recommendation, at least when one compares its use here and in other cases. Consider the next set of errors.

B. IN ITS APPLICATION OF THE NEXUS CRITERION, THE CPE REPORT WAS INCONSISTENT WITH THE CPE GUIDELINES AND PREVIOUS CPE REPORTS AND VIOLATED ICANN’S NON-DISCRIMINATION DIRECTIVE

56 The FTI Scope 2 Report concluded that “the CPE Provider’s scoring decisions were based upon a consistent application of the Applicant Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 3. As before, the FTI said that it considered the “concerns raised in the Reconsideration Requests,” yet still concluded that the “CPE Provider’s scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant

Guidebook and the CPE Guidelines.” FTI Scope 2 Report, p. 21. As before, this conclusion is supported by no independent analysis. The FTI Scope 2 Report uncritically repeated the conclusions found in the CPE Reports and did not discuss or consider the various fairness and nondiscrimination objections raised by dotgay and other applicants. E.g., FTI Scope 2 Report, pp. 37-41 (nexus). This approach is a “description” of the CPE Reports, but is not an “evaluation” to determine whether the CPE Reports were actually applying the guidelines in a neutral and nondiscriminatory manner. At least as regards the dotgay application, they were decidedly **not**.

1. The CPE Report Was Inconsistent with CPE Guidelines

57 According to FTI’s interviews with EIU Panel personnel, “the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process.” FTC Scope 2 Report, p. 11. Yet the EIU Panel has imported into the nexus element a *Liberum Veto* based on “under-reaching” which is strikingly inconsistent with the EIU’s CPE Guidelines. Rather than transparency, the CPE Guidelines, if read carefully in light of their ordinary meaning, are a trap for the applicant. Indeed, as applied by the EIU Panel, they open the door to discriminatory, unfair, and unpredictable application.

58 Recall that the Applicant Guidebook awards the applicant 2 of 3 nexus points if the applied-for string “identifies” the community but does not qualify for a score of 3. I believe dotgay properly qualified for a score of 3, but the CPE Report combined in a confusing way (and apparently contrary to the precise terms of the Applicant Guidebook) the requirements for full

(3 point) and partial (2 point) scores. For both, the EIU Panel focused on whether the application “identified” the community.

59 “Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” AGB, pp. 4-13. The CPE Report rephrased the ICANN criterion to require that the applied-for string “must ‘closely describe the community or the community members’, i.e., the applied-for string is what ‘the typical community member would naturally be called.’” CPE Report, p. 5.

60 Based upon this revision of the ICANN criterion, the CPE Report “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals.” CPE Report, pp. 5-6.

61 As I concluded above, the EIU Panel has imported a new “under-reaching” test into the nexus analysis—contrary to the Applicant Guidebook’s concern only with “over-reaching.” Moreover, this report’s unauthorized test is also directly inconsistent with the published CPE Guidelines, Version 2.0. In its discussion of Criterion #2 (Nexus), the CPE Guidelines developed by the Economist Intelligence Unit quote the Applicant Guidebook’s definition of “Identify,” with the “over-reaching” language. Then, the EIU announces its own “Evaluation Guidelines” for this term, including this:

“Over-reaching substantially” means that the string indicates a **wider** geographic or thematic remit than the community has.

EIU, CPE Guidelines, Version 2.0, p. 7 (emphasis added). The EIU’s CPE Guidelines do not suggest that the inquiry should be whether the string indicates a “**narrower** geographic or thematic remit than the community has” (emphasis for my substitution).

62 The EIU’s CPE Guidelines also discuss inquiries that panels might make, including these two that I consider most relevant:

Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?

Does the string capture a wider geographic/thematic remit than the community has?

EIU, CPE Guidelines, Version 2.0, p. 8 (emphasis in original). Notice that the EIU’s CPE Guidelines do **not** include the following inquiries (new language in **bold**):

*Does the string identify a **narrower** community **than that which is revealed in the applicant’s description of its community?***

*Does the string capture a **narrower** geographic/thematic remit than the community has?*

63 Given these CPE Guidelines, one would not expect “under-reaching” decisions, even when an application clearly presents those concerns. An excellent example is the CPE report for Application 1-901-9391 (July 29, 2014), which evaluated the community-based application for the string “.Osaka.” “Members of the community are defined as those who are within the

Osaka geographical area as well as those who self-identify as having a tie to Osaka, or the culture of Osaka.” Osaka CPE Report, p. 2. In a nonexclusive list, the applicant identified as members of the community “Entities, including natural persons who have a legitimate purpose in addressing the community.” Osaka CPE Report, p. 2.

64 The applied-for string (“.Osaka”) would seem to be one that very substantially “under-reaches” the community as defined by the applicant. Apply to the Osaka application the same fussy analysis that the EIU Panel applied to the dotgay application. Many people who live in Osaka self-identify as “Japanese” rather than “Osakans.” Many of the people who are in Osaka are visitors who do not identify with that city. Others are residents of particular neighborhoods, with which they identify more closely. Shouldn’t the Libero Veto, grounded upon “under-reaching,” apply here?

65 Consider a specific example. Chūō-ku is one of 23 wards in Osaka; it contains the heart of the financial district and is a popular tourist destination. Many a businessperson, or tourist (this is a popular Air BnB location), or even resident might say, “I am only interested in Chūō-ku! The rest of Osaka has no interest for me.” If a fair number of people feel this way, “more than a small part of the applicant’s defined community is not identified by the applied-for string,” CPE Report, p. 5, if one were following the logic of the EIU Panel evaluating dotgay’s application.

66 I must say that this kind of Libero Veto evidence would be supremely silly under the criteria laid out by ICANN in its Application Guidebook (or by the EIU in its CPE Guidelines), but there is a close parallel between this analysis for “.Osaka” and that posed by the EIU Panel for

“.gay.” Simply substitute “transgender” for “Chūō-ku” in the foregoing analysis, and you have the EIU Panel’s evaluation in the CPE Report.

67 By its broad definition of the community, including “[e]ntities, including natural persons who have a legitimate purpose in addressing the community,” the “.Osaka” applicant is screaming “under-reach.” Or at least suggesting some inquiry on the part of its EIU Panel. Yet the EIU Panel for the “.Osaka” application simply concluded that the string “matches the name of the community” and awarded the applicant 3 of a possible 3 points for nexus. Osaka CPE Report, p. 4. “The string name matches the name of the geographical and political area around which the community is based.” Osaka CPE Report, p. 4. Yes, but the applicant defined the community much more broadly, to include anybody or any entity with a connection to Osaka. The EIU Panel simply did not apply an “under-reach” analysis or consider a Librum Veto in the Osaka case, because those criteria were not in the Applicant Guidebook or even in the EIU’s CPE Guidelines. And, it almost goes without saying, the EIU Panel’s analysis for the dotgay application is strongly inconsistent with the EIU Panel’s lenient analysis for the Osaka application.

68 Notwithstanding the foregoing analysis, which was spelled out in my earlier Expert Report, FTI made no effort to reconcile the EIU Panel’s lenient treatment of the Osaka application and its draconian treatment of the dotgay application, even though the Osaka application seems like a more obvious candidate for a Librum Veto based upon the made-up “under-reaching” requirement. Instead, FTI simply observed that the Osaka application was awarded full credit (3 points) for the nexus element of Criterion #2. FTI Scope 2 Report, p. 40.

2. The CPE Report Was Inconsistent with the EIU Panel's Own Previous Reports

69 Dotgay's application was not the first time the EIU Panel has performed a nexus analysis suggesting an "under-reach" of an applied-for string, compared with the identified community. *See* FTI Scope 2 Report, pp. 38-39. But even prior cases that might be read to suggest the possibility of such analysis did not apply it with the ferocity the EIU Panel applied it to the dotgay application. In particular, the analysis never reached the point of creating a *Liberum Veto*.

70 An earlier CPE Report for Application 1-1032-95136 (June 11, 2014), evaluated whether ".hotel" should be approved as a top-level domain. The EIU Panel may have performed a kind of "under-reach" analysis—but it was nowhere as critical as that which it performed for dotgay's application, even though the ".hotel" name was a much more dramatic illustration of "under-reach."

71 The applicant wanted a domain that would serve the "global Hotel Community." It defined its community in this way: "A hotel is an establishment with services and additional facilities where accommodation and in most cases meals are available." Hotel CPE Report, p. 2. The CPE Report awarded the applicant 15 out of 16 points, including 2 of 3 points for the nexus requirement and 1 of 1 point for the uniqueness requirement.

72 In the discussion of the nexus requirement, the EIU Panel observed that "the community also includes some entities that are related to hotels, such as hotel marketing associations that represent hotels and hotel chains and which may not be automatically associated with the

gTLD. However, these entities are considered to comprise only a small part of the community.” Hotel CPE Report, p. 4. This is a stunning understatement. The applicant’s broad definition of “hotel” would logically sweep into the “community” resorts, many spas, bed and breakfasts, the sleeping cars on the Venice-Simplon Orient Express, some cabins in national parks, and perhaps Air BnB (the home-sharing service). Is the Orient Express’s sleeping car a “hotel”? There is an actual Orient Express Hotel in Istanbul, Turkey (a big building with lots of luxury rooms), but I am not aware that the private company running the current Orient Express train would consider its sleeping cars to be “hotel” rooms. Indeed, the company might be alarmed at the possibility, given special regulations governing hotels in the countries through which the Orient Express travels.

73 The EIU’s “under-reach” analysis of the hotel application was perfunctory at best. A fourth-grade student would have been able to come up with more examples where the applied-for string (“.hotel”) did not match the community defined in the application. Contrast the EIU Panel’s tolerant analysis in the hotel application with its hyper-critical analysis of dotgay’s application. The contrast becomes even more striking, indeed shocking, when you also consider the CPE Report’s vague allusions to evidence and its few concrete examples, as well as the easily available empirical evidence included in this Second Expert Report (reported below).

74 Another example of an EIU Panel’s forgiving analysis is that contained in the CPE Report for Application 1-1309-81322 (July 22, 2015), for “.spa”. The EIU Panel awarded the applicant 14 of 16 possible points, including 4 of 4 possible points for nexus and uniqueness. Like the

“.hotel” applicant, the “.spa” applicant presented more significant problems of “under-reach” than dotgay’s application did.

75 The “.spa” applicant defined the community to include “Spa operators, professionals, and practitioners; Spa associations and their members around the world; and Spa products and services manufacturers and distributors.” Spa CPE Report, p. 2. The EIU Panel awarded the applicant 4 of 4 possible points based upon a finding that these three kinds of persons and entities “align closely with spa services.” Spa CPE Report, p. 5. If I were a manufacturer of lotions, salts, hair products, facial scrubs and exfoliants, as well as dozens of other products that are used in spas and thousands of other establishments and sold in stores, I would not self-identify with “spa.” As a consumer, I should not think “.spa” if I were interested in exfoliants and facial scrubs. As before, the EIU Panel did not look very deeply into this “alignment” concern, and awarded the spa applicant 3 of 3 points for nexus.

C. IN ITS ANALYSIS OF THE COMMUNITY ENDORSEMENT CRITERION, THE CPE DOTGAY REPORT MISAPPLIED ICANN’S APPLICANT GUIDEBOOK, IGNORED ITS BYLAWS, AND EVALUATED THE REQUIREMENT LESS GENEROUSLY THAN IN OTHER REPORTS

76 The EIU Panel awarded dotgay only 2 out of 4 points for Criterion #4, Community Endorsement. Dotgay lost 1 point for the community support element and 1 point for the community opposition element of that criterion. Both deductions by the EIU Panel were profoundly unfair and were justified by reasoning that is inconsistent with ICANN’s governing directives. As before, the FTI Scope 2 Report completely failed to examine the EIU Panel’s

analysis in light of the text, purpose, and principles found in ICANN’s governing directives for these applications.

77 In connection with the support element of the community endorsement criterion, dotgay’s application established wide and deep community support, with letters from around 150 organizations, including the ILGA. Founded in 1978, ILGA is a worldwide federation of more than 1100 lesbian, gay, bisexual, transgender, and intersex national and local organizations in over 100 nations on five continents. It is the leading world-wide organization dedicated to establishing the anti-discrimination norm for the benefit of sexual and gender minorities. ILGA enjoys consultative status with the Economic and Social Council of the United Nations.

78 Notwithstanding this impressive—overwhelming—support from the world gay community, the EIU Panel refused to award the full 2 points for community support. While the ILGA was clearly an entity dedicated to the community, the Panel found that it did not meet the standard of a “recognized” organization. According to the Panel, the AGB defines “recognized” to mean that the organization must “be clearly recognized by the community members as representatives of the community.” Without citing any evidence, the Panel concluded that there was no “reciprocal recognition on the part of community members of the [ILGA’s] authority to represent them.” Indeed, the Panel opined that “there is no single such organization recognized by all of the defined community members as the representative of the defined community in its entirety.” CPE Report, p. 11.

79 In the foregoing analysis, the EIU Panel, once again, rewrote the directive set forth in the Applicant Guidebook. The AGB contemplates one or more “recognized community

institution(s)/community organization(s)” and does not contemplate a situation where there is no “recognized community institution(s)/community organization(s)” at all. AGB, p. 4-17. Moreover, the Applicant Guidebook defines “recognized” to mean “the institution(s)/organization(s) that, **through membership or otherwise**, are clearly recognized by the community members as representative of the community.” ABG, pp. 4-17 to 4-18 (emphasized language omitted from the CPE Report). More than 1100 organizations representing the rights of sexual and gender minorities have become **members** of ILGA, and the United Nations has recognized it as the world-wide representative of LGBTI persons. This is surely enough to satisfy the actual requirements of the Applicant Guidebook. If there were any doubt about that, the EIU Panel should resolve the ambiguity by reference to the ICANN Bylaws, which require application of the directives in a nondiscriminatory manner.

80 Indeed, the EIU Panel applied the actual, more liberal, requirements found in the Applicant Guidebook to the application for “.hotel.” The hotel applicant could not identify a single institution that was as recognized a representative of the entire hotel industry, with the widespread membership that ILGA represents for the dotgay applicant. Instead, like dotgay, the hotel applicant offered support from a number of “recognized” organizations. The EIU Panel awarded 2 points for a submission that was less impressive than that made by dotgay. *See* Hotel CPE Report, p. 6. Even the statement of the AGB’s directive was more liberal (and more accurate) in the CPE Report for “.hotel” than in the CPE Report for “.gay.” Specifically, the EIU Panel evaluating the hotel application accurately quoted the AGB’s definition of “recognized” that included the “through membership or otherwise” language and applied the

definition with the understanding that there will normally be several “recognized” institutions and organizations. *See* Hotel CPE Report, p. 6.

- 81 In connection with the opposition element of the community endorsement criterion, only one organization registered opposition: the Q Center in Portland, Oregon, the home of an applicant for a competing string to that of dotgay. Yet the EIU Panel failed to award dotgay the full 2 points for opposition. Recall that the Applicant Guidebook requires an award of 2 points if there is “[n]o opposition of relevance,” and 1 point if there is “[r]elevant opposition from one group of non-negligible size.” AGB, p. 4-17.
- 82 To justify an award of only 1 point, the CPE Report invoked opposition from “one group of non-negligible size” (p. 11). The FTI Scope 3 Report identified that group as the Q Center in Portland, Oregon, and provided three references to the Q Center in the EIU Panel’s working papers (p. 40 note 120). The references establish that the Q Center is a local community center, geographically limited to Portland, Oregon. It is one of several gay groups and institutions in Oregon, which is a state with a small population. The Q Center is also one of more than 200 community centers in 45 states and overseas that are members of CenterLink: The Community of LGBT Centers, <https://www.lgbtcenters.org/> (viewed January 25, 2018). CenterLink is one of dozens of gay organizations that endorsed dotgay’s application. One two-hundredths of CenterLink’s membership—the Q Center in Portland—was deemed sufficient to count as opposition from “one group of non-negligible size.” In my expert opinion, the application by the EIU Panel to dotgay’s case was an absurd interpretation of the Application Guidebook’s stated approach for evaluating the support element of the community endorsement criterion.

It is standard legal interpretation to read terms of a statute, treaty, or contract to avoid absurd results.⁹ The absurdity of the interpretation morphed into the realm of the bizarre, however, once I examined the materials discussed in the FTI Scope 3 Report.

83 Two of the three references identified in the FTI Scope 3 Report raise red flags. One reference reveals that in 2014 the Q Center had an organizational meltdown. *See* Dan Borgan, “A New Era Begins at Q Center,” *P.Q. Monthly*, Dec. 19, 2014, <http://www.pqmonthly.com/new-era-begins-q-center-basic-rights-oregon-provides-financial-stability/21355> (viewed January 25, 2018). The article reported that the Q Center had been mismanaged for some years and that in 2014 its officers had resigned amid charges of fraud and mismanagement. “Q Center is in a tumultuous time: many staff and board members have left.” Community trust had been shattered, according to the source in the CPE working papers. A subsequent article (not identified in the working papers) says that the Q Center’s troubles worsened in 2015. According to this source, the Q Center was operated for the benefit of whites; persons of color and transgender persons felt unwelcome. A Q Center panel addressing a gay bar’s blackface performance raised tensions because it excluded voices of color. The Q Center’s turmoil seemed to deepen, and new managers took over. David Stabler, “Can the Q Center Survive Anger, Plunging Donations, and Staff Departures?,” *The Oregonian*, March 2, 2015, http://www.oregonlive.com/portland/index.ssf/2015/03/problems_at_portlands_q_center.htm 1 (viewed January 25, 2018). Soon after this article appeared, on April 1, 2015, the new Chair

⁹ *See* William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 69-73 (2016); Antonin Scalia & Bryan Garner, *Reading Law* 234-39 (2012).

of the Q Center Board wrote dotgay a letter seeking to void the earlier opposition; dotgay passed on this letter to ICANN. On July 25, 2015, however, yet another new Chair of the Q Center Board wrote ICANN a letter reasserting the Q Center's opposition.

84 In 2014-2015, was the Q Center a “group of non-negligible size,” and was its “opposition of relevance,” the stated criteria in the Applicant Guidebook? The EIU Panel answered yes to both questions, yet such an answer is not even supported by the sources the EIU Panel consulted. Indeed, those sources should have alerted the EIU Panel to proceed cautiously, given the charges of racism and transphobia that were being made against the Q Center. Should ICANN not be concerned that the gay community's application for a needed string has been penalized because of opposition by a small local group riven with strife and charged with race and trans exclusions? Why did the EIU Panel not explore this problem? Why did FTI not flag it?

V. The FTI Scope 3 Report Confirms Dotgay's Claim that the EIU Panel Ignored Important Evidence that Supports Full Credit under the Nexus Criterion

85 Assume, contrary to any sound analysis, that the EIU Panel correctly interpreted and applied the Applicant Guidebook's requirements for Criterion #2 (Community Nexus and Uniqueness). Even under the EIU Panel's excessively restrictive understanding of ICANN's requirements, dotgay's application would merit 4 of 4 possible points, based upon a sound understanding of the history of the gay community and based upon empirical evidence of language actually used in the media and in normal parlance in the last century.

86 Recall that the EIU Panel “determined that more than a small part of the applicant’s defined community [of sexual and gender nonconformists] is not identified by the applied-for string [.gay], as described below, and that it therefore does not meet the requirements for Nexus.” CPE Report, p. 5. Specifically, the EIU Panel “determined that the applied-for string does not sufficiently identify some members of the applicant’s defined community, in particular transgender, intersex, and ally individuals. According to the Panel’s own review of the language used in the media as well as by organizations that work within the community described by the applicant, transgender, intersex, and ally individuals are not likely to consider ‘gay’ to be their ‘most common’ descriptor, as the applicant claims.” CPE Report, pp. 5-6.

87 The CPE Report made no effort to situate dotgay’s claims within the larger history of sexual and gender minorities in history or in the world today. Nor did it identify the methodology or evidence the EIU Panel followed to support these sweeping empirical statements. The FTI’s Report on Scope 3 examined the EIU Panel’s working papers. Most of the sources it identified are searches allegedly conducted by the EIU Panel, using terms that are blacked out (and therefore inaccessible) in the FTI Scope 3 Report, pp. 37-39 & note 117. Has the FTI’s Scope 3 Report been censored? Or was the EIU Panel’s methodology so scattershot that even its own working papers do not reveal how it conducted its research?

88 Other sources were specifically identified—and some of those sources directly support dotgay’s position. For a dramatic example, the FTI identified, as a major source contained in the EIU Panel’s working papers, the Wikipedia entry for “LGBT Community,”

https://en.wikipedia.org/wiki/LGBT_community (viewed January 25, 2018). See FTI Scope 3 Report, p. 38 note 117. Here is the first paragraph of that entry (emphasis in the original):

The **LGBT community** or **GLBT community**, also referred to as the **gay community**, is a loosely defined grouping of lesbian, gay, bisexual, and transgender (LGBT) and LGBT-supportive people, organizations, and subcultures, united by a common culture and social movements. These communities generally celebrate pride, diversity, individuality, and sexuality. LGBT activists and sociologists see LGBT community-building as a counterbalance to heterosexism, homophobia, biphobia, transphobia, sexualism, and conformist pressures that exist in the larger society. The term “pride” or sometimes *gay pride* is used to express the LGBT community’s identity and collective strength; pride parades provide both a prime example of the use and a demonstration of the general meaning of the term. The LGBT community is diverse in political affiliation. Not all LGBT individuals consider themselves part of the LGBT community.

The remaining discussion in Wikipedia’s entry for “LGBT Community” uses “gay” and “LGBT” interchangeably. For example, the Wikipedia entry has an extensive discussion of “LGBT Symbols,” which starts this way: “The gay community is frequently associated with certain symbols; especially the rainbow or rainbow flags. The Greek lambda symbol (‘L’ for liberation), triangles, ribbons, and gender symbols are also used as ‘gay acceptance’ symbol. There are many types of flags to represent subdivisions in the gay community, but the most commonly recognized one is the rainbow flag.”

89 If the EIU Panel actually consulted the Wikipedia entry contained in its working papers, why did it not mention that entry in its CPE Report? If FTI actually read the Wikipedia entry that it cited in its Scope 3 Report, why did it not raise a question about whether the evidence assembled by the EIU Panel really supported its conclusion that “gay” was not a name that

matched or identified the community? These are troubling concerns. For a similar example, taken from the EIU Panel’s working papers referenced in the FTI Scope 3 Report, pp. 37-38 & note 117, *see* Wikipedia, “Coming Out, https://en.wikipedia.org/wiki/Coming_out (viewed January 25, 2018).

90 Many of the sources contained in the EIU Panel’s working papers (cited in FTI’s Scope 3 Report, pp. 37-39 & note 117) relate to the widely-known distinction between sexual orientation and gender identity. *See* GLAAD, “Glossary of Terms—Transgender,” <https://www.glaad.org/reference/transgender> (viewed January 25, 2018); Transgender Law Center, “Values—Mission,” <https://transgenderlawcenter.org/about/mission> (viewed January 25, 2018), both referenced in the FTI Scope 3 Report, p. 38 note 117. These and other sources can support the proposition that transgender persons distinguish between sexual orientation and gender identity and commonly use terms such as “trans” or “transgender” to describe themselves. One could make the same point about black women who sexually partner with other women: they distinguish among race, sex, and sexual orientation and commonly use terms such as “black” and “feminist”—rather than “lesbian” or “gay”—to describe themselves. Does that mean that “gay” cannot be a general descriptor for the larger community of sexual and gender minorities, a community that includes transgender persons, black lesbians, and intersex feminists? Of course, “gay” can be a general descriptor of such an internally diverse group.

91 The FTI Scope 3 Report reveals how unsophisticated the EIU Panel’s personnel were as they went about the process of evaluating the connection between the proposed string (“.gay”) and

the community of sexual and gender minorities. Consider a striking analogy. If the proposed string were “.car,” and the Applicant Guidebook awarded no nexus points if a proposed string “under-reached” the community (a requirement rejected by the actual ICANN Applicant Guidebook), would the nexus requirement be defeated upon a claim that “car” did not match or describe some members of the described community, such as people who are very proud of their Cadillacs and never refer to their automobiles as mere “cars”? Of course not. That would be supremely silly—but that is pretty much what the EIU Panel did when its personnel thought that because transgender persons consider themselves part of a “trans community,” they are not **also** part of a larger “gay community.” The same personnel who would conclude, “Of course, a Cadillac owner is **also** part of the larger car community,” apparently were not able to conclude, “And a transgender person is **also** part of the larger LGBT or gay community” (see Wikipedia, “LGBT Community,” quoted above). Why would they make this mistake? One explanation could be homophobia, but a much more likely explanation would be ignorance about sexual and gender minorities—and about the term “gay.”

92 My earlier Expert Report, presumably available to FTI, provided a terminological history of the term “gay” as a reference to the larger community of sexual and gender minorities. Without repeating all of that earlier evidence, let me reassemble most of it, in order to demonstrate not only how “gay” is, historically, the best term for the larger community of sexual and gender minorities, but also how “gay” brings together the ways that sexuality and gender are deeply interrelated. That is, one reason why lesbians and gay men are part of the same larger social movement as transgender and intersex persons is that all of these people have traditionally

been demonized and persecuted for the same general reason: they “deviate” from rigid gender roles that are derived from a naturalized (mis)understanding of biological sex.

A. FROM STONEWALL TO MADRID: “GAY” AS AN UMBRELLA TERM FOR SEXUAL AND GENDER MINORITIES, AND NOT JUST A TERM FOR HOMOSEXUAL MEN

93 In the late nineteenth and early twentieth centuries, sexual and gender nonconformists were pathologized in western culture and law as “degenerates,” “moral perverts,” “intersexuals,” and “inverts,” as well as “homosexuals.”¹⁰ European sexologists, led by Richard von Krafft-Ebing, the author of *Psychopathia Sexualis* (1886), theorized that a new population of “inverts” and “perverts” departed from “natural” (male/female) gender roles and (procreative) sexual practices. As freaks of nature, these people reflected a “degeneration” from natural forms.¹¹

94 Even the “inverts” themselves used these terms, as illustrated by Earl Lind’s *Autobiography of an Androgyne* (1918) and *The Female Impersonators* (1922). Lind’s was the first-person account of an underground New York City society of people he described as “bisexuals,” “inverts,” “female impersonators,” “sodomites,” “androgynes,” “fairies,” “hermaphroditoi,” and so forth. What these social outcasts and legal outlaws had in common was that they did not follow “nature’s” binary gender roles (biological, masculine man marries biological,

¹⁰ E.g., Havelock Ellis, *Sexual Inversion* (3d ed. 1915); William Lee Howard, *The Perverts* (1901), and *Effeminate Men and Masculine Women*, 71 N.Y. Med. J. 686-87 (1900); see generally William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003*, at 39-49 (2008); Jonathan Ned Katz, *Gay/Lesbian Almanac: A New Documentary* 213 et al. (1983).

¹¹ Krafft-Ebing and the other European sexologists are discussed in Eskridge, *Dishonorable Passions*, pp. 46-49.

feminine woman) and procreative sexual practices that were socially expected in this country.¹²

Notice that, both socially and theoretically, what put all these people in the same class was that they did not conform to standard gender roles and procreation-based sexual practices.

95 Most of these terms were derogatory, as was “homosexual,” a German term imported into the English language in the 1890s. Some members of this outlaw community in Europe and North America resisted the pathologizing terms and came up with their own language. In Germany, Karl Ulrichs, a homosexual man, dubbed his tribe “urnings,” and Magnus Hirschfeld described “transvestites” with sympathy. At first in America and subsequently in the rest of the world, the most popular term to emerge was “gay,” a word traditionally meaning happy and joyful. Sexual and gender minorities appropriated this “happy” word as a description of their own amorphous subculture.

96 An early literary example was Gertrude Stein’s *Miss Furr and Miss Skeene* (1922, but written more than a decade earlier). The author depicted a female couple living together in an unconventional household that did not conform to gender and sexual expectations that a woman would “naturally” marry and live with a man/husband and raise the children they created through marital intercourse. In 1922, almost no one would have dared represent, in print, Miss Furr and Miss Skeene as a lesbian couple or as a couple where one woman passed

¹² See also Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908); Xavier Mayne (a/k/a Edward Stevenson), *The Intersexes: A History of Simulsexualism as a Problem in Social Life* (1908).

or posed as a man. (Such an explicit book would have been subject to immediate censorship.)

Instead, Gertrude Stein described the women thus:

“They were quite regularly gay there, Helen Furr and Georgine Skeen, they were regularly gay there where they were gay. To be regularly gay was to do every day the gay thing that they did every day. To be regularly gay was to end every day at the same time after they had been regularly gay.”

If they were not completely baffled, the censors and most readers in the 1920s would have assumed the traditional reading of “gay,” used here in a distinctively repetitive, literary manner. Denizens of the subculture of sexual and gender outlaws would have guessed that there was more to the relationship than a joint lease—but they would not have known whether the women were sexual partners, whether one of them played the “man’s role,” or even whether they were even two women, and not a woman and a man passing as a woman, or even what Earl Lind had called an “androgynous” or “hermaphrodite.”

97 Gertrude Stein’s story illustrates how “gay” could, as early as 1922, have three layers of meaning: (1) happy or merry, (2) homosexual, and/or (3) not conforming to traditional gender or sexual norms. As the twentieth century progressed, meaning (1) has been eclipsed by meanings (2) and (3), which are deeply related. There was in this early, closeted, era a “camp” feature to this toggling among three different meanings, as different audiences could draw different meanings, and audiences “in the know” could find delight in the ambiguity or being in on the secret.

98 An early example from popular culture might be helpful. In the hit cinematic comedy *Bringing Up Baby* (1938), Cary Grant's character sent his clothes to the cleaners and dresses up in Katherine Hepburn's feather-trimmed frilly robe. When a shocked observer asked why the handsome leading man was thus attired, Grant apparently ad-libbed, "Because I just went gay all of a sudden!" Audiences found the line amusing. Ordinary people, and presumably the censors (who in the 1930s were supposed to veto movies depicting homosexuality or transvestism), liked the handsome matinee idol's "carefree" attitude about donning female attire. Cross-dress for success! Hollywood insiders and people in the underground gay community appreciated the hint of sexual as well as gender transgression. Cross-gender attire and behavior (gender "inversion," to use the older term) were associated with homosexuality. And Cary Grant's inner circle would have been shocked and titillated that this actor, who lived for twelve years with fellow heart-throb Randolph Scott, a bromance rumored to be sexual, would have cracked open his own closet door with this line.¹³

99 In the mid-twentieth century, "gay" gained currency as both a specific term for homosexual men in particular **and** as an umbrella term for the larger subculture where homosexual men were most prominent but were joined by lesbians, butch "dykes," drag queens, bisexuals, sexual and gender rebels, and their allies. "Queer" is another term that had this quality, but it never gained the wide currency and acceptance that "gay" did. *See* Figure 1, above. Indeed,

¹³ For a provocative analysis of the Cary Grant-Randolph Scott bromance, see Michael Musto, *Cary Grant and Randolph Scott: A Love Story*, Village Voice, Sept. 9, 2010.

in many countries, “queer” to this day carries more negative connotations than “gay,” which continues to make “queer” a less attractive generic term.

100 A defining moment in gay history came when gay people rioted for several nights in June 1969, responding to routine police harassment at New York City’s Stonewall Inn. As historian David Carter says in his classic account of the riots, a motley assortment of sexual rebels, gender-benders, and their allies sparked the “Gay Revolution.”¹⁴ Sympathetic accounts of the Stonewall riots mobilized the popular term “gay” to mean **both** the homosexual men **and** the community of sexual and gender minorities who participated in the “Gay Revolution.” For example, Carter reports that this “Gay Revolution” began when a “butch dyke” punched a police officer in the Stonewall, which triggered a series of fights, a police siege of the bar, and several nights of protests and riots. Many and perhaps most of the fighters, protesters, and rioters were homosexual or bisexual men, but Carter insists that “special credit must be given to gay homeless youths, to transgendered men, and to the lesbian who fought the police. * * *

A common theme links those who resisted first and fought the hardest, and that is gender transgression.”¹⁵

101 Take the Stonewall Inn itself. It was a seedy establishment in the West Village of Manhattan that contemporary accounts described as a “gay bar.” The patrons of the gay bar included

¹⁴ David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2010).

¹⁵ *Id.* at 261; *see id.* at 150-51 (describing the first punch thrown by the “butch dyke,” who floored a police officer).

homosexual and bisexual men who were insisting they be called “gay” and not the disapproved Greek terms (“homosexual” and “bisexual”) that had been devised by the doctors. Many of the people in the gay bar were not homosexual men, but were lesbians, gender-bending “bull dykes” and “drag queens,” gender rebels, bisexual or sexually open youth, and the friends and allies of these gender and sexual nonconformists.¹⁶

102 Early on, Stonewall was hailed as “the birth of the Gay liberation movement.”¹⁷ In New York alone, it spawned organizations for “gay rights” that prominently included the Gay Liberation Front, the Gay Activists Alliance, and dozens of other gay groups. These groups included gay men, but also bisexuals, lesbians, and transgender persons, allies, hangers-on, and “queers” of all sorts. The community of sexual and gender minorities knowingly used the term “gay” in both senses—as a term displacing “homosexual” for sexual orientation and as an umbrella term for the entire community. In San Francisco, Carl Wittman’s *The Gay Manifesto* (1970) made clear that the “gay agenda” was to mobilize gender and sexual nonconformists to resist social as well as state oppression and disapproval. “Closet queens” should “come out” and celebrate their differences.

103 Activists also sought to reclaim the history of their community—what Jonathan Ned Katz, the leading historian, calls “Gay American History.” First published in 1976 and reissued many

¹⁶ See *id.* at 67-88 (describing the reopening of the Stonewall in 1967 and the highly diverse gay crowd that it attracted, even though its Mafia owners sought to restrict entry through a doorman).

¹⁷ Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 508 (1976).

times since, Katz's *Gay American History* is populated by a wide range of gay characters, most of whom were not homosexual men. The Americans narrating or described in the pages of *Gay American History* include dozens of Native American *berdaches*, namely, transgender or intersex Native Americans, whom white contemporaries called "hermaphrodites" and "man-women";¹⁸ poet Walt Whitman, who celebrated "the love of comrades," which he depicted as male bonding and intimate friendships;¹⁹ "male harlots," or prostitutes, on the streets of New York;²⁰ Murray Hall, a woman who passed as a man and married a woman, as well as dozens of other similar Americans;²¹ lesbian or bisexual women such as blues singer Bessie Smith and radical feminist and birth control pioneer Emma Goldman.²² More recent historical accounts of the diverse community of sexual and gender nonconformists have, like Katz, described their projects in terms such as *Gay L.A.* and *Gay New York*.²³

¹⁸ *Id.* at 440-69, 479-81, 483-500 (dozens of examples of transgender Indians).

¹⁹ *Id.* at 509-12 (Whitman).

²⁰ *Id.* at 68-73 (male prostitutes, called "harlots" in a contemporary report).

²¹ *Id.* at 317-90 (dozens of women who "passed" as men, many of whom marrying women).

²² *Id.* at 118-27 (Smith), 787-97 (Goldman).

²³ Lillian Faderman & Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (2006) (excellent account of the increasingly diverse and differentiated population of "Gay Los Angeles"); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994) (although an account focusing on the world of men, this book includes within the "gay male world" bisexual men, drag queens, fairies, queers, and other gender-bending men and their allies).

104 Since the early 1970s, of course, the gay community has evolved, especially as it has successfully challenged most of the explicit state discriminations and violence against sexual and gender minorities. As hundreds of thousands of sexual and gender nonconformists have come out of the closet and have asserted their identities openly in our society, there has been a great deal more specification for different groups within the larger gay community.

105 Early on and widely in the 1970s, many lesbians insisted that public discourse should discuss the common challenges faced by “lesbian and gay” persons. In the 1990s, it was not uncommon for community members to refer to sexual minorities as lesbian, gay, and bisexual persons, and soon after that the blanket term “LGBT” (lesbian, gay, bisexual, and transgender) came into prominence, in order to include transgender persons explicitly. Notwithstanding this level of specification and the laudable impulse to recognize different subcommunities, the term “gay” still captured the larger community.

106 I entitled my first gay rights book *Gaylaw: Challenging the Apartheid of the Closet* (1999). The book described its subject in this way: “Gaylaw is the ongoing history of state rules relating to gender and sexual nonconformity. Its subjects have included the sodomite, the prostitute, the degenerate, the sexual invert, the hermaphrodite, the child molester, the transvestite, the sexual pervert, the homosexual, the sexual deviate, the bisexual, the lesbian and the gay man, and transgender people.”²⁴ Although many readers were taken aback that

²⁴ William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 1 (1999). The United States Supreme Court both cited and borrowed language and citations from my law review article that was reproduced as chapter 4 of *Gaylaw* in *Lawrence v. Texas*, 539 U.S. 558, 568-71 (2003). The Court also relied on the brief I wrote for the Cato Institute, which was drawn

“gaylaw” might mean rights, rather than jail sentences, for sexual and gender nonconformists, no one objected that “gaylaw” and “gay rights” did not include the law and rights relating to transgender and intersex persons, bisexuals, and other sexual or gender nonconformists.

107 In the new millennium, after the publication of *Gaylaw*, the acronym summarizing membership in the gay community has grown longer and more complicated. Sometimes the acronym is LGBTQ, with “queer” added, and intersex persons are often included, to make the acronym LGBTI or LGBTQI. Dotgay’s application describes the community as LGBTQUIA, namely, lesbian, gay, bisexual, transgender, queer, intersex, and allied persons.

108 Has the expanding acronym rendered “gay” obsolete as the commonly understood umbrella term for our community? In my expert opinion, it has not. Recall that ICANN’s requirement for the nexus requirement between proposed string and community is **not** that the proposed string is the only term for the community, or even that it is the most popular. Instead, the test is whether the proposed string (“.gay”) “is a well-known short-form or abbreviation of the community.” AGB, p. 4-12. There is a great deal of evidence indicating that it is. As the FTI Scope 3 Report makes painfully obvious, none of this evidence was considered by the EIU

from *Gaylaw* as well. See *id.* at 567-68. Justice Scalia’s dissenting opinion cited *Gaylaw* so often that he short-formed it “Gaylaw.” See *id.* at 597-98 (dissenting opinion).

Panel, and none was considered by FTI when it concluded that the EIU Panel faithfully adhered to the ICANN and CPE guidelines and consistently applied those guidelines.

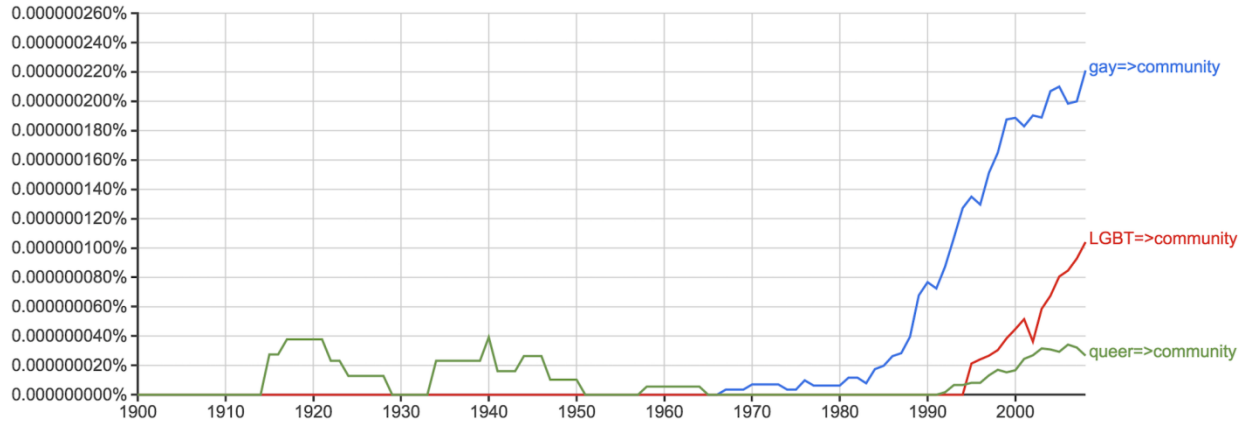


Figure 2. A Depiction of Dependency Relations among “Community” and Modifying Adjectives (“Gay”, “LGBT”, and “Queer”)

109 Figure 2, above, reflects the usage in the searchable Internet of “gay” as modifying “community,” and offers a comparison with other adjectives, such as “queer” and “LGBT” modifying “community.” (The methodology for the search is contained in Appendix 2.)

110 There are other corpuses that can be searched, and I have done so to check the reliability of the data in Figure 2. Brigham Young University maintains a Corpus of Contemporary American English (“BYU Corpus”); it contains 520 million words, 20 million each year from 1990 to 2015. The BYU Corpus can be accessed at <http://corpus.byu.edu/coca/> (last viewed Jan. 28, 2018). The BYU Corpus captures a wide range of usage, as it divides words equally among fiction, newspapers, spoken word, popular magazines, and academic texts. A search of the BYU Corpus confirms the suggestion in Figure 1, above, that “gay” dominates “LGBT” and other acronyms used to describe sexual and gender minorities. In my 2016

search, I found 26,530 hits on the BYU Corpus for “gay,” 673 hits for “LGBT,” 193 hits for “LGBTQ,” and 0 hits for “LGBTQIA.”

111 Does “gay community” generate a comparable number of hits? In my 2016 search of the BYU Corpus, I found “gay community” eight times more frequently than “LGBT community.” (“LGBTQIA community” returned no results.) While “LGBT community” is much more popular now than it was ten or even five years ago, the most popular term remains “gay community.” Figure 3 provides an illustration of these results.

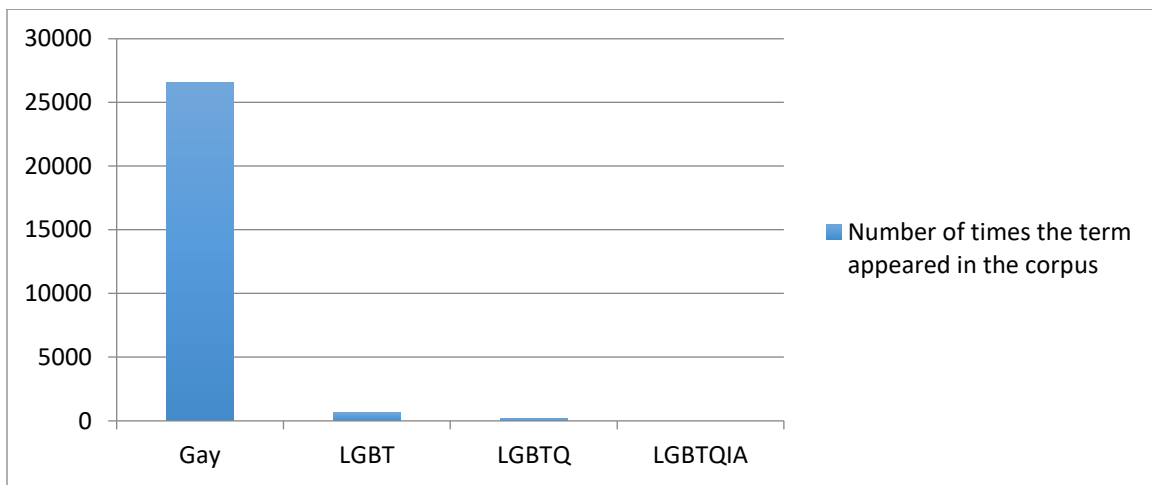


Figure 3. A Depiction of Dependency Relations found in the BYU Corpus among “Community” and Modifying Adjectives (“Gay”, “LGBT”, “LGBTQ” and “LGBTQIA”)

112 How does this empirical evidence relate to the legal criteria that must be applied to Criterion #2 (Nexus)? Recall that ICANN’s Applicant Guidebook awards 3 of 3 points for the community-nexus category if the applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). Both the specific examples (above and in the following pages) and the empirical analysis establish beyond cavil that “gay” is a “well known short-form or abbreviation for the community.” Indeed, the data would support the proposition that “gay” is the “**best known** short-form or abbreviation for the community” (“best” substituted for “well”). But that is not the burden of the applicant here; dotgay has more than met its burden to show that its applied-for string is “a **well known** short-form or abbreviation for the community” (emphasis added). To confirm this point, consider some current evidence.

113 Bring forward the Stonewall story of violence against sexual and gender minorities to the present: the shootings at Pulse, the “gay bar” in Orlando, Florida in June 2016. My research associates and I read dozens of press and Internet accounts of this then-unprecedented mass assault by a single person on American soil.²⁵ Almost all of them described Pulse as a “gay bar,” the situs for the gay community. But, like the Stonewall thirty-seven years earlier, Pulse was a “gay bar” and a “gay community” that included lesbians, bisexual men and women, transgender persons, queer persons, and allies, as well as many gay men.

²⁵ We examined accounts by the *New York Times* and *Washington Post*, CNN, BBC, NBC, and NPR.

114Forty-nine “gay people” died as a result of the massacre. They were a diverse group of sexual and gender minorities, and their allies and friends.²⁶ Most of the victims were homosexual or bisexual men enjoying Pulse with their boyfriends or dates. But some of the victims were women, such as Amanda Alvear and Mercedes Flores and Akyra Murray. Others were drag queens and transgender persons such as Anthony Luis Laureanodisla (a/k/a Alanis Laurell). Yet other celebrants were queer “allies” such as Cory James Connell, who was with his girlfriend at Pulse when he was shot, and Brenda McCool, a mother of five and grandmother of eleven, who was with her son when she was shot.

115Consider, finally, a positive legacy of the Stonewall riots, namely, “gay pride.” For more than 40 years, the New York City gay community has hosted a Pride Parade, remembering the degrading treatment once accorded sexual and gender minorities by the state and by society and asserting pride in ourselves and pride that our country now celebrates sexual and gender diversity. The New York City Pride Parade is highly inclusive and includes marchers and floats from all gender and sexual minorities. Held in the aftermath of the Orlando shootings, the June 2016 New York Pride Parade was one of the largest ever, and the mainstream media celebrated the event with highlights from what most accounts called “the Gay Pride Parade.”²⁷

²⁶ For biographies of victims in the Pulse shootings, see <http://www.npr.org/sections/thetwo-way/2016/06/12/481785763/heres-what-we-know-about-the-orlando-shooting-victims> (last viewed Sept. 9, 2016).

²⁷ *E.g., Highlights from New York’s Gay Pride Parade*, N.Y. Times, June 26, 2016, available at <http://www.nytimes.com/live/gay-pride-parade-nyc-2016/> (viewed Sept. 10, 2016).

116 Today, the phenomenon of gay pride celebrations is world-wide. Cities on all continents except Antarctica host these events—from Gay Pride Rio to Gay Pride Week in Berlin to Cape Town Gay Pride to the Big Gay Out in Auckland to Gay Pride Rome to Gay Pride Orgullo Buenos Aires to Gay Pride Tel Aviv to Istanbul Gay Pride to Gay Pride Paris. I am taking these tag names from a website that collects more than 200 “gay pride events” all over the world, <https://www.nighttours.com/gaypride/> (last viewed January 25, 2018). A review of the websites for the world-wide gay pride events suggests that most are just as inclusive as the New York Gay Pride Parade.

117 There are also international gay pride events. In 2017, it was World Pride Madrid, celebrating Spain’s leadership on issues important to lesbians, gay men, bisexuals, transgender and intersex persons, queers, and allies. Indeed, Madrid’s annual pride celebration was voted “best gay event in the world” by the Tripout Gay Travel Awards in 2009 and 2010. When Madrid was chosen for this honor, media accounts routinely referred to the event as “Gay World Pride.”²⁸ The official website described World Pride Madrid as “the biggest Gay Pride Event in the World” during 2017, <http://worldgaypridemadrid2017.com/en/worldpride/> (viewed January 25, 2018). Gay pride parades and celebrations all over the world illustrate the theme that the media, especially the Internet, often use “gay” **both** as a generic, umbrella term for

²⁸ *E.g., Madrid to Host World Gay Pride*, Gay Star News, Oct. 12, 2012, available at <http://www.gaystarnews.com/article/madrid-host-2017-world-gay-pride081012/>.

sexual and gender minorities **and** as a term referring to homosexual men—often in the same article.

B. “GAY” IS AN UMBRELLA TERM FOR THE COMMUNITY THAT INCLUDES TRANSGENDER, INTERSEX, AND ALLIED PERSONS

118 As illustrated by the accounts of the Orlando “gay bar” and the world-wide “gay pride” events, the term “gay” remains a broad term used to describe **both** the larger community of sexual and gender minorities **and** the smaller community of homosexual men. A simple statistical analysis will illustrate this point. Figure 4, below, reports that “gay people,” the generic term, remains the most popular use of the term “gay,” with “gay men” and “gay women” also popular, but much less so.

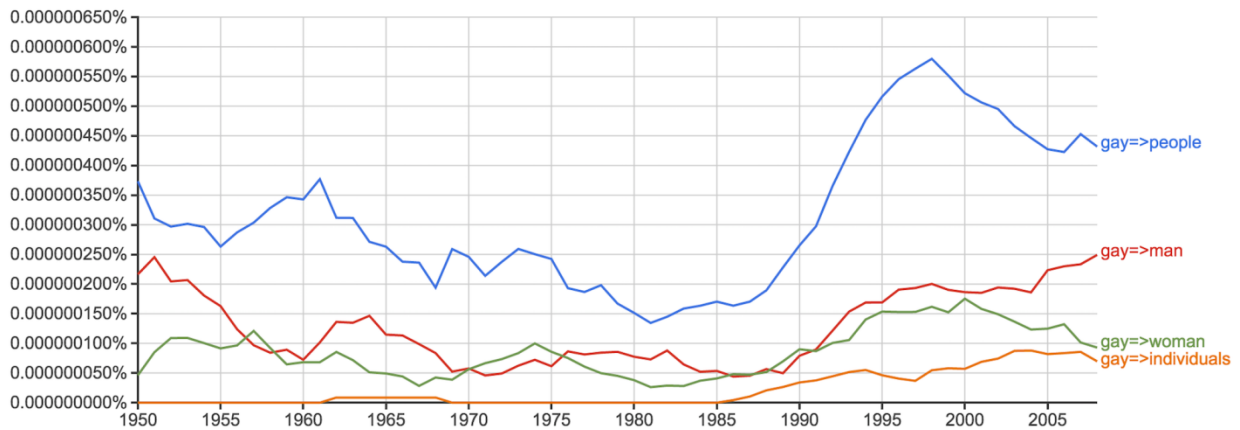


Figure 4. A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”

119 The CPE Report, however, insisted that “gay community” does not include transgender, intersex, and allied persons. The EIU Panel offered no systematic evidence for this proposition,

aside from its assertion that its staff did some kind of unspecified, nonreplicable browsing, an impression that is confirmed by the FTI Scope 3 Report, pp. 37-39. As I shall show, the EIU Panel did not browse very extensively.

120 To begin with, it is important to understand that the proliferation of letters in the acronyms, describing the gay community by listing more subgroups, is no evidence whatsoever that “gay” does not describe the overall community. Indeed, the CPE Report and this Second Expert Report are in agreement that the term “gay” has been the only stable term that has described the community of sexual and gender nonconformists over a period of generations. That “gay” has been a longstanding, stable, and widely referenced term makes it perfect for an Internet domain (“.gay”) for the community that consists of sexual and gender minorities.

121 Thus, almost all of the CPE Report’s examples, such as the renaming of gay institutions to identify subgroups through LGBT specifications, are consistent with dotgay’s claim that “gay” is a “well known short-form or abbreviation for the community.” The EIU Panel objected that dotgay’s analysis “fails to show that when ‘gay’ is used in these articles it is used to identify transgender, intersexes, and/or other ally individuals or communities.” CPE Report, p. 7. Although I do not believe that statement fairly characterized dotgay’s application and supporting evidence, I can offer some further specific examples and some systematic evidence (with identifiable methodologies).

122 Consider the famous “Gay Games,” an international Olympic-style competition run every four years by the Federation of the Gay Games for the benefit of the community of sexual and gender minorities. “The mission of the Federation of Gay Games is to promote equality

through the organization of the premiere international LGBT and gay-friendly sports and cultural event known as the Gay Games.”²⁹ Or: “The Gay Games and its international Federation exist to serve the needs of athletes, artists, and activists. The mission is to promote equality for all, and in particular for lesbian, gay, bi and trans people throughout the world.”³⁰ Notice how the Federation uses the term “gay” as both a generic, umbrella term (“Gay Games”) and as a more particularized term for homosexual men. And notice how the Federation uses the acronyms (mainly, LGBT+) to describe the community with specific inclusivity, but still refers to the endeavor with the umbrella term, i.e., “Gay” Games.

123 Most and perhaps all of the people running the Federation of Gay Games are themselves sexual and gender minorities, so their terminology says something about usage within the community. While LGBTQIA individuals self-identify in a variety of ways, and while some of them prefer one of the acronyms when speaking more broadly, they also know “gay” to be a short-form for their community. Very important is the fact that this is even more true of the larger world population. If you asked a typical, well-informed person anywhere in the world to name the Olympic-style competition that welcomes transgender or intersex participants, he or she would be more likely to answer “Gay Games” (or its predecessor, “Gay Olympics”) than “Trans Games” or “Intersex Olympics.”

²⁹ Federation of Gay Games, *Purpose and Mission Statement*, <https://gaygames.org/Mission-&-Vision> (viewed January 25, 2018).

³⁰ Federation of Gay Games, “How We Do It,” <https://gaygames.org/> (viewed January 25, 2018).

124 The Gay Games analysis does not stand alone. As the EIU Panel conceded, many lesbian, gay, bisexual, transgender, intersex, queer, and allied people happily celebrate “gay pride” events or engage in “gay rights” advocacy. CPE Report, p. 7.³¹ “Gay rights” include the rights of transgender, intersex, and other gay-associated persons. To take a recent example, North Carolina in 2016 adopted a law requiring everyone to use public bathrooms associated with his or her chromosomal sex. Although the law obviously targeted transgender and intersex persons, the mainstream media constantly referenced this as an “anti-gay” measure or as a law that implicated “gay rights.”³²

125 In addition to being a unifying term to describe the community’s political and legal activity, the short-form “gay” is also associated with community cultural activities. Bars for sexual and gender nonconformists are routinely called “gay bars.” These bars are frequented not just by gay men and lesbians, but also by transgender individuals, queer folk, and straight allies.³³

³¹ See *Gay Pride Calendar*, <http://www.gaypridecalendar.com/> (last viewed January 25, 2018) (the website that lists dozens of “pride” parades, operating under a variety of names but all clustered under the generic “gay pride calendar”).

³² E.g., Richard Socarides, *North Carolina and the Gay-Rights Backlash*, *New Yorker*, Mar. 28, 2016; Jonathan M. Katz & Erik Eckhom, *Anti-Gay Laws Bring Backlash in Mississippi, and North Carolina*, *New York Times*, Apr. 5, 2016.

³³ Sunnive Brydum, *Meet the Trans Performer Who Narrowly Escaped the Pulse Shooting*, *Advocate*, June 20, 2016, <http://www.advocate.com/transgender/2016/6/20/meet-trans-performer-who-narrowly-escaped-pulse-shooting-video> (viewed Sept. 9, 2016).

Gay Star News is a prominent international news website for the community of sexual and gender minorities, covering many stories on transgender, intersex, and queer issues.³⁴

126 Recent histories by LGBT+ insiders continue to use “gay” as a generic, umbrella term, while at the same time paying close attention to transgender, intersex, queer, and hard-to-define persons. Consider Lillian Faderman and Stuart Timmons’ account of *Gay L.A.* They conclude their history with a chapter on the twenty-first century, which explores the greater specification and the copious permutations of sexual and gender identity. Raquel Gutierrez, for example, is a gender-bender who does not identify as transgender and has “exhausted [her] identity as a ‘lesbian of color’.” * * * But, as she affirms, there is a panoply of identities from which to choose in an expansive **gay L.A.**³⁵ These authors capture a dichotomy that the EIU Panel missed: Individuals might describe themselves in a variety of increasingly specific ways, yet still be considered part of this larger “gay community.” And recall that the Applicant Guidebook’s test is **not** whether every member of the community uses that term, but **instead** whether the public would understand the term “gay community” to be a “short-form or abbreviation” for sexual and gender nonconformists.

³⁴ Greg Hernandez, *Less than One Percent of Characters in Hollywood Movies were LGBTI in 2015*, *Gay Star News*, Sept. 8, 2016, <http://www.gaystarnews.com/article/less-than-1-of-characters-in-hollywood-movies-were-lgbti-in-2015/#gs.AB78vLA> (viewed Sept. 9, 2016).

³⁵ Faderman & Timmons, *Gay L.A.*, pp. 354-55 (account of Raquel Gutierrez). The quotation in text is from the book, but with my bold emphasis.

127 Miley Cyrus is a famous singer and celebrity. She views herself as “gender fluid” and “pansexual.” From the perspective of the EIU Panel, she ought not be a person who would consider herself part of a larger “gay community,” but in the last few years she has been sporting t-shirts and caps adorned with the slogan “Make America Gay Again.”³⁶ Her selfie wearing her stylish “Make America Gay Again” t-shirt went viral on Instagram, reaching more than a million viewers.

128 As before, it is useful to see if these examples can be generalized through resort to a larger empirical examination. In 2016, my research associates and I ran a series of correlations on the corpus of books published between 1950 and 2008, searching for instances where “gay” is not only in the same sentence as “transgender,” but is, more specifically, being used to include “transgender.” Figure 5 reveals our findings. There are virtually no incidences before the 1990s, when transgender became a popular category. Rather than replacing “gay,” as the CPE Report suggested, “transgender” has become associated with “gay.” Specifically, we found thousands of examples where “gay” was used in a way that included “transgender” or “trans” people.

³⁶ Joe Williams, *Miley Cyrus Wants to ‘Make America Gay Again,’* Pink News, July, 25, 2016, available at <http://www.pinknews.co.uk/2016/07/25/miley-cyrus-wants-to-make-america-gay-again/> (last viewed January 25, 2018).

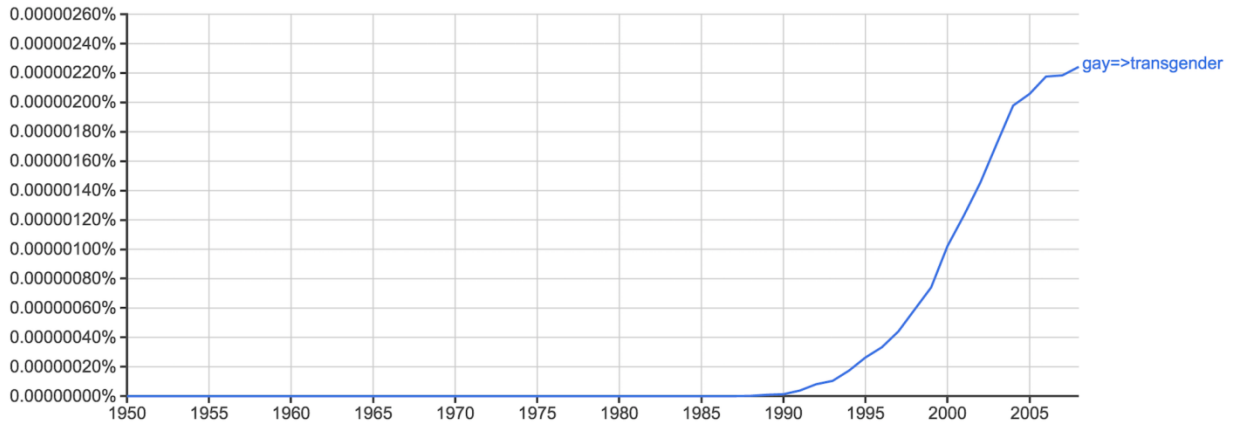


Figure 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

129 The relationship between the gay community and intersex persons is trickier to establish, because “intersex” is a newer term, and it is not clear how many intersex persons there are in the world. Most discussion of intersex persons in the media involves questions about the phenomenon itself, whereby markers conventionally associated with male and female sexes are mixed in the same individual. Nonetheless, some generalizations can be made. Intersex persons themselves have engaged the gay community to add their letter (“I”) to the expanding acronym—hence the LGBTQIA term used in dotgay’s application. This move, itself, suggests that intersex persons consider themselves part of a larger gay community. Indeed, there are many specific examples of this phenomenon—starting with the ILGA, which strongly supports dotgay’s application and which includes intersex persons and organizations within its membership.

130 Some championship-level athletes are or may be intersex individuals. An allegedly intersex runner whose competition as a woman has generated years of controversy, Caster Semenya

of South Africa won the gold medal in the women’s 800 meters at the 2016 Rio Olympics—but only after an international panel required the Olympics to include her. Any actual or suspected intersex athlete competing in the Olympics and most other international competitions faces a great deal of scrutiny and controversy. Not so at the Gay Games, which not only welcomes intersex and transgender athletes, but has a “Gender in Sport” policy that creates opportunities for fair competition without stigmatizing gender minorities.³⁷

131 Common usages of “gay” as an umbrella term have included intersex persons. For example, an informative source of advice on intersex persons can be found in the website, *Everyone Is Gay*.³⁸ The *Gay Star News* is a news source for the broad gay community, and it includes informative articles in intersex persons.³⁹ While there are many intersex-focused websites, *Everyone Is Gay* does reflect the fact that generic gay websites are sources of information about and support for intersex, transgender, and other gender-bending persons.

VI. CONCLUSION AND SIGNATURE

132 Return to ICANN’s mission and core values, as expressed in its Bylaws. The Bylaws establish ICANN’s mission “to coordinate, at the overall level, the global Internet’s systems of unique

³⁷ See Caroline Symons, *Gay Games: A History* (2010) (describing the “Gender in Sport” policy, opening up the Gay Games to intersex and transgender persons on an equal basis).

³⁸ *Intersex Advice*, *Everyone Is Gay*, <http://everyoneisgay.com/tag/intersex/> (last viewed Sept. 9, 2016).

³⁹ E.g., Lewis Peters, *This Infographic Will Tell You Everything You Need To Know About Intersex*, *Gay Star News*, Mar. 16, 2016, <http://www.gaystarnews.com/article/intersex-infographic/#gs.OJOcKBg> (last viewed Sept. 9, 2016).

identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN Bylaws, Art. I, § 1. One of ICANN’s “Core Values” is “[s]eeking and supporting broad informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.” ICANN Bylaws, Art. I, § 2(4).

133 Dotgay’s application for the string “.gay” would seem to fit perfectly within the mission and core values of ICANN. “Gay” is the only generic term for the community of sexual and gender nonconformists that has enjoyed a stable and longstanding core meaning, as reflected in the history surveyed in this Second Expert Report. Such a “.gay” string would create a readily-identifiable space within the Internet for this community. Not surprisingly, ICANN’s requirements for community nexus, Criterion #2 in its Applicant Guidebook, are easily met by dotgay’s application. Led by ILGA, the world-wide gay community supports this application as well, which ought to have generated a higher score for community endorsement, Criterion #4 in the Applicant Guidebook.

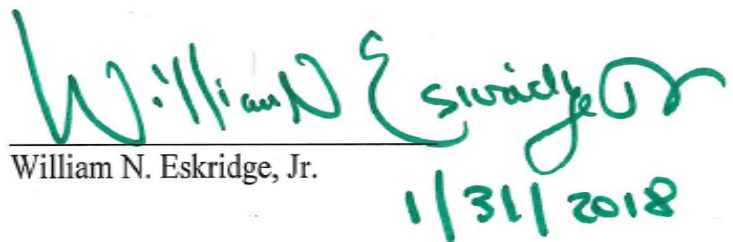
134 Moreover, ICANN “shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” ICANN Bylaws, Art. II, § 3 (“Non-Discriminatory Treatment”). And ICANN “and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” ICANN Bylaws, Art. III, § 1.

135 Evaluating dotgay’s application, the EIU Panel has not acted in a completely “open and transparent manner,” nor has it followed “procedures designed to ensure fairness.” To the contrary, the EIU Panel that produced the CPE Report engaged in a reasoning process that remains somewhat mysterious to me but can certainly be said to reflect an incomplete understanding of the EIU’s own Guidelines, of the requirements of the Applicant Guidebook, and of the history of the gay community, in all of its diverse rainbow glory.

136 Hence, I urge ICANN to reject the recommendations and analysis of the CPE Report and the conclusions reached by FTI in its Scope 2 Report.

Respectfully submitted,

Date: January 31, 2018



William N. Eskridge, Jr.

John A. Garver Professor of Jurisprudence
Yale Law School

APPENDICES

APPENDIX 1

CURRICULUM VITAE OF WILLIAM N. ESKRIDGE JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

EDUCATION

Davidson College, Bachelor of Arts (History), 1973

Summa cum laude, high departmental honors

Algernon Sydney Sullivan Award

Phi Beta Kappa, Phi Eta Sigma (President), Omicron

Delta Kappa, Delta Sigma Rho-Tau Kappa Alpha
(President)

Harvard University, Master of Arts (History), 1974

Reading ability certified in French, German, Latin

Passed Ph. D. oral examinations (with distinction)

Yale University, Juris Doctor, 1978

The Yale Law Journal, 1976-78

Note & Topics Editor (volume 78), 1977-78

Yale prison services clinic, 1975-78

POSITIONS HELD

John A. Garver Professor of Jurisprudence, Yale Law School, 1998 to present

Deputy Dean, 2001-02

Visiting Professor of Law

NYU, 1993, 2004

Harvard, 1994

Yale, 1995
Stanford, 1995
Toronto, 1999, 2001
Vanderbilt, 2003
Columbia, 2003
Georgetown, 2006, 2012

Scholar in Residence

Columbia, 2005, 2011
Fordham, 2008
Pennsylvania, 2018 (expected)

Simon A. Guggenheim Fellow, 1995

Professor of Law, Georgetown University

Full Professor, 1990 - 1998
Associate Professor, 1987 - 1990

Assistant Professor of Law, University of Virginia, 1982 - 1987

Attorney, Shea & Gardner, Washington, D.C., 1979 - 1982

Law Clerk, The Honorable Edward Weinfeld, Southern District of New York (U.S.), 1978 – 1979

(SELECTED) PUBLICATIONS

Books

Interpreting Law: A Primer on How to Read Statutes and the Constitution (Foundation 2016)

Statutes, Regulations, and Interpretation: Legislation and Administration in the Republic of Statutes (West 2014) (co-authored with Abbe R. Gluck and Victoria F. Nourse)

A Republic of Statutes: The New American Constitutionalism (Yale 2010) (co-authored with John Ferejohn)

“Dishonorable Passions”: Sodomy Law in America, 1861-2003 (Viking 2008)

Gay Marriage: For Better or For Worse? What We Have Learned from the Evidence (Oxford 2006) (co-authored with Darren Spedale)

Equality Practice: Civil Unions and the Future of Gay Rights (Routledge 2002)

Legislation and Statutory Interpretation (Foundation, 1999; 2d ed. 2005) (co-authored with Philip Frickey and Elizabeth Garrett)

Gaylaw: Challenging the Apartheid of the Closet (Harvard 1999)

Constitutional Tragedies and Stupidities (NYU 1998) (co-authored and edited with Sanford Levinson)

Sexuality, Gender, and the Law (Foundation 1997; 2d ed. 2003; abridged ed. 2005; 3d ed. 2011) (co-authored with Nan Hunter)

The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment? (Free Press 1996)

Henry M. Hart Jr. and Albert M. Sacks, **The Legal Process: Basic Materials in the Making and Application of Law** (Foundation 1994) (historical and critical edition of 1958 tentative draft) (co-author and -editor with Philip P. Frickey)

Dynamic Statutory Interpretation (Harvard 1994)

Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century (West Publishing Co. 1993; 2d ed. 1998; 3d ed. 2004, 4th ed. 2009; 5th ed. 2013) (co-authored with Daniel Farber & Philip Frickey and, with fifth edition, Jane Schacter)

Legislation: Statutes and the Creation of Public Policy (West 1987; 2d ed. 1994; 3d ed. 2001; 4th ed. 2007; 5th ed. 2014) (co-authored with Philip Frickey and, after second edition, Elizabeth Garrett; starting with fifth edition, add James Brudney)

A Dance Along the Precipice: The Political and Economic Dimensions of the International Debt Problem (Lexington 1985) (editor and author of one chapter) (also published in Spanish and Portuguese editions)

(Selected) Articles

“Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections,” 127 Yale L.J. 322 (2017)

“The First Marriage Cases, 1970-74,” in *Love Unites Us: Winning the Freedom to Marry in America* 21-27 (Kevin M. Cathcart & Leslie J. Gabel-Brett, eds., 2016)

“Law and the Production of Deceit,” in Austin Sarat ed., *Law and Lies: Deception and Truth-Telling in the American Legal System* 254-312 (2015)

“Original Meaning and Marriage Equality,” 52 Hous. L. Rev. 1067 (2015)

“Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011,” 92 Tex. L. Rev. 1317 (2014) (with Matthew R. Christiansen)

“Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States,” 93 B.U.L. Rev. 275 (2013)

“Expanding *Chevron*’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,” 2013 Wis. L. Rev. 411

“The New Textualism and Normative Canons,” 113 Colum. L. Rev. 531 (2013) (book review)

“Marriage Equality: An Idea Whose Time Is Coming,” 37 NYU Rev. L. & Soc. Change 245 (2013)

“Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms,” 57 St. Louis U.L. Rev. 865 (2012)

“Vetogates and American Public Law,” J.L. Econ. & Org. (April 2012)

“Family Law Pluralism: A Guided-Choice Regime of Menus, Default Rules, and Override Rules,” 100 Geo. L.J. 1881 (2012)

“Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms,” 45 Ga. L. Rev. 657 (2011)

“Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?,” 50 Washburn L.J. 1 (2010)

“Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases,” 110 Colum. L. Rev. 1727 (2010) (with Connor N. Raso)

“The California Proposition 8 Case: What Is a Constitution For,” 98 Calif. L. Rev. 1235 (2010)

“Sexual and Gender Variation in American Public Law: From Malignant to Tolerable to Benign,” 57 UCAL L. Rev. 1333 (2010)

“The California Supreme Court, 2007-2008—Foreword: The Marriage Cases, Reversing the Burden of Inertia in a Pluralist Democracy,” Calif. L. Rev. (2009)

“A Pluralist Theory of Equal Protection,” U. Pa. J. Const’l L. (2009)

“Constitutional Horticulture: Deliberation-Respecting Judicial Review,” 87 Tex. L. Rev. 1273 (2009) (with John Ferejohn)

“Vetogates, Preemption, *Chevron*,” 83 Notre Dame L. Rev. 1441 (2008)

“The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,” 96 Geo. L.J. 1083 (2008) (co-authored with Lauren Baer) (the Ryan Lecture)

“America’s Statutory ‘Constitution,’” 41 U.C. Davis L. Rev. 1 (2007) (the Barrett Lecture)

“No Frills Textualism,” 119 Harv. L. Rev. 2041 (2006) (book review)

“*Chevron* and Agency Norm Entrepreneurship,” 115 Yale L.J. 2623 (2006) (essay co-authored with Kevin Schwartz)

“Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” 57 Fla. L. Rev. 1011 (2005) (the Dunwoody Lecture)

“Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics,” 114 Yale L.J. 1279 (2005)

“*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism,” 2 Int’l J. Const’l L. 555 (2004)

“*Lawrence*’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics,” 88 Minn. L. Rev. 1021 (2004)

“Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century,” 100 Mich. L. Rev. 2062 (2002)

“Structuring Lawmaking to Reduce Cognitive Bias: A Critical View,” 87 Cornell L. Rev. 616 (2002)

“Channeling: Identity-Based Social Movements and Public Law,” 150 U. Pa. L. Rev. 419 (2001)

“All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806,” 101 Colum. L. Rev. 999 (2001)

“The Relationship Between Obligations and Rights of Citizens,” 69 Fordham L. Rev. 1721 (2001)

“Super-Statutes,” 50 Duke L.J. 1215 (2001) (co-authored with John Ferejohn)

“Equality Practice: Reflections on the Jurisprudence of Civil Unions,” 64 Alb. L.J. 853 (2001) (Sobota Lecture)

“January 27, 1961: The Birth of Gaylegal Equality Arguments,” 58 NYU Ann. Survey Am. Law 39 (2001)

“No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review,” 75 NYU L. Rev. 1327 (2000)

“Destabilizing Due Process and Evolutive Equal Protection,” 47 UCLA L. Rev. 1183 (2000)

“Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions,” 31 McGeo. L.J. 641 (2000)

“The Circumstances of Politics and the Application of Statutes,” 100 Colum. L. Rev. 558 (2000)

“Multivocal Prejudices and Homo Equality,” 100 Ind. L.J. 558 (1999) (Harris Lecture)

“Norms, Empiricism, and Canons in Statutory Interpretation,” 66 U. Chi. L. Rev. 671 (1999)

“*Hardwick* and Historiography,” 1999 U. Ill. L. Rev. 631 (Baum Lecture)

“Relationships Between Formalism and Functionalism in Separation of Powers Cases,” 22 Harv. J.L. & Pub. Pol’y 21 (1998)

“Should the Supreme Court Read the *Federalist* But Not Statutory Legislative History?,” 66 *Geo. Wash. L. Rev.* 1301 (1998)

“Textualism, the Unknown Ideal,” 96 *Mich. L. Rev.* 1509 (1998) (book review)

“A Jurisprudence of ‘Coming Out’: Religion, Sexuality, and Liberty/Equality Collisions in Public Law,” 106 *Yale L.J.* 2411 (1997)

“Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961,” 24 *Fla. St. U.L. Rev.* 703 (1997) (Mason Ladd Lecture)

“Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981,” 25 *Hofstra L. Rev.* 817 (1997) (Visiting Scholar in Residence Lecture)

“Willard Hurst, Master of the Legal Process,” 1997 *Wis. L. Rev.* 1181

“From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945,” 82 *Iowa L. Rev.* (1997) (Murray Lecture)

“Steadying the Court’s ‘Unsteady Path’: A Theory of Judicial Enforcement of Federalism,” 68 *U. So. Cal. L. Rev.* 1447 (1995) (co-authored with Jenna Bednar)

“Virtual Logrolling: How the Court, Congress, and the States Multiply Rights,” 68 *U. So. Cal. L. Rev.* 1545 (1995)

“Regulatory Variables and Statutory Interpretation,” 73 *Wash. U.L.Q.* 1103 (1995) (co-authored with Judith Levi)

“Fetch Some Soupmeat,” 16 *Cardozo L. Rev.* 2209 (1995)

“The Supreme Court, 1993 Term – Foreword: Law as Equilibrium,” 108 *Harv. L. Rev.* 26 (1994) (co-authored with Philip Frickey)

“The Elastic Commerce Clause: A Political Theory of American Federalism,” 49 *Vand. L. Rev.* 1355 (1994) (co-authored with John Ferejohn)

“The Making of ‘The Legal Process,’” 107 *Harv. L. Rev.* 2031 (1994) (essay, co-authored with Philip Frickey)

“From Handholding to Sodomy: The First Amendment and the Regulation of Homosexual Conduct,” 29 *Harv. C.R.-C.L. L. Rev.* 319 (1994) (co-authored with David Cole)

“The Economics Epidemic in an AIDS Perspective,” 61 *U. Chi. L. Rev.* 733 (1994) (review essay co-authored with Brian Weimer)

“Gaylegal Narratives,” 46 *Stan. L. Rev.* 607 (1994)

“Post-Enactment Legislative Signals,” 57 *Law & Contemp. Probs.* 75 (Winter 1994)

“The Judicial Review Game,” 88 *Nw. U.L. Rev.* 382 (1993)

“Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet,” 2 *Reconstruction* 52 (1993)

“The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell,” 61 *Geo. Wash. L. Rev.* 1731 (1993)

“A History of Same-Sex Marriage,” 79 *Va. L. Rev.* 1419 (1993)

“The Relationship Between Theories of Legislatures and Theories of Statutory Interpretation,” in *The Rule of Law (Nomos, 1993)* (co-authored with John Ferejohn)

“A Gay Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda,” 102 *Yale L.J.* 333 (1992) (review essay)

“Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking,” 45 *Vand. L. Rev.* 593 (1992) (co-authored with Philip Frickey)

“The Article I, Section 7 Game,” 80 *Geo. L.J.* 523 (1992) (co-authored with John Ferejohn)

“Overriding Supreme Court Statutory Interpretation Decisions,” 101 *Yale L.J.* 331 (1991)

“Making the Deal Stick: Enforcing the Original Constitutional Understanding,” *J.L. Econ & Org.* (1991) (co-authored with John Ferejohn)

“Reneging on History? Playing the Court/Congress/President Civil Rights Game,” 79 *Calif. L. Rev.* 613 (1991)

“The New Public Law Movement: Moderation as a Postmodern Cultural Form,” 89 *Mich. L. Rev.* 707 (1991) (co-authored with Gary Peller)

“The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases,” 88 *Mich. L. Rev.* 2450 (1990)

“Legislative History Values,” 66 *Chi.-Kent L. Rev.* (1990)

“Dynamic Interpretation of Economic Regulatory Statutes,” 21 *L. & Pol'y Int'l Bus.* 663 (1990)

“Gadamer/Statutory Interpretation,” 90 *Colum. L. Rev.* 609 (1990)

“The New Textualism,” 37 *UCLA L. Rev.* 621 (1990)

“Statutory Interpretation as Practical Reasoning,” 42 *Stan. L. Rev.* 321 (1990) (co-authored with Philip Frickey)

“Spinning Legislative Supremacy,” 78 *Geo. L.J.* 319 (1989)

“Public Values in Statutory Interpretation,” 137 *U. Pa. L. Rev.* 1007 (1989)

“Metaprocedure,” 98 *Yale L.J.* 945 (1989) (review essay)

“Interpreting Legislative Inaction,” 87 *Mich. L. Rev.* 67 (1988)

“Overruling Statutory Precedents,” 76 *Geo. L.J.* 1361 (1988)

“Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,” 74 *Va. L. Rev.* 275 (1988)

“Dynamic Statutory Interpretation,” 135 *U. Pa. L. Rev.* 1479 (1987)

“Legislation Scholarship & Pedagogy in the Post-Legal Process Era,” 48 U. Pitt. L. Rev. 691 (1987) (co-authored with Philip Frickey)

“*Les Jeux Sont Faits*: Structural Origins of the International Debt Problem,” 25 Va. J. Int’l L. 281 (1985)

“One Hundred Years of Ineptitude,” 70 Va. l. Rev. 1083 (1984)

“The Iranian Nationalization Cases,” 22 Harv. Int’l L.J. 525 (1981)

“*Dunlop v. Bachowski* & the Limits of Judicial Review under Title IV of the LMRDA,” 86 Yale L.J. 885 (1977) (student note)

ENDOWED LECTURES

Sullivan Lecture, Capital University School of Law, “Ohio’s 2004 Super-DOMA and Constitutional Deliberation,” October 2017

Henry J. Miller Lecture, Georgia State University College of Law, “Marriage Equality, 1967-2017,” September 15, 2016

Frankel Lecture, University of Houston Law Center, “Marriage Equality as a Testing Ground for Original Meaning,” November 2014, published as “Marriage Equality and Original Meaning” (2015)

Mathew O. Tobriner Memorial Lecture on Constitutional Law, University of California at Hastings, College of Law, “Marriage Equality’s Cinderella Moment,” September 6, 2013

2012 Distinguished Lecture, Boston University School of Law, “Beyond Backlash: How Constitutional Litigation Has Advanced Marriage Equality in the United States, 1970-2012,” November 15, 2012, published as “Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States” (2013)

Foulston Siefkin Lecture, Washburn University School of Law, March 26, 2010, published as “Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?”

Sibley Lecture at the University of Georgia, School of Law, March 18, 2010, published as “Noah’s Curse and Paul’s Admonition: What the Civil Rights Cases Can Teach Us about the Clash Between Gay Rights and Religious Liberty” (2012)

Centennial Visitor, Public Lecture, Chicago-Kent College of Law, “Administrative Constitutionalism,” March 5, 2009

Edward Barrett Lecture at the University of California, Davis, School of Law January 17, 2007, published as “America’s Statutory constitution” (2008).

Ryan Lecture at Georgetown University Law Center, November 4, 2006, published as “The Supreme Court’s Deference Continuum, An Empirical Study (from *Chevron* to *Hamdan*)” (2008)

Center for Religious Studies at Princeton University, November 2005, “Nordic Bliss: What the American Same-Sex Marriage Debate Can Learn from Scandinavia”

Lockhart Lecture at University of Minnesota School of Law, “Same-Sex Marriage and Equality Practice,” October 2005,

Dunwoody Lecture at University of Florida School of Law, March 2005, published as “Body Politics: *Lawrence v. Texas* and the Constitution of Disgust and Contagion,” Fla. L. Rev. (2005)

President’s Lecture at Davidson College, March 2004, “The Case for Same-Sex Marriage”

Brennan Lecture at Oklahoma City University School of Law, March 2004, “*Lawrence v. Texas* and Constitutional Regime Shifts”

Dean’s Diversity Lecture at Vanderbilt University School of Law, February 2000, “Prejudice and Theories of Equal Protection”

Steintrager Lecture at Wake Forest University, February 1999, “Jeremy Bentham and No Promo Homo Arguments”

Adrian C. Harris Lecture at the University of Indiana School of Law, October 1998, published as “Multivocal Prejudices and Homo Equality” (1999)

Robbins Distinguished Lecture on Political Culture and the Legal Tradition at the University of California at Berkeley School of Law, February 1998, “Implications of Gaylegal History for Current Issues of Sexuality, Gender, and the Law”

Baum Lecture at the University of Illinois School of Law, November 1997, published as “*Hardwick* and Historiography” (1998)

Visiting Scholar in Residence Lecture at Hofstra University School of Law, October 1996, published as “Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, *Nomos*, and Citizenship, 1961-1981” (1997)

Mason Ladd Lecture at Florida State University College of Law, April 1996, published as “Privacy Jurisprudence and the Apartheid of the Closet” (1997)

Murray Lecture at the University of Iowa, January 1996, published as “From the Sodomite to the Homosexual: American Regulation of Same-Sex Intimacy, 1885-1945” (1998)

Cutler Lecture at William and Mary School of Law, February 1995, published as “The Many Faces of Sexual Consent” (1995)

Donley Lectures at West Virginia University School of Law, published as “Public Law from the Bottom Up” (1994)

Congressional Testimony and Consultation

Senate Comm. on Labor, Pensions, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Nov. 2009) (written testimony only)

House Comm. on Education & Labor, 111th Congress, 1st Sess., *Proposed Employment Non-Discrimination Act of 2009* (Sept. 2009)

Senate Comm. on the Judiciary, Senator Arlen Specter (Chair), Confirmation of Judge John Roberts as Chief Justice, United States Supreme Court (2005) (consultation only)

H.R. 1283, The Fairness in Asbestos Compensation Act, House Comm. on the Judiciary, 106th Cong., 1st Sess. (1999) (written testimony only) (jumbo consolidations in asbestos litigation)

Senate Comm. on the Judiciary, Senator Joseph Biden (Chair), Confirmation of Judge Stephen Breyer as Associate Justice, United States Supreme Court (1994) (consultation only)

S. 420, the Ethics in Government Reform Act of 1993, and S. 79, the Responsible Government Act of 1993, Subcomm. on Oversight of Government Management of the Senate Comm. On Governmental Affairs, 103d Cong., 1st Sess. (1993)

Interpreting the Pressler Amendment: Commercial Military Sales to Pakistan, Senate Comm. on Foreign Relations, 102d Cong., 2d Sess. (1992)

S. 2279, the Lobbying Disclosure Act of 1992, Subcomm. On Oversight of the Senate Comm. on Governmental Affairs, 102d Cong., 2d Sess. (1992)

Statutory Interpretation and the Uses of Legislative History, Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990)

Adjustable Rate Mortgages (ARMs), Subcomm. On Housing and Community Development of the House Comm. on Banking and Urban Affairs, 98th Cong., 2d Sess. (1984)

APPENDIX 2

EXPLANATIONS OF DATA COLLECTION REFLECTED IN THE FIGURES

FIGURE 1. *A Comparison of the Frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English Corpus of Books published in the United States from 1900 to 2008*

This Figure is a comparison of the frequency of “Gay” “Queer” “Lesbian” and “LGBT” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The X-Axis represents years. The Y-Axis represents the following: Of all the bigrams/unigrams in the sample of books, what percentage of them are “Gay” “Queer” “Lesbian” and “LGBT”?

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 2. A Depiction of Dependency Relations: Frequency of Various Adjectives (“Gay”, “LGBT”, and “Queer”) Modifying “Community”

This Figure is a comparison of how often “community” is modified by “gay” “LGBT” and “queer” in the English corpus of books published in the United States from 1900 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 4. *A Depiction of Dependency Relations: Frequency Various Nouns (“People”, “Man”, “Woman”, and “Individuals”) Modified by “Gay”*

This figure is a comparison of how often “gay” modifies “people” “man” “woman” and “individuals” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpuses. Users may scour corpuses for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by “=>” followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click “Search lots of books,” and N-gram will produce the chart.

FIGURE 5. A Depiction of Dependency Relations: Frequency of “Gay” Modifying “Transgender”

This figure is a comparison of how often “gay” modifies the word “transgender” in the English corpus of books published in the United States from 1950 to 2008, available at <https://books.google.com/ngrams>

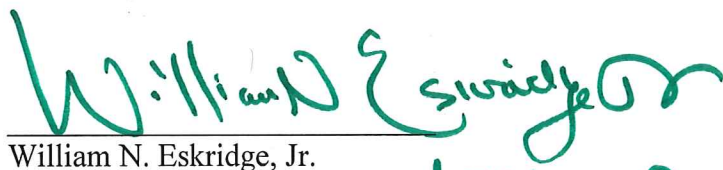
The corpus search method relied on N-gram, a digital humanities tool accessible online through Google. Through N-gram, users can conduct statistical analysis on online corpora. Users may scour corpora for words, phrases or letters and the tool will aggregate its findings and create a chart depicting frequency.

Open the N-gram link (<https://books.google.com/ngrams>) and enter words, phrases or letters of interest into the search field. Adjust time frame from 1900 to 2008. To search for words in different grammatical forms, add `_ADJ`, `_NOUN`, `_ADV`, or `_PRON` to the end of the word. To search for a word or phrase modified by another, type the modifier word followed by `"=>"` followed by the word that is modified. For example, to search for instances in which *gay* modifies *transgender*, type `gay=>transgender` into the search bar. Next, click "Search lots of books," and N-gram will produce the chart.

Expert Declaration

The Author makes the following declaration:

1. I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures by any party participating in ICANN's New gTLD Application process;
2. I confirm that all matters upon which I have expressed an opinion are within my area of expertise;
3. I confirm that I have referred to all matters which I regard as relevant to the opinions I have expressed and to all matters, of which I am aware, which might adversely affect my opinion;
4. I confirm that, at the time of providing this written opinion, I consider it to be complete and accurate and constitute my true, professional opinion; and
5. I confirm that if, subsequently, I consider this opinion requires any correction, modification or qualification I will notify ICANN, dotgay LLC, and their respective counsel.



William N. Eskridge, Jr.

1/31/2018

1 February 2018

ICANN
Board Accountability Mechanisms Committee (BAMC)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536, USA

By email: reconsideration@icann.org

Dear Members of the BAMC,

Re: Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)

We refer to our letter of 16 January 2018 and to the BAMC meeting that was supposed to take place on 17 January 2018. Pursuant to Article 3(5)(c) of ICANN's Bylaws, the preliminary report of said meeting should have been published already. However, no such report was published. It is unclear what steps, if any, the BAMC considered in the CPE process review.

In any event, ICANN confirmed that our letter of 16 January 2018 was going to be provided to the BAMC for consideration. As a follow-up to that letter, Requesters' wish to clarify further their concerns about the CPE process review.

1. Lack of transparency in ICANN's organisation of the CPE process review

Despite numerous requests (see letters of 14 June 2017 and of 27 July 2017 on behalf of Requesters), Requesters remain without information as to the selection process for the CPE process reviewer ('FTI Consulting' or 'FTI'), and the names and curricula vitae of the FTI individuals involved in the review.

Requesters are left in the dark about the instructions FTI received from ICANN, either directly or indirectly. Despite Requester's previous demands, ICANN failed to communicate

about the criteria and standards that FTI used to perform the CPE process review. ICANN did not communicate these criteria and standards before the start of the CPE process review, as it should have. And, now that FTI's review is apparently finished, the criteria and standards remain still unclear (cf. *infra*).

2. Lack of transparency before, during and beyond the CPE process review

In addition to the above, Requesters have asked for (i) the disclosure of correspondence between the ICANN organization and the CPE provider, (ii) the content of the interviews made by FTI during the CPE process review, (iii) FTI's engagement letter with ICANN, and (iv) the information requested in our letter of 14 June 2017.

To date, ICANN did not respond to this request.

On 13 December 2017, ICANN published three reports made by FTI on its review of the CPE process. FTI's reports provide little transparency about the requested information.

The first part of FTI's report (Scope 1) aimed at understanding ICANN's involvement in the CPE process. However, FTI offers no transparency about the identity and qualifications of the evaluators who performed the CPE. In addition, FTI's report does not contain the documents or the recordings of the interviews on which its findings are based. FTI fails to provide the questions that were asked during interviews.

Without access to the documents on which FTI based its review, it is impossible for anyone, including the ICANN Board, to assess the weight of FTI's conclusions.

3. Lack of diligence and care in the CPE process review

FTI claims that it examined different data sets of communication between ICANN and the CPE Provider and that it conducted interviews with ICANN personnel and the two remaining evaluators of the CPE Provider.² However, FTI recognized that it did not benefit from a complete data set, as the CPE Provider refused to give access to its email communication pertaining to the CPE process.³ No reason is provided as to why the CPE Provider refused access.

Remarkably, it seems that the vast majority of evaluators had left the CPE Provider before FTI started its review of the CPE process.⁴ Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process.

FTI's review of the CPE process was thus extremely limited.

Given its limited scope, no value can be attached to FTI's conclusion in the report that it found no evidence of undue influence of the ICANN organization on the CPE provider.⁵

4. FTI's report reveals a lack of independence of the CPE provider

As a matter of fact, FTI's report shows a lack of independence of the CPE provider. FTI's Scope 1 report reveals that abundant phone calls were made between the CPE Provider and ICANN.⁶ It also mentions that ICANN advised at times that the CPE Provider's conclusions were not supported by sufficient reasoning.⁷

ICANN was thus intimately involved in the evaluation process. The CPE Provider was anything but an independent provider. The abundant phone calls between ICANN and the CPE Provider to discuss "various issues"⁸ and ICANN's influence on the CPE Provider's rationale demonstrate that the CPE Provider was not free from external influence from ICANN. As a result, the CPE Provider was not independent.

FTI's attempt to minimize ICANN's influence on the CPE Provider is unconvincing. FTI's report shows (i) that ICANN made extensive comments on the draft reports prepared by the CPE Provider, (ii) that those drafts were discussed at length between the CPE Provider and ICANN, and (iii) that the working of the CPE Provider and ICANN became intertwined to such extent that it became "difficult to discern which comments were made by ICANN organization versus the CPE Provider".⁹ It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or the CPE Provider.

One can only conclude from these findings that the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue. FTI's report confirms ICANN's intimate involvement in the CPE and the fact that the *Despegar et al.* IRP Panel was given incomplete and misleading information.

5. FTI fails to analyse the consistency issues of CPE decisions

The second part of FTI's report (Scope 2) was supposed to focus on the consistency – or better, the lack of consistency – of CPE decisions.

However, FTI's did not *analyse* the consistency issues during CPE. The report simply *sums up* the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria. FTI did not examine the consistency between the reasons invoked by the CPE Provider. It also failed to examine whether the CPE provider was consistent in applying those reasons to the different applications. There is no analysis whatsoever as to the inconsistencies invoked by applicants in RfRs, IRPs or other processes.

Emblematic of the lack of analysis is the fact that FTI did not examine the gTLD applications underlying the CPE report. These gTLD applications are not even mentioned among the materials reviewed by FTI.¹⁰ Without reviewing the underlying applications, it is impossible to assess the consistent application of policies and standards.

Specifically with respect to .hotel, the CPE report contains inconsistencies that are readily apparent. To give but one example, the CPE panel determined that the applicant provided for an appeal system, whereas the application does not provide for an appeal system. These inconsistencies and others are left unaddressed in FTI's report.

The fact that those inconsistencies were left unaddressed by FTI is inexcusable. Requesters described the inconsistencies clearly and repeatedly. The *Despegar et al.* IRP Panel considered Requesters' description of those inconsistencies to have merit.¹¹ The existence of said inconsistencies has never been contested. And FTI's report simply ignores them.

Therefore, we ask you to address these inconsistencies – in the event that you do not simply decide to cancel HTLD's application for the reasons set out in our Reconsideration Request – and to ensure a meaningful review of the CPE regarding .hotel.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,


Flip Petillion

¹ This letter is sent on behalf of Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc. and Fegistry LLC (Requesters in Reconsideration Request 16-11).

² FTI Scope 1 report, pp. 13-15

³ FTI Scope 1 Report, p. 6.

⁴ FTI Scope 1 Report, p. 14.

⁵ FTI Scope 1 Report, p. 17.

⁶ The report makes mention of weekly conference calls between ICANN and the CPE Provider: FTI Scope 1 Report, p. 14.

⁷ FTI Scope 1 Report, p. 12.

⁸ FTI Scope 1 Report, p. 12.

⁹ FTI Scope 1 Report, pp. 15-16.

¹⁰ FTI Scope 2 Report, pp. 5-9.

¹¹ *Despegar et al* IRP Declaration, ¶ 146.

Subject: [reconsider] DotMusic Analysis of .MUSIC CPE Process & FTI Reports for ICANN Board
Date: Friday, February 2, 2018 at 1:47:38 PM Pacific Standard Time
From: Constantine Roussos (sent by reconsider <reconsider-bounces@icann.org>)
To: Reconsideration@ ICANN, Cherine Chalaby, Goran Marby, chris.disspain@icann.org, Jason Schaeffer, Ali, Arif, Sancheti, Harsh, Rana, Rajat, ALL DOT Music, Jason B. Schaeffer
Attachments: DotMusic_Analysis_to_ICANN_on_CPE Process_and_FT_Reports_31_January_2018.pdf, ATT00001.txt

Dear Mr. Göran Marby, ICANN Board Chair Cherine Chalaby and ICANN BAMC Chair Chris Disspain:

Attached is DotMusic's "Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports" (the "Analysis") in relation to ICANN's Community Priority Evaluation ("CPE") process and FTI Reports that were released by ICANN on 13 December 2017 (See [https://newgtlds.icann.org/en/applicants/cpe#process-review\[newgtlds.icann.org\]](https://newgtlds.icann.org/en/applicants/cpe#process-review[newgtlds.icann.org])).

We kindly request that the ICANN Board consider the substance of our Analysis during its upcoming Board Meeting that is scheduled for 4 February 2018. According to the Agenda items, the ICANN Board will be looking into the "Next Steps in New gTLD Programs Community Priority Evaluation (CPE) Process Review" (See [https://www.icann.org/resources/board-material/agenda-2018-02-04-en\[icann.org\]](https://www.icann.org/resources/board-material/agenda-2018-02-04-en[icann.org])).

We would also **request an opportunity to present our Analysis and findings to the ICANN Board** prior to any ICANN determination to ensure that **ICANN's decision** with respect to Reconsideration Request 16-5 **is based on substantive and accurate facts, procedural fairness, non-discrimination and transparency.**

Please distribute the Analysis to all ICANN Board members for their kind consideration before the scheduled 4 February 2018 Board Meeting.

Respectfully Submitted

--
Constantine Roussos
Founder
DotMusic

Jason Schaeffer
Legal Counsel
DotMusic

<http://music.us> [music.us]



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Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports

31 January, 2018

Table of Contents

A.	Introduction and Background	2
B.	Community Priority Evaluation Process Overview	5
	DotMusic Application Materials and .MUSIC CPE Process	9
	Independent Expert Letters	11
	The Independent Nielsen QuickQuery Poll.....	12
	Responses to CPE Clarifying Questions	13
	The .MUSIC CPE Report.....	14
C.	The Reconsideration Request 16-5	14
D.	Expert Opinions.....	17
E.	The Council of Europe Report.....	25
F.	The FTI Reports	35
G.	Analysis.....	37
	.MUSIC CPE and CPE Comparative Analysis	37
	Community Establishment	37
	Nexus between Proposed String and Community	43
	Community Endorsement	44
	Conclusion on .MUSIC CPE Analysis and CPE Comparison	46
	FTI Reports Analysis	46
H.	Conclusion	66



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A. Introduction and Background

1. On 13 December 2017, FTI Consulting prepared a Report for Jones Day¹ called the **Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports** ("Report").² On 13 December 2017, ICANN issued an announcement that:

The CPE Process Review was initiated at the request of the ICANN Board as part of the Board's due diligence in the administration of the CPE process. The CPE Process Review was conducted by FTI Consulting Inc.'s (FTI) Global Risk and Investigations Practice (GRIP) and Technology Practice,³ and consisted of three parts: (i) reviewing the process by which the ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1); (ii) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (iii) a compilation of the reference material relied upon by the CPE Provider to the extent such reference material exists for the eight evaluations which are the subject of pending Reconsideration Requests that were pending at the time that ICANN initiated the CPE Process Review (Scope 3).

FTI concluded that "there is no evidence that the ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process" (Scope 1) and that "the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook [] and the CPE Guidelines throughout each CPE" (Scope 2). ([See Scope 1 report](#) [PDF, 159 KB], Pg. 3; [Scope 2 report](#) [PDF, 312 KB], Pg. 3.)

For Scope 3, FTI observed that two of the eight relevant CPE reports included a citation in the report for each reference to research. In the remaining six reports, FTI observed instances where the CPE Provider referenced research but did not include the corresponding citations in the

¹ Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

² FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports (13 December 2017). Prepared for Jones Day. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>

³ According to their website, FTI Consulting "conducts sophisticated investigations, uncovers actionable intelligence and performs value-added analysis to help decision-makers address and mitigate risk, protect assets, remediate compliance, make informed decisions and maximize opportunities." See <http://www.fticonsulting.com/services/forensic-litigation-consulting/global-risk--investigations-practice>



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reports. Except for one evaluation, FTI observed that the working papers underlying the reports contained material that corresponded with the research referenced in the CPE reports. In one instance, FTI did not find that the working papers underlying the relevant report contained citation that corresponded with the research referenced in the CPE report. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers underlying the first evaluation of that application. (See [Scope 3 report](#) [PDF, 309 KB], Pg. 4.) The findings will be considered by the Board Accountability Mechanisms Committee (BAMC) when the BAMC reviews the remaining pending Reconsideration Requests as part of the Reconsideration process.

“The Board appreciates the community's patience during this detailed investigation, which has provided greater transparency into the CPE evaluation process,” said Cherine Chalaby, Chairman of the ICANN Board. “Further, this CPE Process Review and due diligence has provided additional facts and information that outline and document the ICANN organization's interaction with the CPE Provider.”⁴

2. On January 2018, Arif Ali of Dechert LLP, DotMusic Limited's (“DotMusic”) legal counsel, sent a letter to ICANN that called into question the FTI Report's accuracy and reliability. In part, the letter stated:

... [T]he Board's adoption of the FTI's findings will be fundamentally inconsistent with the unfairness and inconsistency issues that Board itself recognized in the CPE process.

*As a neutral investigator hired by ICANN to pursue an “**independent review**” of the CPE Process, FTI should have also attempted 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. Instead, FTI sheltered the EIU's decisions, no matter how irrational or arbitrary, thus seriously calling into question its own credibility. As a result, FTI's findings are unreliable, unfair, and incorrect, while at the same time raising potential serious conflict of interest, bias and collusion concerns.*

Accordingly, we request that the ICANN Board take no action with respect to the conclusions reached by FTI, until DotMusic, and indeed all affected parties, have been provided with the underlying materials reviewed by the

⁴ ICANN Organization Publishes Reports on the Review of the Community Priority Evaluation Process (13 December 2017). See <https://www.icann.org/news/announcement-2017-12-13-en>



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FTI, and subsequently had an opportunity to respond to the FTI Report. To do otherwise would violate DotMusic's right to be heard.

DotMusic reserves all of its rights and remedies all available for whether within or outside of the United States of America.

3. This is an analysis of ICANN's Community Priority Evaluation process and the FTI Reports (the "Analysis"). Specifically:
 - a. Whether DotMusic's .MUSIC Report by the CPE Provider (EIU) conformed to the principles and methodology set forth in ICANN's Applicant Guidebook ("AGB").⁵
 - b. Whether DotMusic's .MUSIC CPE Report⁶ was consistent with the CPE Reports that passed CPE for .ECO,⁷ .HOTEL,⁸ .OSAKA,⁹ .RADIO¹⁰ and .SPA.¹¹ I will apply the same interpretation of the Applicant Guidebook (AGB) that has been adopted by the EIU in grading the applications that were successfully granted community priority status. The analysis will be restricted to CPE Reports that have prevailed CPE or have been awarded maximum scores in certain sections that the .MUSIC Report was not awarded full scores.¹² The analysis will not look into sections where the .MUSIC Report was awarded full points because those sections are not in dispute.
 - c. Whether this Analysis is consistent with other opinions concerning DotMusic's .MUSIC Report, such as the Council of Europe Report¹³ and opinions

⁵ ICANN, New gTLD Applicant Guidebook (4 June 2012). See <https://newgtlds.icann.org/en/applicants/agb> and <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

⁶ .MUSIC CPE Report for DotMusic Limited (10 February 2016). See <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.

⁷ .ECO CPE Report (7 October 2014). See <https://icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>.

⁸ .HOTEL CPE Report (12 June 2014). See <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>

⁹ .OSAKA CPE Report (30 July 2014). See <https://www.icann.org/sites/default/files/tlds/osaka/osaka-cpe-1-901-9391-en.pdf>.

¹⁰ .RADIO CPE Report (10 September 2014). See <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

¹¹ .SPA CPE Report (22 July 2015). See <https://icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>.

¹² ICANN, Community Priority Evaluation and CPE Reports. See <https://newgtlds.icann.org/en/applicants/cpe>

¹³ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2, MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

<https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>



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filed by experts in (i) ethnomusicology;¹⁴ (ii) law and intellectual property;¹⁵ and (iii) organization¹⁶ respectively.

- d. Whether the FTI Report fulfilled its objectives to facilitate ICANN Board decision-making on the DotMusic Reconsideration Request 16-5,¹⁷ by taking an independent, complete and comprehensive look at the CPE Process. This analysis will examine the effectiveness of the FTI Report's evaluation methodology in relation to the issues outlined in DotMusic's Reconsideration Request 16-5 and any relevant recommendations on how the evaluation methodology and investigative process adopted by the FTI was appropriate or not for and if not, provide recommendations on how the process can be improved upon in a transparent, fair and neutral manner to benefit all affected parties.

B. Community Priority Evaluation Process Overview

4. The AGB provided the procedures and rules on how new gTLD applications were to be evaluated. According to the AGB, new gTLD applicants could designate their applications as either standard or community based ("operated for the benefit of a clearly delineated community").¹⁸ According to the AGB, Community Applicants must "demonstrate an ongoing relationship with a clearly delineated community" and "have applied for a gTLD string strongly and specifically related to the community named in [their] application."¹⁹ If two or more applications were submitted for identical or "confusingly similar" strings and had completed all preliminary stages of evaluation then they were placed in a "contention set."²⁰ Community-based applicants could then elect to proceed with Community Priority Evaluation ("CPE") for that application.²¹ If the applicant elected to proceed to CPE, then the application was evaluated by The Economist Group's Economist Intelligence Unit ("EIU") that was selected by ICANN in 2011 to conduct Community Priority Evaluations.²²

¹⁴ Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

¹⁵ Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>

¹⁶ Joint Organisation Experts' Opinion by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>

¹⁷ DotMusic Reconsideration Request 16-5. See <https://www.icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

¹⁸ AGB, § 1.2.3.1. See <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

¹⁹ Id., § 1.2.3.1

²⁰ Id., § 4.1

²¹ Id., § 4.2

²² See <http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>



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ICANN solicited Comparative Evaluation Panel Expressions of Interest (“EOI”) in 2009. The EIU confirmed in its EOI that it had “significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role”²³ and that “the evaluation process for selection of new gTLDs will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination.”²⁴ In addition, the EIU agreed to provide ICANN with a “statement of the candidate’s plan for ensuring fairness, nondiscrimination and transparency.”²⁵

5. The ICANN-EIU Statement of Work (“SOW”) agreement confirmed that the Panel must “ensure that the evaluations are completed consistently and completely in adherence to the Applicant Guidebook” and follow “evaluation activities based on ICANN’s gTLD Program Governance requirements to directly support the Program Office governance processes.”²⁶ In addition, the Panel confirmed that they would “document their evaluation activities and results and provide a summary of the analysis performed to reach the recommended result” by “document[ing] the evaluation and analysis for each question to demonstrate how the Panelist determined a score for each question based on the established criteria” [] “provid[ing] a summary of the rationale and recommended score for each question”²⁷ and “providing ad-hoc support and documentation as requested by ICANN’s Quality Control function as part of the overall gTLD evaluation quality control process” that would include “access to work papers as required verifying Panel Firm’s compliance.”²⁸ The CPE Panel Process Document necessitated that “all EIU evaluators undergo regular training to ensure full understanding of all CPE requirements as listed in the Applicant Guidebook, as well as to ensure consistent judgment. This process included a pilot training process, which has been followed by regular training sessions to ensure that all evaluators have the same understanding of the evaluation process and procedures. EIU evaluators are highly qualified and have expertise in applying criteria and standardized methodologies across a broad variety of issues in a consistent and systematic manner.”²⁹
6. According to ICANN’s CPE Guidelines, it was a requirement that “the panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined community plays an important role. The provider must be able to convene a panel capable of evaluating applications from a wide variety of different communities. The panel

²³ New gTLDs: Call for Applicant Evaluation Panel Expressions of Interest (“EOI”), Comparative Evaluation Panel, <https://www.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>, p.5

²⁴ Id., p.5

²⁵ Id., p.6

²⁶ EIU Contract and Statement of Work (“SOW”) with ICANN, <http://newgtlds.icann.org/en/applicants/cpe/eiu-contract-sow-information-08apr15-en.zip>, March 12, 2012 Statement of Work No:[2], p.8

²⁷ Id., p.5

²⁸ Id., p.12

²⁹ EIU Panel Process document, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.2



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must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and [...] the panel must be able to document the way in which it has done so in each case. EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to applications. All applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.”³⁰

7. If the application was determined to meet the CPE criteria set forth in the AGB by scoring at least 14 out of 16 possible points then the application prevailed in CPE and was thereby given priority, while the other standard applicants in the contention set did not proceed.³¹
8. The CPE process is set forth in Module 4 of the AGB. There are four principal criteria, each worth a maximum possible of 4 points: Community Establishment, the Nexus between Proposed String and Community, Registration Policies and Community Endorsement.³² As mentioned earlier, an application had to receive a total score of at least 14 points in order to pass CPE.
9. The first criterion is Community Establishment, which is comprised of two main sub-criteria: 1-A Delineation (2 points possible) and 1-B Extension (2 points possible). According to the AGB, the term “community” implies “more of cohesion than a mere commonality of interest” with “an awareness and recognition of a community among its members;” an “understanding of the community’s existence prior to September 2007” and with “extended tenure or longevity—non transience—into the future.” Under the 1-A Delineation sub-criterion, the Community’s membership definition is evaluated to determine whether the Community defined by the community application is “clearly delineated [‘Delineation’], organized [‘Organization’], and pre-existing [‘Pre-Existence’].” Delineation requires “a clear and straightforward membership definition” and an “awareness and recognition of a community (as defined by the applicant) among its members.” Organization requires “documented evidence of community activities” and “at least one entity mainly dedicated to the community.” Pre-existence requires that the community defined by the applicant “must have been active prior to September 2007.” Under the I-B Extension sub-criterion, the community defined must be of “considerable size [‘Size’] and longevity [‘Longevity’].” Size requires that the “community is of considerable size.”³³ Longevity requires that the community defined “was in existence prior to September 2007.”³⁴ “With respect to ‘Delineation’ and ‘Extension,’ a community

³⁰ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>, p.22

³¹ AGB, § 4.2.2

³² AGB, Section 4.2.3, pp.4-9 to 4-19

³³ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

³⁴ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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can consist of [...] a logical alliance of communities (for example, an international federation of national communities of a similar nature).³⁵

10. The second criterion is the Nexus between Proposed String and Community, which has two main sub-criteria: 2-A Nexus (3 points possible) and 2-B Uniqueness (1 point possible). Under “Nexus,” for a score of 3, “the essential aspect is that the applied-for string is commonly known by others as the identification / name³⁶ of the community” so that “[t]he string matches the name of the community.”³⁷ Under “Uniqueness,” for a full score, it must be determined that the “[s]tring has no other significant meaning beyond identifying the community described in the application.”³⁸ “With respect to ‘Uniqueness,’ ‘significant meaning’ relates to the public in general, with consideration of the community language context added. ‘Uniqueness’ will be scored both with regard to the community context and from a general point of view.”³⁹
11. The third criterion is the Registration Policies section. There is 1 point possible for each sub-criterion: 3-A Eligibility, 3-B Name Selection, 3-C Content and Use and 3-D Enforcement.⁴⁰
12. The fourth criterion is Community Endorsement, which has two sub-criteria, each worth a possible 2 points (4-A Support and 4-B Opposition). Under “Support,” the “Applicant is, or has documented support from, the recognized⁴¹ community institution(s) / member organization(s).”⁴² “With respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions / organizations. In such cases there must be documented support from institutions / organizations representing a majority of the overall community addressed in order to score 2.”⁴³ Under “Opposition,” 2 points are awarded if there is “no opposition of relevance.”⁴⁴ “To be taken into account as relevant opposition, objections or comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.”⁴⁵

³⁵ AGB, p.4-12

³⁶ AGB, “‘Name’ of the community means the established name by which the community is commonly known by others,” p.4-13

³⁷ AGB, p.4-12

³⁸ AGB, p.4-13

³⁹ AGB, p.4-14

⁴⁰ AGB, pp. 4-14 to 4-16

⁴¹ AGB, “‘Recognized’ means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community,” pp. 4-17 to 4-18

⁴² AGB, p.4-17

⁴³ AGB, p.4-18

⁴⁴ AGB, p.4-17

⁴⁵ AGB, p.4-19



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DotMusic Application Materials and .MUSIC CPE Process

13. DotMusic Limited (with Application ID. 1-1115-14110⁴⁶) entered the CPE process on 29 July 2015.⁴⁷ According to DotMusic's Application materials provided to the CPE Panel and ICANN for evaluation:
 - a. The Mission and Purpose is “[c]reating a trusted, safe online haven for music consumption and licensing; Establishing a safe home on the Internet for *Music Community* (“*Community*”) members regardless of locale or size; Protecting intellectual property and fighting piracy; Supporting Musicians’ welfare, rights and fair compensation; Promoting music and the arts, cultural diversity and music education; Following a multi-stakeholder approach of fair representation of all types of global music constituents, including a rotating regional Advisory Committee Board working in the Community’s best interest. The global Music Community includes both commercial and non-commercial stakeholders.⁴⁸
 - b. The “Community” was defined in 20A: “The Community is a strictly delineated and organized community of individuals, organizations and business, a “logical *alliance* of communities of a similar nature (“COMMUNITY”)”, that relate to music: the art of combining sounds rhythmically, melodically or harmonically.”⁴⁹
 - c. Community Establishment was described in 20A: “DotMusic will use clear, organized, consistent and interrelated criteria to demonstrate Community Establishment beyond reasonable doubt and incorporate safeguards in membership criteria “aligned with the community-based Purpose” and mitigate anti-trust and confidentiality / privacy concerns by protecting the Community of considerable size / extension while ensuring there is no material detriment to Community rights / legitimate interests. Registrants will be verified using Community-organized, unified “criteria taken from holistic perspective with due regard of Community particularities” that “invoke a formal membership” without discrimination.”⁵⁰

⁴⁶ DotMusic Application, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>

⁴⁷ See ICANN CPE microsite, <https://newgtlds.icann.org/en/applicants/cpe>

⁴⁸ See .MUSIC Application, 18A. Also see 20C, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added)

⁴⁹ See .MUSIC Application, 20A, para.3 at <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392> (emphasis added); Also see DotMusic Public Interest Commitments: “... Community definition of a “logical alliance of communities of similar nature that relate to music” ...” at

<https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁵⁰ DotMusic Application, 20A, para.1



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- d. Examples of music community Organisation and Cohesion were described in 20A, which included “commonly used [] classification systems such as ISMN, ISRC, ISWC, ISNI [].”⁵¹
- e. The Size and Extension of the community defined were described in 20A, which stated that “the Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries [] with a Community of considerable size with millions of constituents (‘SIZE’).”⁵²
- f. The “Name” of the community defined was described in 20A. “The name of the community served is the ‘Music Community’ (‘Community’).”⁵³
- g. The “Nexus between Proposed String and Community” was described in 20A and 20D. “The ‘MUSIC’ string *matches* the name (‘Name’) of the Community and is the established name by which the Community is commonly known by others.”⁵⁴ DotMusic’s application “explain[ed] the relationship between the applied- for gTLD string and the community identified in 20A” in 20D. “The .MUSIC string relates to the Community by *completely representing* the *entire* Community. It relates to all music-related constituents using an all-inclusive, multi-stakeholder model.”⁵⁵

⁵¹ Id., 20A, para.3; Also see DotMusic letter submitted to ICANN and the EIU on August 12th, 2015 (See <https://www.icann.org/en/system/files/correspondence/schaeffer-to-crocker-et-al-2-redacted-12aug15-en.pdf>): “The International Standard Music Number (ISMN) is a unique number for the identification of all notated music publications from all over the world. The ISMN is an ISO certified global standard number (ISO 10957:2009). See <http://www.ismn-international.org/whatis.html> and http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=43173,” footnote 7, p.8; “The ISRC (International Standard Recording Code) is the international identification system for sound recordings and music video recordings. The ISRC is an ISO certified global standard number (ISO 3901:2001) and is managed by the IFPI. See <http://isrc.ifpi.org>, <https://www.usisrc.org/about/index.html> and http://www.iso.org/iso/catalogue_detail?csnumber=23401,” footnote 8, pp.8 to 9; “The ISWC (International Standard Musical Work Code) is a unique, permanent and internationally recognized reference number for the identification of musical works. The ISWC has been approved by ISO (International Organization for Standardisation) as a global standard (ISO 15707:2001) and is managed by CISAC. See <http://www.iswc.org/en/faq.html> and http://www.iso.org/iso/catalogue_detail?csnumber=28780, footnote 9, p.9; “The International Standard Name Identifier (ISNI) is the ISO certified global standard number (ISO 27729) for identifying the millions of contributors to creative works and those active in their distribution. ISNI holds public records of over 8 million identities and 490,000 organizations. See <http://www.isni.org> and http://www.iso.org/iso/catalogue_detail?csnumber=44292,” footnote 10, p.9; Also see DotMusic Answers to Clarifying Questions, <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, pp. 121 to 122 of 993, Exhibit A21

⁵² DotMusic Application, 20A, para.4 at

<https://qtdresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1392?t:ac=1392>

⁵³ Id., 20A, para.1

⁵⁴ Id., 20A, para.3 (emphasis added)

⁵⁵ Id., 20D, para.1 (emphasis added)



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14. DotMusic's community application received "documented support" from multiple organizations representing a majority of the community. In 20D, DotMusic states "See 20F for documented support from institutions/organizations representing majority of the Community and description of the process/rationale used relating to the expression of support."⁵⁶ According to the DotMusic Application Materials, the community defined and application is supported by *multiple* recognized organizations with members representing over ninety-five percent (95%) of music consumed globally, a *majority* of the overall community defined in its application (defined as the "organized and delineated logical alliance of communities of similar nature that relate to music").⁵⁷

Independent Expert Letters⁵⁸

15. Forty-three (43) independent expert letters were also submitted to ICANN and the CPE provider that were in agreement that DotMusic's Application met the Community Establishment, Nexus and Support criteria.⁵⁹ The experts included Dr. Argiro Vatakis, Dr. Askin Noah, Dr. Brian E Corner, Dr. Chauntelle Tibbals, Dr. Daniel James Wolf, Dr. David Michael Ramirez II, Dr. Deborah L Vietze, Dr. Dimitrios Vatakis, Dr. Dimitris Constantinou, Dr. Eric Vogt, Dr. Graham Sewell, Dr. Jeremy Silver, Dr. Joeri Mol, Dr. John Snyder, Dr. Jordi Bonada Sanjaume, Dr. Jordi Janer, Dr. Juan Diego Diaz, Dr. Juliane Jones, Dr. Kathryn Fitzgerald, Dr. Lisa Overholser, Dr. Luis-Manuel Garcia, Dr. Manthos Kazantzides, Dr. Michael Mauskapf, Dr. Mike Alleyne, Dr. Nathan Hesselink, Dr. Paul McMahon, Dr. Rachel Resop, Dr. Shain Shapiro, Dr. Sharon Chanley, Dr. Tom ter Bogt, Dr. Vassilis Varvaresos, Dr. Wendy Tilton, Dr. Wilfred Dolfsma, JD Matthew Covey Esq, Jonathan Segal MM, Lecturer David Loscos, Lecturer David Lowery, Lecturer Dean Pierides, Professor Andrew Dubber, Professor and Author Bobby Borg, Professor Heidy Vaquerano Esq and Professor Jeffrey Weber Esq.

⁵⁶ Id., 20D, last paragraph

⁵⁷ See Support Letters from multiple organizations for DotMusic's Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf>. (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cg5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

⁵⁸ The independent experts selected were from different fields of study. Having such diversity ensured that perspectives from different disciplines were applied to assess whether or not DotMusic's application met the CPE criteria in question. The independent expert letters agreed unanimously that the criteria were met.

⁵⁹ See 43 independent expert letters scoring chart at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A40; Also see 43 independent expert letters at <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, *Answers to Clarifying Questions*, Exhibit A21, Annex K; Also see <http://music.us/expert/letters>.



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The Independent Nielsen QuickQuery Poll

16. An independent poll conducted by Nielsen⁶⁰ was also submitted to ICANN and the CPE provider as supporting evidence to demonstrate that DotMusic's Application met the CPE criteria in relation to the Community Establishment and Nexus sections. According to DotMusic's Application and the Independent Poll conducted by Nielsen, the "Name" of the community defined was the "Music Community"⁶¹ and the "Definition" of the "Community" addressed was "a logical alliance of communities of individuals, organizations and business that relate to music."⁶² The independent Nielsen QuickQuery survey (August 7, 2015, to August 11, 2015) comprised of 2,084 adults.⁶³ Its objective was to evaluate whether or not the applied-for string "music" was commonly-known and associated with the identification of the community that was defined by DotMusic by asking the following question: "If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e. a logical alliance of communities of individuals, organizations and business that relate to music)?" A substantial majority, 1562 out of 2084 (75% of the respondents) responded positively, asserting that the applied-for string (music) corresponds to the name of community addressed by the application (the "music community") and that the "music community" definition derived from DotMusic's application can be accurately defined as "a logical alliance of communities of individuals, organizations and business that relate to music."

⁶⁰ See Nielsen QuickQuery. Retrieved on May 11, 2016, from

<http://sites.nielsen.com/meetquickquery/?cid=emtechcrunchquickquery>

⁶¹ According to the DotMusic Application: "The name of the community served is the 'Music Community' ('Community')." See 20A, para.1 at

<https://qtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>; According to the DotMusic Application: "The 'MUSIC' string matches the name ('Name') of the Community and is the established name by which the Community is commonly known by others." See 20A, para.3

⁶² According to the DotMusic Application: "The Community is a strictly delineated and organized community of individuals, organizations and business, a 'logical alliance of communities of a similar nature ('COMMUNITY')', that relate to music: the art of combining sounds rhythmically, melodically or harmonically." See 20A, para.3; Also see DotMusic Public Interest Commitments: "[...] Community definition of a 'logical alliance of communities of similar nature that relate to music' [...]" at

<https://qtdresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, § 5.i, p.2

⁶³ See Nielsen Quick Query poll, Fielding Period: August 7-11, 2015: "Q3505 If you saw a website domain that ended in '.music' (e.g., www.name.music), would you associate it with musicians and/or other individuals or organizations belonging to the music community (i.e., a logical alliance of communities of individuals, organizations and business that relate to music)?" <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-exhibits-a25-redacted-24feb16-en.pdf>, Exhibit A32, Appendix B, pp. 38 to 41; Also see Nielsen QuickQuery Q3505, <http://music.us/nielsen-harris-poll.pdf>, pp. 1 to 3



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Responses to CPE Clarifying Questions

17. On September 29th, 2015, DotMusic received Clarifying Questions from ICANN and the CPE Panel on Community Establishment and Nexus.⁶⁴ On October 29, 2015, DotMusic provided ICANN and the CPE Provider with responses to the Clarifying Questions,⁶⁵ which included:
- a. A “Community Establishment & Definition Rationale and Methodology” section clarifying the “community defined, ‘a delineated and organized logical alliance of communities of similar nature related to music’” and the Community Establishment rationale and methodology.⁶⁶
 - b. A “Venn Diagram for Community Definition and Nexus” section clarifying how the community defined matches the string, including clarification that “non-music community members that lack recognition and awareness of the community defined” were not part of the community defined because the community definition was a “strictly delineated and organized logical alliance of communities related to music with [the] requisite awareness of [the] community defined.”⁶⁷
 - c. A “Music Sector Background: Music is a Copyright Industry for Clarifying Question D” section clarifying that the “organized alliance” community defined by DotMusic functions in a regulated sector and as such must have organisation, cohesion and awareness across all its members. DotMusic also points to “ICANN Resolutions and GAC Advice that recognized music as a regulated, sensitive sector.”⁶⁸ DotMusic also clarifies that the community defined has cohesion under international copyright law, treaties and conventions e.g. music “rights are defined within national copyright laws which are, in large part, shaped by international treaties, many of which are administered by WIPO.⁶⁹ Copyright law defines the rights conferred on authors of original works, and those who perform them, as well as those who support their widespread dissemination...Copyright includes economic rights which give the creator the right to authorize, prohibit or obtain financial compensation...Copyright also confers moral rights (Article 6b is of the Berne Convention) allowing the creator of a work to claim authorship in it (the right

⁶⁴ See Clarifying Questions (“CQ”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A20

⁶⁵ See Answers to Clarifying Questions (“CQ Answers”), <https://icann.box.com/shared/static/w4r8b711mfs1yww46ey4fa009tkzk8cr.pdf>, Exhibit A21

⁶⁶ Id., Annex A, p.26 of 993

⁶⁷ Id., Annex D, p.80 of 993

⁶⁸ Id., Annex F, p.93 of 993

⁶⁹ WIPO is a United Nations agency with 188 member states, which provides a global forum for intellectual property services, policy, and cooperation (See <http://www.wipo.int/about-wipo/en/index.html>). WIPO is also the leading provider of domain dispute and alternative dispute resolution services under the Uniform Dispute Resolution Policy (“UDRP”) adopted by ICANN (See <http://wipo.int/amc/en/domains> and <https://icann.org/resources/pages/udrp-rules-2015-03-11-en>)



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of paternity or attribution) and to object to any modification of it that may be damaging or prejudicial to them (the right of integrity) [] Every piece of music is protected by copyright.”⁷⁰

- d. A “Forty-three (43) Expert Testimonies” section providing forty-three (43) expert letters that supported the position that DotMusic’s Application met the Community Establishment, Nexus and Support CPE criteria.⁷¹
- e. An “Independent Nielsen / Harris Poll for Community Establishment and Nexus” section providing supporting evidence by the general public (over 2000 surveyed) to demonstrate that DotMusic’s Application met the CPE criteria for the sections of Community Establishment and Nexus.⁷²

The .MUSIC CPE Report

18. The .MUSIC CPE Report⁷³ was released on 10 February 2016, giving DotMusic a score of 10 out of 16 possible points. 4 points were deducted from the “Community Establishment” criterion section, 1 point was deducted from the “Nexus between Proposed String and Community” criterion section, and 1 point was deducted from the “Community Endorsement” criterion section. 14 points were required to pass CPE.

C. The Reconsideration Request 16-5

19. DotMusic,⁷⁴ the American Association of Independent Music⁷⁵ (“A2IM”), the Association of Independent Music⁷⁶ (“AIM”), the Content Creators Coalition⁷⁷ (“C3”), the Independent Music Companies Association⁷⁸ (“IMPALA”), the International Federation of Arts Councils and Culture Agencies⁷⁹ (“IFACCA”), the International Federation of Musicians⁸⁰ (“FIM”), the Merlin Network⁸¹ (“Merlin”), the Nashville Songwriters Association International⁸²

⁷⁰ Id., Annex F, pp.97 to 99 of 993

⁷¹ Id., Annex K, pp. 159 to 993 of 993

⁷² Id., Annex H, pp.102 to 105 of 993

⁷³ DotMusic CPE Report, <https://icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>

⁷⁴ <http://music.us>; Also see Supporting Organizations at: <http://music.us/supporters>

⁷⁵ <http://a2im.org/groups/tag/associate+members> and <http://a2im.org/groups/tag/label+members>

⁷⁶ <http://musicindie.com/about/aimmembers>

⁷⁷ <http://c3action.org>

⁷⁸ <http://impalamusic.org/node/16>

⁷⁹ http://ifacca.org/membership/current_members and http://ifacca.org/membership/current_members

⁸⁰ <http://fim-musicians.org/about-fim/history>

⁸¹ <http://merlinnetwork.org/what-we-do>

⁸² <https://nashvillesongwriters.com/about-nsai>



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(“NSAI”), ReverbNation⁸³ and the Worldwide Independent Network⁸⁴ (“WIN”), co-filed a Reconsideration Request 16-5 (“RR”)⁸⁵ requesting that the ICANN Board Governance Committee reject the findings of the .MUSIC CPE Report based on numerous CPE process violations, including the contravention of established procedures by both ICANN and the CPE Panel.⁸⁶ Some of these violations of established procedures and policies included:

- a. Ignoring International Laws and Conventions in relation to cohesion under music copyright⁸⁷ and incorrectly determining that the music community defined has no organization, no cohesion and no awareness. Such a conclusion would wrongly suggest that the community defined as a whole does not have international music rights functioning under a regulated sector.

⁸³ <https://reverbNation.com/band-promotion> (Artists/Bands), <https://reverbNation.com/industryprofessionals>, (Industry), <https://reverbNation.com/venue-promotion> (Venues), and <https://reverbNation.com/fan-promotion> (Fans)

⁸⁴ <http://winformusic.org/win-members>

⁸⁵ See <https://icann.org/resources/pages/reconsideration-16-5-dotmusic-request-2016-02-25-en>

⁸⁶ Also see RR-related letter from the International Federation of the Phonographic Industry (“IFPI”) stating: “We believe the finding to be flawed [...] Given the scale of the music community’s support for the Dot Music application, it is difficult to understand what level of support a CPE applicant would need to demonstrate to prevail, and this gives rise to serious misgivings about the transparency, consistency, and accountability of the CPE process [...] highlighting the disparity between the decisions of the EIU Panel. Unfortunately, these inconsistencies have continued in the EIU Panel’s evaluation of the DotMusic Application. [...] we note with concern the different criteria that appear to have been applied to the .HOTEL and .MUSIC CPE applications respectively. Also of concern is the EIU Panel’s finding that DotMusic failed to provide documented support from ‘recognised community institution(s)/member organization(s).’ IFPI is a globally recognised organization [...] Our members operate in 61 countries and IFPI has affiliated organisations, including national groups in 57 countries. We also administer the internationally recognised ISRC system. We therefore object to the EIU Panel’s finding,” <https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-letter-ifpi-to-icann-24feb16-en.pdf>; Also see RR-related letter from the National Music Council, representing almost 50 music organizations (including the Academy of Country Music, American Academy of Teachers of Singing, American Composers Forum, American Federation of Musicians, American Guild of Musical Artists, American Guild of Organists, American Harp Society, American Music Center, American Orff-Schulwerk Association, Artists Against Hunger & Poverty, ASCAP, BMI, Chopin Foundation of the United States, Conductors’ Guild, Country Music Association, Delta Omicron International Music Fraternity, Early Music America, Interlochen Center for the Arts, International Alliance for Women in Music, International Federation of Festival, Organizations, International Music Products Association, Mu Phi Epsilon International Music Fraternity, Music Critics Association of North America, Music Performance Fund, Music Publishers Association of the United States, Music Teachers’ Association of California, Music Teachers National Association, National Academy of Popular Music, National Academy of Recording Arts & Sciences, National Association for Music Education, National Association of Negro Musicians, National Association of Recording Merchandisers, National Association of Teachers of Singing, National Federation of Music Clubs, National Flute Association, National Guild for Community Arts Education, National Guild of Piano Teachers, American College of Musicians, National Music Publishers’ Association, National Opera Association, Recording Industry Association of America, SESAC, Sigma Alpha Iota and the Songwriters Guild of America) and the International Music Council (an organization that UNESCO founded in 1949 representing over 200 million music constituents from over 150 countries and over 1000 organizations globally. See <http://www.imc-cim.org/about-imc-separator/who-we-are.html>). The letter stated that: “The international music community has come together across the globe to support the DotMusic Application, and we cannot comprehend how the application could have failed on the community criteria [...] We therefore object to the decision noted above, the basis of which is an apparent inconsistency in the application of the governing rules.”

<https://icann.org/en/system/files/files/reconsideration-16-5-national-music-council-to-icann-bgc-28mar16-en.pdf>

⁸⁷ Also See RR-related DotMusic Letter to ICANN Board Governance Committee (“BGC”),

<https://icann.org/en/system/files/files/reconsideration-16-5-dotmusic-to-icann-bgc-28mar16-en.pdf>



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- b. Misapplying and ignoring the “Community” Definition defined 20A. Instead the CPE Panel used a sentence from 20D as the community definition even though the AGB required that the definition be stated explicitly in 20A.
- c. Misapplying and ignoring “logical alliance” Community Definition that has “cohesion” and fulfills the criteria based on the AGB.
- d. Misapplying and ignoring the Community “Name” under the Nexus section.
- e. Misapplying and ignoring the “Majority” criterion under the Support section.
- f. Misapplying and ignoring “Recognized” organisations that are recognized by the United Nations and the WIPO.
- g. Ignoring international music organisations that are “mainly” dedicated to the community defined and are recognized by United Nations and WIPO.
- h. Ignoring evidence that the Music Community defined existed prior to 2007.
- i. Misapplying policy in relation to GAC consensus Category 1 Advice accepted by ICANN that demonstrates that the community defined is united and legally-bound by a regulated sector.
- j. Discriminating by failing to compare and apply the same consistent grading methodology and rationale that was adopted by the CPE Panel in community applications that passed CPE. Instead the CPE Panel applied inconsistent point distribution in comparison to community applications that passed CPE.
- k. Failing to implement a quality control process to ensure fairness, transparency, predictability and non-discrimination in the CPE Process.
- l. Failing to address the CPE Panel’s conflict of interest with another competing applicant that is a violation of the ICANN-EIU Statement of Work and Expression of Interest, the AGB and CPE Guidelines, ICANN’s Bylaws, and The Economist’s Guiding Principles.
- m. Failing to undertake, document and cite appropriate research to support the conclusions CPE Report’s conclusions in a compelling manner.



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D. Expert Opinions

20. Three (3) expert opinions were submitted to ICANN. The expert opinions were presented from three (3) perspectives and fields of study: ethnomusicology, law and intellectual property, and organization.
21. An Expert Legal Opinion was submitted by Honorary Professor Dr. Jørgen Blomqvist on 17 June 2016 and said, in summary:⁸⁸
 - a. *Activities of Music Community members – regardless whether they are commercial or non-commercial – are reliant in one way or another on the regulated structure of the music sector and cohesion of general principles of international music copyright, international law as well as international conventions, treaties and agreements that relate to music copyright and activities. The CPE Panel’s conclusion that there is “no substantive evidence” that the Music Community defined in its entirety has cohesion (i.e. does not unite cohesively under music copyright or is reliant on international conventions for its activities) is neither a compelling nor a defensible argument. In fact, all of the Music Community’s activities rely upon cohesion of general principles of international copyright law, international conventions, management of rights and government regulations. Without such cohesion and structure, music consumption and music protection under general principles of international copyright law and international conventions would be non-existent.*
 - b. *ICANN’s Articles of Incorporation mandate that all of ICANN’s activities and decision-making must be “in conformity with relevant principles of international law and applicable international conventions.” The Music Community participates in a regulated sector with activities tied to music that must cohere to general principles of international music copyright, international law as well as international conventions, treaties and agreements, which are held together by a strong backbone of collective management of rights that channels permissions to use protected material and the remuneration for such use from the one end of the feeding chain (the authors, performers and producers) to the other (the music users) and vice versa. Accordingly, ICANN cannot deny Music Community “cohesion” when its own Articles of Incorporation mandate it to recognize applicable international conventions, such as the 1886 Berne Convention that relates to the protection of music copyright signed by 171 countries and which, for*

⁸⁸ Expert Legal Opinion by Honorary Professor Dr. Jørgen Blomqvist (17 June 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-expert-opinion-blomqvist-redacted-17jun16-en.pdf>



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example, in its Article 14 bis (3) recognizes the specific situation for musical works.⁸⁹

- c. *It appears that the Panel failed to undertake appropriate (if any) research to support its conclusions. The decision was rendered despite DotMusic's provision of thousands of pages of "application materials and [...] research" as "substantive evidence" of "cohesion," including citing in numerous materials the international Berne Convention. For example, DotMusic defined its Community and clarified in its Application materials that: "The requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members..."⁹⁰*
- d. *The CPE Panel also ignored the significance of the Music Community's regulated sector that is governed by general principles of international copyright law as well as international conventions, treaties and agreements as well as by the collective management of copyright and related rights. In fact, both the ICANN Board and the NGPC have admitted such a finding by accepting the GAC Category 1 Advice that .MUSIC is a "string that is linked to regulated sector" that "should operate in a way that is consistent with applicable laws." In effect, this ICANN-approved resolution reaffirms that all music groups (and music sub-groups) that comprise the Music Community defined have cohesion because they participate as a whole in a regulated sector with activities tied to music that cohere to general principles of international copyright law, international conventions, treaties and agreements.⁹¹*
- e. *The music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. Recognized organizations include the IFPI and the FIM. DotMusic's application possesses documented support from the recognized community member organizations.⁹²*

⁸⁹ Blomqvist, Expert Legal Opinion, pp. 39 - 40

⁹⁰ Id., p.40

⁹¹ Id., p.41

⁹² Id., p.48



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22. An Expert Ethnomusicologist Opinion was submitted by Dr. Richard James Burgess on 12 September 2016 and said, in summary:⁹³
- a. *The CPE Report's conclusion that there is "no substantive evidence" that the defined Music Community in its entirety has cohesion is not a compelling or a defensible statement. The Music Community in its entirety (across all music constituent member categories as described in DotMusic's Application) must unite cohesively under music copyright in order to function as it does today. It is more of cohesion than a commonality of interest because legal music activities and participation are established by general principles of international law. The global Music Community as a unit is reliant on international conventions for its activities. Without cohesion established under international law and music-related conventions (such as the Berne Convention), the Music Community would lack structure and as a result would not be able to provide music to consumer nor have any way to compensate musicians and corresponding rights holders. In effect, if the Music Community across all member categories lacked cohesion and an awareness and recognition of general principles such music copyright protection established by international law, international conventions and a regulated sector then music consumption and the music industry as we know them today would not exist in their present form nor cohere. Mass copyright infringement cases (such as Napster, Limewire, Kazaa and Megaupload) showcase the importance of a regulated Music Community structure. Without cohesion and dependence under the current music regulatory framework that forms the basis of the music business and industry, the Music Community will have difficulties sustaining itself with respect to longevity because there will no longer be any protection of musical works or the ability for creators to be compensated or receive attribution. Furthermore, in the absence of international conventions and structures, Community members will no longer be able to make any sort of living through music.*⁹⁴
 - b. *Activities of Music Community members depend on the regulated structure of the music sector. My music career's viability, that has spanned over 40 years, has been sustainable because of the Music Community's reliance on general principles of international music copyright, international law as well as international conventions, treaties and agreements (such as the Berne Convention that relates to music copyright and music activities).*⁹⁵
 - c. *[E]ach member category delineated in DotMusic's Community definition is essential for the complete, proper and efficient functioning of the Community. In*

⁹³ Expert Ethnomusicologist Opinion by Dr. Richard James Burgess (12 September 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-ethnomusicologist-opinion-burgess-redacted-12sep16-en.pdf>

⁹⁴ Dr. Richard Burgess, Expert Ethnomusicologist Opinion, pp. 7 - 8

⁹⁵ Dr. Richard Burgess, Expert Ethnomusicologist Opinion, pp. 7 - 8



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my professional music experience, all music constituent types delineated are interdependent and reliant on each other given the symbiotic nature of the Music Community and its regulated sector.

- d. *From my perspective as an expert ethnomusicologist, it is essential to realize that the Community does not exist because of these international instruments; rather the instruments are a reflection of the fact that there is an organized Music Community. They satisfy a need of the Community, which is why the signatory states negotiated the treaties. All those who participate in music activities who demonstrably accept that they are subject to regulation is a reflection of having awareness and recognition that the Music Community exists. International instruments, such as the Berne Convention, are evidence of the existence of the Music Community. International treaties and agreements are a reflection of a need for rules that are accepted by a substantial number of nation states to serve the public interest and the public good with respect to those covered by the conventions. In my expert ethnomusicologist opinion, the existing international instruments provide the strongest evidence for Community existence that demonstrates awareness and recognition among its members.⁹⁶*
- e. *[T]he Expert Ethnomusicologist Opinion agrees with the definition of the Music Community as an “alliance” of music communities that are organized under a regulated music sector and general principles of international copyright law and conventions of similar nature. DotMusic’s definition of the Music Community as an organized and delineated “alliance” of music communities of similar nature is the most accurate and reflective definition of the Community. Based on my music experience, the dictionary definitions of “alliance” align entirely with how the Music Community organizes itself. An “alliance” is defined as “a union between groups etc.: a relationship in which people agree to work together,” “an association to further the common interests of the members” (i.e. more of cohesion than a commonality of interest), a “union by relationship in qualities” or “a treaty of alliance.”²⁸ While there may be many member category types, music constituents all are united under common principles, such as the protection of music. As the CEO of one of the world’s leading music trade organizations, I can testify that it is the norm that organizations representing diverse member category types work together as a united family to protect principles aligned with DotMusic’s articulated Mission and Purpose, such as protecting music, supporting fair compensation as well as promoting legal music and music education.⁹⁷*
- f. *The CPE Report does not explicitly define nor identify the delineated constituent category type(s) that should have been excluded to enable the community defined to function cohesively as defined by the AGB. The CPE Report did not provide any research or analysis explaining which specific music constituent types are not essential to the Music Community to function as it does today and how these music*

⁹⁶ Id., p.9

⁹⁷ Id., p.10



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constituent types' activities and participation lack cohesion in relation to regulatory nature music sector and how the music community organizes itself and functions today. As such, any suggestion that a particular delineated community type compromises the cohesiveness of the "community defined as a whole" is false, imprecise and undocumented. Not only did ICANN and the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, ICANN and the EIU did not provide any EIU supporting research and documented evidence to substantiate this particular CPE Report conclusion. That said, a few of the primary categories, such as Musical Groups and Artists, Independent Music Artists, Performers, Arrangers and Composers, Music Publishers, Music Recording Industries, Music Collection Agencies or Performance Rights Organizations, represent nearly all of the Music Community defined in size. Even if one considers the EIU's undefined music constituent types that, according to the CPE Report, lacked cohesion with the community defined (I do not agree to such a vague, non-specific and unsubstantiated assessment), they are not substantial in size in comparison to be "considerable enough" (or influential enough) to conclude that "community defined as a whole cannot be said to have cohesion." Moreover, one "member category"⁹⁸

- g. *[A]s long as music is being made then the Community defined will continue to exist. As mentioned earlier, even if the CPE Report's purported Community definition of "member categories" is considered as the Community defined then again the CPE Report fails to show how these "member categories" will not continue into the future. In fact, all these Music Constituent categories (or constituent types) that delineate the "logical alliance of music communities" are essential for the Community to function as it does today and all are expected to have an extended tenure given the Community's symbiotic nature. As such, the community definition cannot be construed. Any assertion that the community defined will not have an "extended tenure or longevity—non transience—into the future" cannot in my view be considered credible. There is no ambiguity or contradiction concerning the Community's permanency because the music sector's regulated structure has a long history of sustainability, which includes conventions that date from 1886 that will continue to exist into the future. Even certain rules or guidelines are modified to reflect the digital age or to adapt to other changes in the regulatory environment, the regulatory framework of the music sector will never disappear. Furthermore, the alliance of communities of similar nature that relate to music will not disappear as a whole. The alliance of music communities are expected to evolve over time but not disappear or be "ephemeral." Again, not only did the EIU not fulfill its obligations by providing conclusions that are compelling and defensible, the EIU did not provide any supporting research and documented evidence to substantiate this particular CPE Report conclusion.⁹⁹*

⁹⁸ Id., p.14

⁹⁹ Id., p.24



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- h. *[I]n my Expert Ethnomusicologist Opinion, the music organizations supporting the DotMusic Application are the most recognized and trusted music organizations, including multiple globally-recognized organizations that constitute a majority of all music that is consumed at a global level. It is indisputable that DotMusic's application possesses documented support from the recognized community member organizations.¹⁰⁰*
- i. *[R]ecognized supporting organizations, such as A2IM and Reverbnation, are representative of the addressed community defined in its entirety¹³⁸ without discrimination, with members across all the music categories and music subset of categories delineated by DotMusic's Application. As such, both A2IM and Reverbnation qualify as "recognized" community member organizations as per the AGB.¹⁰¹*
23. A Joint Organisation Experts' Opinion was submitted by Dr. Noah Askin and Dr. Joeri Mol on 11 October 2016 and said, in summary:¹⁰²
- a. *Based on our collective qualifications and decades of experience in organisation, our professional vocation as researchers, academics and professors/lecturers/teachers, and having reviewed the relevant parts of the documents that include the ICANN Applicant Guidebook ("AGB"), the CPE Guidelines, DotMusic's publicly-available Application Materials, the expert testimonies submitted in support of the Application (43 in total), the results of an independent Nielsen Poll concerning DotMusic's community "definition" and "name," DotMusic's Public Interest Commitments, the CPE Reports conducted by the Economist Intelligence Unit (the EIU) on behalf of ICANN for the community applications for the strings .HOTEL, .SPA, .ECO, .RADIO, .OSAKA, .CPA, .MERCK and .GAY, the Expert Legal Opinion by Honorary Professor Dr. Blomqvist and the Expert Ethnomusicologist Opinion by Dr. Burgess, it is our collective expert opinion (the "Joint Organisation Experts' Opinion) and conclusion that DotMusic fully meets all CPE criteria for a score of 16 points. The music community defined is indeed a "real community" that can be grounded in both organization theory and practice. Indeed one could argue that the music community defined has a significant level of cohesion because it is highly organised in nature and operates under a regulated sector under international principles of copyright law and conventions. The Joint Organisation Expert's Opinion also provides additional supporting perspectives in relation to what constitutes an organised, symbiotic and*

¹⁰⁰ Id., pp. 27 - 28

¹⁰¹ Id., pp. 28 - 29

¹⁰² Joint Organisation Experts' Opinion by Dr. Noah Askin and Dr. Joeri Mol (11 October 2016). See <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-joint-organisation-opinion-redacted-11oct16-en.pdf>



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interdependent community, including findings that, indeed, the music community defined and delineated is “real” and organised. The essential component of a “real community” is that it is linked by ties of commensalism, interdependence and symbiosis, including collective action by interest groups and associations that builds community legitimacy (Aldrich and Ruef). An organised community is a set of diverse, internally homogeneous populations that are fused together into functionally integrated systems based on interdependencies (Astley), with great emphasis on the relationships comprising a functioning community (Barnett, Henrich, and Douglas). In organisational ecology, community members are those that are essential to the viability of the other (Hannan and Freeman). Organised communities, such as the music community defined, are considered “real” and legitimate based on shared principles and a system of norms, values, beliefs, and definitions (Mark C. Suchman) and from a socio-political organisational theory perspective, a willingness to associate by environment (Aldrich and Fiol). Communities, such as the music community defined, emerge from relationships between units that involve competition, cooperation, dominance, and symbiotic interdependence (Aldrich and Ruef). An organised community is defined as a set of co-evolving organizational populations joined by ties of commensalism (Amos Hawley) and symbiosis (Aldrich and Ruef) through their orientation to a common technology (such as the Internet), normative order (such as a system of common values and principles), or legal regulatory regime (such as music copyright regulation by government).

- b. *DotMusic delineated all music constituent parts that would represent the essential music community members that would have a legitimate claim in music-related activities and music-related participation with respect to the string. As per the CPE Panel, the music community defined “bounds community membership by way of well-defined categories” and “provides a clear and straightforward membership definition” based on NAICS codes. This scientific methodology was not an attempt to construe a community to be awarded a sought-after string. In fact, this approach is the most common scientific model used by researchers, academics and institutions (e.g. the Creative Economy Coalition and UNESCO) for defining, organising and delineating creative communities that are comprised of essential, symbiotic and interconnected category groups. For a community to function, community resources include not only individual artistic and creative abilities, but also all the complementing support necessary for activities to be undertaken (Bunting, Jones and Wagner). Music community cohesiveness relies on all music community components and sub-components to work together in symbiosis. DotMusic sensibly excluded non-essential (i.e. those that would not have a legitimate claim to identify themselves as members of the community) and peripheral entities that are*



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unrelated to music from every “member category” to ensure the music community definition was precise and to make certain that the community addressed matches the string in relation to “music” in its entirety (without discriminating against legitimate music members, while at the same time preventing any overreach beyond the community defined). The music community defined is held together by shared sets of norms, values and practices and is defined in terms of an alliance, which by definition inherently has cohesion and organisation.

- c. *The Joint Organisation Experts’ Opinion also used the Ngrams humanities research tool to conduct statistical analyses and frequency charting on corpuses found in printed sources prior to 2008. Relevant terms, such as the “music industry,” the “music community,” the “IFPI” and the “RIAA,” were charted against other pertinent benchmarks to comparatively demonstrate that (i) the music community defined is organised (given the prevalence of the “music industry” term) and pre-existed 2007; (ii) the “music community” name is a well-known short-form of the community defined (and pre-existed 2007); and (iii) both the RIAA and IFPI are recognized organisations mainly dedicated to music (and pre-existed 2007). The Joint Organisation Experts’ Opinion also investigated whether the “music community” name was a well-known short form of the community defined. Both music community members and the global media use the term “music community” to correspond to the community defined, encompassing both commercial (i.e. business/industry) and non-commercial music stakeholders. The “music community” is the most popular name in common parlance to describe the community addressed to match the string.*
- d. *The Joint Organisation Experts’ Opinion concludes that DotMusic’s application satisfies the criteria for “Community Establishment,” “Nexus” and “Support.” Based on the evidence provided and our expertise in organisation theory, DotMusic’s application meets the AGB’s community priority threshold. This conclusion is consistent with 43 other independent expert opinions that were submitted prior to DotMusic’s CPE process and two other independent expert opinions submitted following the release of the CPE Report, namely, the Legal Expert Opinion by Honorary Professor Dr. Blomqvist and the Ethnomusicologist Expert Opinion by Dr. Burgess. In conclusion, we are also in agreement that DotMusic’s application should be granted community priority by ICANN.¹⁰³*

¹⁰³ Dr. Noah Askin and Dr. Joeri Mol, Joint Organisation Experts’ Opinion, pp. 3 - 5



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24. All Expert Opinions concluded that DotMusic's Application met the CPE criteria based on the guidelines set forth in the AGB.

E. The Council of Europe Report

25. An independent Council of Europe¹⁰⁴ report also analyzed the CPE Process and provided recommendations to ICANN. The report titled "*Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*"¹⁰⁵ (the "CoE Report") was written by Eve Salomon and Kinanya Pijl and submitted to ICANN.¹⁰⁶
26. The CoE Report revealed that the CPE Process was undermined by issues of inconsistency, disparate treatment, conflicts of interest, and lack of transparency in violation of ICANN's Bylaws and Articles of Incorporation. Furthermore, the CoE Report addressed how these failings specifically harmed DotMusic:

a. CPE Process contained Major Flaws:

- i. *"During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination."*¹⁰⁷
- ii. *"[W]e have found that priority is given to some groups and not to others, with no coherent definition of 'community' applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself ofrt all responsibility for determining priority, despite the delegated third party*

¹⁰⁴ The Council of Europe is Europe's leading human rights organization, with 47 member states (28 of which are also members of the European Union). The Council of Europe also has observer status within ICANN's Governmental Advisory Committee

¹⁰⁵ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17. See <https://rm.coe.int/16806b5a14>; Also see ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017),

https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2, MP3 at

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes> and Presentation at

<https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>

¹⁰⁶ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," Directorate General Human Rights and Rule of Law (DGI) (2016) 17, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹⁰⁷ *Id.*, p. 9.



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*(the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority.*¹⁰⁸

b. ICANN and the EIU treated DotMusic Differently than other Community Applicants that passed CPE:

i. **“First, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process... The Guidebook says utmost care has been taken to avoid any ‘double-counting’ – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria. However, the **EIU appears to double count ‘awareness and recognition of the community amongst its members’ twice: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.**”**¹⁰⁹

- “As an example, the .MUSIC CPE evaluation says:

1A: However, according to the AGB, ‘community’ implies ‘more of cohesion than a mere commonality of interest’ and there should be ‘an awareness and recognition of a community among its members.’ The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls ‘cohesion’ – that is, that the various members of the community as defined by the application are ‘united or form a whole’ (Oxford Dictionaries).

1B: However, as previously noted, the community as defined in the application does not show evidence of ‘cohesion’ among its members, as required by the AGB.

*Although both 1A and 1B are part of the same criterion, the **EIU has deducted points twice for the same reason.**”*¹¹⁰

- **“It is also interesting to note that the **EIU Panel has not considered this question of ‘cohesion’ at all in the CPE for .RADIO, where the term does not appear.**”**¹¹¹

¹⁰⁸ *Id.*, p. 16.

¹⁰⁹ *Id.*, p. 49 (emphasis added).

¹¹⁰ *Id.*, p. 49 (emphasis added).

¹¹¹ *Id.*, p. 49 (emphasis added).



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- ii. **“Second, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others.”**¹¹²
- **“The EIU has demonstrated inconsistency in the way it interprets ‘Support’ under Criterion 4 of the CPE process. Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from a majority of the community By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organization exists either, but the EIU did not appear to be demanding one.”**¹¹³
 - **“It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: ‘Recognized’ means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community.’ If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional membership bodies as ‘recognised’ organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not ‘recognised’. This is despite the fact that the AGB does not limit recognition by a community to membership by that community.”**¹¹⁴
- iii. **“Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to improve their process over time, but that this did not affect the process as described in the AGB.”**¹¹⁵
- iv. **Fourth, “[w]e found that although the Statement of Works (SOW) between ICANN and the EIU refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done... A mere assessment of consistency and alignment**

¹¹² *Id.*, p. 49 (emphasis added).

¹¹³ *Id.*, p. 51 (emphasis added).

¹¹⁴ *Id.*, p. 57.

¹¹⁵ *Id.*, p. 51 (emphasis added).



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*with the AGB and CPE Guidelines does not suffice. Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law)."*¹¹⁶

c. Improper Conflicts of Interest Existed During DotMusic's CPE Process:

- i. *"It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest . . . In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that **Sir Robin Jacob** (Panellist) represented Samsung in a legal case, one of Google's multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist."*¹¹⁷
- ii. *"It was pointed out to us that **Eric Schmidt** became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google's former CEO). Google is in contention with CBAs for a number of strings[, such as .MUSIC], which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of **Vint Cerf**, who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN's reputation for taking decisions on a fair and non-discriminatory basis."*¹¹⁸
- iii. *"On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN's stated policy on community priority and the potential revenues that can be earned through*

¹¹⁶ *Id.*, p. 52.

¹¹⁷ *Id.*, p. 41 (emphasis added).

¹¹⁸ *Id.*, p. 47 (emphasis added).



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the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.”¹¹⁹

d. Lack of Transparency in the CPE Process:

- i. *“The anonymity of panel members has been defended on the grounds that the Panels are advisory only. This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report, the EIU state, ‘We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.’ However, in all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.”¹²⁰*
 - ii. *“It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available presubmission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).”¹²¹*
27. The CoE Report confirms that the CPE Process had issues concerning inconsistency, disparate treatment, conflicts of interests, and lack of transparency – especially in relation to DotMusic’s application. This is contrary to ICANN’s own commitments, Bylaws, and Articles of Incorporation. In the foreword to the CoE Report, *Jan Kleijssen*, the Council of Europe’s *Director of Information Society and Action against Crime*, reiterates ICANN’s commitment to make decisions in a fair, reasonable, transparent, and proportionate manner serving the public interest:

The ICANN Board’s commitment to a new bylaw on human rights recognises that the Internet’s infrastructure and functioning is important for pluralism and diversity

¹¹⁹ *Id.*

¹²⁰ *Id.*, p. 53.

¹²¹ *Id.*, p. 54.



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*in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the **public interest** . . . [P]articular attention is given to ICANN's decision-making which should be as fair, reasonable, transparent and proportionate as possible.¹²²*

28. The CoE report re-affirms DotMusic's assertions in Reconsideration Request 16-5 concerning the CPE process for .MUSIC. According to DotMusic, the DotMusic Application Represents a Bona Fide Community and Serves the Public Interest and satisfies the core considerations identified in the CoE Report for determining whether or not a community-based application should be awarded community priority status:

It seems to us that the core questions for ICANN to be assured of when giving priority to a [Community-based Applicant] are the first ones: "Is the applicant representing a bona fide community, and does it have the support of that community?" We would add a third question here: "Is the applicant properly accountable to the community it represents?" If the answers to those questions are "yes", then that should be the basis for awarding priority.¹²³

29. The CoE Report also outlines the significance of trust and protecting vulnerable communities (e.g., the music community and music consumers) while at the same time enhancing safeguards for strings linked to a regulated sector (such as music) to serve the global public interest:

*It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to national regulation or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse. Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted. To award a community TLD to a community can – as such – **serve the public interest**.¹²⁴*

30. According to the "Declaration of the Committee of Ministers on ICANN, concerning human rights and the rule of law,"¹²⁵ in pursuing its **commitment to act in the general public interest**, ICANN should ensure that, when defining access to TLDs, an appropriate balance is struck between economic interests and other objectives of common interest,

¹²² *Id.*, p. 3 (emphasis added).

¹²³ Eve Salomon and Kinanya Pijl, Council of Europe Report on "Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective," *Directorate General Human Rights and Rule of Law (DGI)* (2016) 17, p. 58, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹²⁴ *Id.*, p. 35 (emphasis added).

¹²⁵ Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true).



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such as pluralism, cultural and linguistic diversity, and respect for the special needs of vulnerable groups and communities, such as the global music community.

31. The CoE Report also mentions DotMusic in relation to the right to freedom of expression and how DotMusic will enforce “legitimate” safeguards to protect the music community’s intellectual property rights and consumers against crime, thus facilitating the music community’s freedom of expression:

DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal, licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community. [T]hese arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime.¹²⁶

32. Furthermore, the CoE Report asserts that there is a balancing act for evaluating whether a TLD supports the freedom of expression. It describes the balancing act as follows:

As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas. [But,] [a]t the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded.¹²⁷

33. DotMusic does not “undermin[e] free expression and restricting numerous lawful and legitimate uses of domain names.”¹²⁸ DotMusic’s Public Interest Commitments reiterate its commitment to restrict .MUSIC registration to music community members and *not* to exclude any registrants that have a legitimate interest in registering a .MUSIC domain “to express and seek opinions and ideas” in relation to music or to exclude any registrant who is part of the music community:

¹²⁶ *Id.*, p. 20.

¹²⁷ *Id.*, pp. 19-20 (emphasis added).

¹²⁸ *Id.*, p. 20.



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3. *A commitment to not discriminate against any legitimate members of the global music community by adhering to the DotMusic Eligibility policy of non-discrimination that restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes. . . .*
 5. *A commitment that the string will be launched under a multi-stakeholder governance structure of representation that includes all music constituents represented by the string, irrespective of type, size or locale, including commercial, non-commercial and amateur constituents, as explicitly stated in DotMusic's Application.¹²⁹*
34. The CoE Report affirmed that DotMusic “intends to create a safe haven for legal music consumption . . . [through] enhanced safeguards, tailored policies, legal music, [and] enforcement policies.”¹³⁰ It also reiterates the consensus that the objective of community-based applications is to serve the public interest and protect vulnerable groups (such as the music community) and consumers from harm (such as from malicious abuse):

There is consensus that community-based applications ought to serve the public interest, but without agreement about what “public interest” might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection.¹³¹

35. The authors of the CoE Report also made a presentation to ICANN during an ICANN webinar called “Community gTLD Applications and Human Rights”¹³² on 18 January 2017.¹³³

a. The Findings on Human Rights, the Public Interest and Communities:

¹²⁹ DotMusic Limited, Specification 11 Public Interest Commitments (“PIC”), pp. 1-2,

<https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadpicposting/1392?t:ac=1392>.

¹³⁰ Eve Salomon and Kinanya Pijl, Council of Europe Report on “Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” *Directorate General Human Rights and Rule of Law (DGI)* (2016) 17, p. 20, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

¹³¹ *Id.*, p. 8.

¹³² ICANN, Community gTLD Applications and Human Rights webinar (2017),

<https://community.icann.org/display/gnsononcomstake/Meeting+Notes>

¹³³ Eve Salomon and Kinanya Pijl, Community gTLD Applications and Human Rights presentation (2017) <https://community.icann.org/display/gnsononcomstake/Meeting+Notes?preview=/53772757/64063241/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf>



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- i. *“ICANN adopted a new Bylaw in May 2016 that explicitly commits ICANN to respect internationally recognized human rights.”*
- ii. *“However, the Community TLD [CPE] process failed to adequately protect the following human rights:*
 - *Freedom of expression*
 - *Freedom of association*
 - *Non-discrimination.”*
- iii. *“These rights fell short in large part because due process (itself a Human Right) did not meet acceptable standards.”*
- iv. *“ICANN lacks a clear vision on the purpose of community-based TLDs.”*
- v. *“There is no clear definition of “community” for the purpose of community-based applications: the initially broad definition of community as formulated by the GNSO has been severely restricted in the Applicant Guidebook, the Community Priority Evaluation (CPE) Guidelines and by the Economist Intelligence Unit (EIU). As a consequence, the process defeats the initial GNSO Policy intention.”¹³⁴*

b. The Findings on Process:

- i. *“Community Priority Evaluation*
 - *There is no external quality control of the Economist Intelligence Unit’s procedures and decisions, despite this being a term of the contract between the EIU and ICANN.*
 - *ICANN has devolved itself of all responsibility for determining community priority, despite the EIU insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN’s own accountability mechanisms are unable to hold ICANN (or the EIU) to account.”¹³⁵*
- ii. *“Accountability Mechanisms*
 - *Community-based applicants and their competitors have recourse to the following accountability mechanisms: reconsideration requests, the Independent Review Process, the ICANN*

¹³⁴ Id., p.2

¹³⁵ Id., p.3



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Ombudsman, and the court. These mechanisms have been of very limited value to community applicants.”

iii. *General Concerns*

- *“The cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, have led to accusations of unfairness and of discrimination.*
- *Maximum predictability of the behaviour of delegated decision-makers need to be guaranteed by ICANN.*
- *There are no appeal mechanisms in place.*
- *The lines of responsibility are unclear when it comes to delegated decision-makers.”¹³⁶*

c. Recommendations to Improve Process

- i. *“Having greater clarity of the purpose of Community TLDs and why ICANN has created a special regime for Communities. This should be firmly grounded in Human Rights.”*
- ii. *“Introducing a single appeal mechanism which can look at substance as well as process.”*
- iii. *“Ensuring that all the delegated decision making processes – for Community Objections, CPE and the accountability mechanisms –are all human rights compliant and quality controlled.”*
- iv. *“Review the role of the Economist Intelligence Unit. The credibility of the EIU has arguably been damaged by allegations of lack of transparency, collusion with ICANN staff, and conflicts of interest.”¹³⁷*
- v. *“Placing sufficient restrictions on the registry agreements for Community TLDs to deter purely commercial interests from applying. This would shift the burden of proof so that applicants would not need to prove they were, in fact, community-based as this would be a prima facie assumption. Instead, applications would be awarded to those who proved they had the most support from, and accountability to the community, and would provide the most benefit.”¹³⁸*

36. Lee Hibbard, the Internet governance co-ordinator at the Council of Europe, authored an ICANN blog titled “Community consensus on the need for change regarding community-

¹³⁶ Id., p.4

¹³⁷ Id., p.5

¹³⁸ Id., p.6



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based new Generic Top-Level Domains (gTLDs)” on 18 January 2017 that encapsulated community conclusions in relation to the ICANN webinar that was organized by ARTICLE 19, the Council of Europe, and the Cross Community Working Party on ICANNs Corporate and Social Responsibility to Respect Human Rights:¹³⁹

- a. *“The Council of Europe report on Applications to ICANN for Community-based new Generic Top-Level Domains (gTLDs) – Opportunities and challenges from a human rights perspective was presented. Its authors, Eve Solomon and Kinanya Pijl, raised concerns regarding the policies and procedures for community objections (i.e. inconsistency in who has standing to object, opaque decision-making) and community priority evaluations (i.e. uncertainty in appealing the decisions of the Economic Intelligence Unit).”*
- b. *“Concerns were expressed about the treatment of community applications in the ICANN process. Cherine Chalaby, ICANN Board member, underlined the need for an adequate rationale in dealing with all community applicants. Avri Doria, Co-chair to the GNSO working group on subsequent gTLD procedures, considered the pre-screening of community applicants.”*
- c. *“In summary, it was generally agreed that ICANN’s policies and procedures should be as clear, fair, reasonable and transparent as possible in order to reduce inconsistency, increase predictability, ensure due process, eliminate discrimination and deter potential gaming.”¹⁴⁰*

F. The FTI Reports

37. On 13 December 2017, FTI Consulting published the Reports it had prepared under instructions from Jones Day¹⁴¹ relating to the CPE Process (“FTI Report”).¹⁴²

¹³⁹ Lee Hibbard, ICANN, Community consensus on the need for change regarding community-based new Generic Top-Level Domains (gTLDs) (18 January 2017). See <https://community.icann.org/pages/viewpage.action?pagelD=64067496>

¹⁴⁰ Id.

¹⁴¹ Jones Day is the ICANN outside legal firm used for various ICANN-related activities, such as litigation (See ICANN Litigation Documents at <https://www.icann.org/resources/pages/governance/litigation-en>), Reconsideration Requests (See Letter from Jones Day to DotMusic Limited (15 May 2017) at <https://www.icann.org/en/system/files/correspondence/levee-to-ali-2-15may17-en.pdf>) and the Independent Review Process (See Independent Review Process Documents at <https://icann.org/resources/pages/accountability/irp-en>).

¹⁴² FTI Consulting, FTI Report (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf> (Communications Between ICANN Organization and the CPE Provider, Scope 1), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf> (Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2) and <https://www.icann.org/en/system/files/files/cpe-process->



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38. The **FTI Report Scope 1** pertained to “**Communications Between ICANN Organization and the CPE Provider.**”¹⁴³ It concluded:

*[T]hat there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion is based upon FTI’s review of the written communications and documents described in Section III below and FTI’s interviews with relevant personnel. While FTI understands that many communications between ICANN organization and the CPE Provider were verbal and not memorialized in writing, and thus FTI was not able to evaluate them, FTI observed nothing during its investigation and analysis that would indicate that any verbal communications amounted to undue influence or impropriety by ICANN organization.*¹⁴⁴

39. The **FTI Report Scope 2** pertained to the “**Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports.**”¹⁴⁵ It concluded:

[T]hat the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook and the CPE Guidelines throughout each CPE. This conclusion is based upon FTI’s review of the written communications and documents and FTI’s interviews with the relevant personnel []. Throughout its investigation, FTI carefully considered the claims raised in Reconsideration Requests and Independent Review Process (IRP) proceedings related to CPE. FTI specifically considered the claim that certain of the CPE criteria were applied inconsistently across the various CPEs as reflected in the CPE reports. FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner. While some applications received full points for certain criterion and others did not, the CPE Provider’s findings in this regard were not the result of inconsistent application of

[review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf](#) (Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3).

¹⁴³ FTI Report, Communications Between ICANN Organization and the CPE Provider, Scope 1 (13 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>

¹⁴⁴ Id., p.3

¹⁴⁵ FTI Report, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in CPE Reports, Scope 2 (13 December 2017), p.1. See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>



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the criteria. Rather, based on FTI's investigation, it was observed that the CPE Provider's scoring decisions were based on a consistent application of the Applicant Guidebook and the CPE Guidelines.¹⁴⁶

40. The **FTI Report Scope 3** pertained to the **Compilation of the Reference Material** relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests.¹⁴⁷ It concluded:

[FTI] observed that of the eight relevant CPE reports, two (.CPA and .MERCK) contained citations in the report for each reference to research. For all eight evaluations, FTI observed instances where the CPE Provider cited reference material in the CPE Provider's working papers that was not otherwise cited in the final CPE report. In addition, in six CPE reports (.MUSIC, .HOTEL, .GAY, .INC, .LLP, and .LLC), FTI observed instances where the CPE Provider referenced research but did not include citations to such research. FTI then reviewed the CPE Provider's working papers associated with the relevant evaluation to determine if the referenced research was reflected in those materials. In all instances except one, FTI found material within the working papers that corresponded with the research referenced in the final CPE report. In one instance (the second .GAY evaluation), research was referenced in the second final CPE report, but no corresponding citation was found within the working papers. However, based on FTI's observations, it is possible that the research being referenced was cited in the CPE Provider's working papers associated with the first .GAY evaluation.¹⁴⁸

G. Analysis

.MUSIC CPE and CPE Comparative Analysis

Community Establishment

41. The CPE Panel argues in the .MUSIC CPE Report that there is "no substantive evidence" that the defined "organized alliance of communities that relate to music" has no cohesion in its entirety. Such an argument is problematic because an "organized alliance" must have cohesion in order to be considered an alliance. In other words, the organizations that form the alliance must have awareness of each other and that each constituent group exists. In short, different constituents interconnect with each other and each constituent performs

¹⁴⁶ Id., p.3

¹⁴⁷ FTI Consulting, FTI Report, Compilation of the Reference Material relied upon by the CPE Provider in connection with the Evaluations which are the subject of Pending Reconsideration Requests, Scope 3 (17 December 2017). See <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

¹⁴⁸ Id., pp. 57 - 58



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a function that is essential for the music industry to function the way it does. It is not possible to argue that constituent groups that make up the music community are not aware of each other, do not interact with each other, or do not understand how each constituent group functions within this logical alliance. If the CPE Panel's assertions are correct (they are not) then how can the music industry function without cohesion or organisation? More importantly, a lack of cohesion would also suggest that music copyright (and music rights in general) are non-existent or non-essential for each constituent to perform their activity. DotMusic provided various examples of internationally-recognized standards to showcase such cohesion, such as the International Standard Name Identifier (ISNI).¹⁴⁹

42. **It is also observed that the community definition provided by DotMusic is nowhere to be seen in the CPE Report.** The “organized logical alliance” community definition is disregarded and it appears that a new definition is developed by the CPE Panel to help rationalize its argument. Such a process error creates unintended consequences because applying the wrong community definition compromises how the community application is graded. The CPE Process should be re-evaluated based on this procedural error alone. The description of the “constituent parts” is not the definition of the community. In fact, the AGB mandates applicants that in the case of a community of an “alliance of groups” (which is exactly what the community defined by DotMusic is), that the “details about the constituent parts are required.”¹⁵⁰ It appears that the CPE Panel mistook the “details about the constituent parts” as the community definition (it is not).
43. DotMusic clarifies in its Application materials that “[t]he requisite awareness of the community is clear: participation in the Community, the logical alliance of communities of similar nature related to music, -- a symbiotic, interconnected eco-system that functions because of the awareness and recognition of its members. The delineated community exists through its members participation within the logical alliance of communities related to music (the “Community” definition). Music community members participate in a shared system of creation, distribution and promotion of music with common norms and communal behavior e.g. commonly-known and established norms in regards to how music entities perform, record, distribute, share and consume music, including a shared legal framework in a regulated sector governed by common copyright law under the Berne Convention, which was established and agreed upon by over 167 international governments with shared rules and communal regulations.”¹⁵¹

¹⁴⁹ The ISNI is an ISO Standard for the Public Identities of parties: that is, the identities used publicly by parties involved throughout the music industry in the creation, production, management, and content distribution chains. See <http://www.isni.org> and <http://www.isni.org/content/isni-music-industry>

¹⁵⁰ AGB, Attachment to Module 2, Evaluation Questions and Criteria. “Descriptions should include: How the community is structured and organized. For a community consisting of an **alliance of groups, details about the constituent parts are required.**” See Notes, 20A, A-14

¹⁵¹ DotMusic Public Interest Commitments (“PIC”), <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.6



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44. A logical alliance of communities qualifies for a full score under the AGB: “With respect to “Delineation” and “Extension,” it should be noted that a community can consist of [...] a **logical alliance of communities** (for example, an international federation of national communities of a similar nature).”¹⁵² DotMusic met the criteria for a full score by explicitly using similar AGB language to meet this requirement to define the community: “a strictly **delineated** and **organized community** of individuals, organizations and business, a “**logical alliance of communities** of a similar nature (**‘COMMUNITY’**), that relate to music”¹⁵³ In short, the community definition adopted by DotMusic is aligned with the language permitted by the AGB to meet the Community Establishment criteria of a **delineated** and **organized** community. One could assert that the definition mirrors the requirements of the AGB for Community Establishment in relation to music. In addition, since a letter of endorsement was required to be filed by each of these organizations that comprise the constituent parts, it cannot be debated that they had no awareness of the community defined and that they unite under the mission and purpose of the string that was described in DotMusic’s application. A community that formally files letters of support to endorse and participate under a united purpose implies more of a cohesion than a mere commonality of interest.
45. Another requirement under the AGB is that there is “at least one entity mainly dedicated to the community” that was defined. Such organizations include the International Federation of Phonographic Industry (“IFPI”) and the International Federation of Musicians (“FIM”) that are entirely dedicated to the community in areas, including the protection of music rights, a key area that the entire community in its entirety relies upon and is united behind. Without such protections and activities to support such protections, the community would not have an industry or be able to conduct any of its activities the way it does.
46. Founded in 1948, the FIM is a globally recognized international federation representing the “voice of musicians worldwide.”¹⁵⁴ For example, the FIM is recognized by the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization, the World Intellectual Property Organization and the Organisation Internationale de la Francophonie¹⁵⁵
47. Founded in 1933, the IFPI is a recognized international federation “representing the “recording industry worldwide” and the majority of music consumed globally.”¹⁵⁶ The IFPI represents Universal Music, Sony Music and Warner Music, globally-recognized organizations that “control 78% of the global market.”¹⁵⁷

¹⁵² AGB, p.4-12

¹⁵³ DotMusic Application, 20A

¹⁵⁴ Musicians represent the majority of the music community defined in absolute numbers.

¹⁵⁵ UNESCO, <http://ngo-db.unesco.org/r/or/en/1100025135>

¹⁵⁶ IFPI, <http://www.ifpi.org>

¹⁵⁷ Credit Suisse Research and Analytics, Global Music, 25 June 2014. Retrieved May 12, 2016 from

https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1034433411&ext_docid=1034433411_1_eng_pdf



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48. The FIM and IFPI both qualify as recognized community member organizations that are mainly dedicated to the community addressed with “documented activities” such as activities centered around the protection of music rights.
49. The CPE Panel awarded the .HOTEL community applicant with a full score for “Organization” because the Panel found “recognized community institution(s)/member organization(s)”¹⁵⁸ and has at least one organization mainly dedicated to the community:

“[T]he community as defined in the application has at least one entity mainly dedicated to the community. In fact there are several entities that are mainly dedicated to the community, such as the International Hotel and Restaurant Association (IH&RA), Hospitality Europe (HOTREC), the American Hotel & Lodging Association (AH&LA) and China Hotel Association (CHA)”¹⁵⁹

“The applicant possesses documented support from the recognized community institution(s)/member organization(s).”¹⁶⁰

According to the .HOTEL CPE Report, it is also noted that the Panel recognized that the nationally-based AH&LA and CHA were “recognized” organizations that were “mainly” dedicated to the hotel community. Consistently and similarly, DotMusic’s application had multiple recognized international federations (such as the FIM and the IFPI) and national organizations mainly dedicated to the music community.

50. Under the AGB, the community defined must be of “**considerable size** [‘Size’] and **longevity** [‘Longevity’].¹⁶¹ DotMusic’s application meets this criterion because it states that “[t]he Music Community’s geographic breadth is inclusive of all recognized territories covering regions associated with ISO-3166 codes and 193 United Nations countries...with a **Community of considerable size with millions of constituents (“SIZE”)**.”¹⁶² Under the Pre-existence criteria, the community defined by the applicant “must have been active prior to September 2007.”¹⁶³ Longevity also mandates that the community defined is not ephemeral or set up for the specific purpose of obtaining a gTLD approval.¹⁶⁴ With respect to pre-existence, the FIM and IFPI were founded in 1948 and 1933 respectively. Their activities that have had global impact on the entire music community (in areas such as the

¹⁵⁸ .HOTEL CPE Report, <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6

¹⁵⁹ Id., p.2

¹⁶⁰ Id., p.6

¹⁶¹ AGB, “‘Size’ relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers,” p.4-11

¹⁶² See .MUSIC Application, 20A, para.4 at <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1392?t:ac=1392>

¹⁶³ AGB, p.4-11

¹⁶⁴ AGB, “‘Longevity’ means that the pursuits of a community are of a lasting, non-transient nature,” p.4-12



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protection of music rights) occurred **decades prior to 2007**. In short, the community defined was not set up for the specific purpose of obtaining gTLD approval. The music community defined has been organized for ages and did not create itself after 2007 for the sole purpose of applying for a top-level domain.

51. According to the .GAY CPE Report, “the [International Lesbian, Gay, Bisexual, Trans and Intersex Association] ILGA, an organization mainly dedicated to the community as defined by the applicant ... **has records of activity beginning before 2007.**”¹⁶⁵ Similarly, according to the .SPA CPE Report: “The community as defined in the application was active prior to September 2007... [T]he **proposed community segments have been active prior to September 2007.** For example, the International Spa Association, a professional organization representing spas in over 70 countries, has been in existence since 1991.”¹⁶⁶ Consistent with the .SPA and .GAY CPE Reports’ rationale for ISA and ILGA, both the FIM and the IFPI have “records of activity before 2007.” Similarly, the constituent segments of the community defined by DotMusic have also been active prior to September 2007. Consistent with both the .GAY and .SPA Reports’ rationale and grading threshold, the CPE Panel should have also awarded DotMusic with a full score under Community Establishment by applying the AGB criteria in a similar manner.
52. DotMusic’s application was consistent with (and in some cases exceeded) the Community Establishment rationale and “cohesion” threshold that the CPE Panel applied to be award the .ECO, .GAY, .HOTEL, .OSAKA, .RADIO and .SPA community applications with maximum points under Community Establishment. As stated in DotMusic’s Reconsideration Request 16-5:
- *“The EIU awarded .ECO full points, stating that “cohesion and awareness is founded in their demonstrable involvement in environmental activities” which “may vary among member categories.”¹⁶⁷ Conversely, the EIU penalized DotMusic with a grade of zero based on similar category variance and members that also have demonstrable involvement in music-related activities.”*
 - *“The improper grading and evaluation in the .MUSIC Report is even more apparent considering the recent CPE decision providing .GAY a full score under community establishment establishing that there is stronger cohesion than DotMusic based on “an implicit recognition and awareness of belonging to a community of others who have come out as having non-normative sexual orientations or gender identities, or as their allies”¹⁶⁸ (emphasis added). In contradiction, the EIU determined DotMusic’s “logical alliance” operating under a*

¹⁶⁵ .GAY CPE Report, <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf>, p.3

¹⁶⁶ .SPA CPE Report, <https://www.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>, p.3

¹⁶⁷ .ECO CPE, p.2

¹⁶⁸ .GAY CPE, p.2



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regulated sector that is united by copyright lacked any “cohesion” of belonging to a community.”

- “The EIU awarded .HOTEL full points for community establishment for a “cohesive” community definition that is comprised of “categories [that] are a logical alliance of members.”¹⁶⁹ Even though DotMusic similarly presents music community based on “logical alliance” definition that is delineated by “music categories” and “music subsets,” its Application received no points. Failure to recognize the alliance that encompasses the music community is improper.”
- “The EIU awarded full points to .OSAKA determining there was “cohesion” for its community because members self identify as having a tie to Osaka, or with the culture of Osaka;¹⁷⁰ Similarly, DotMusic’s “logical alliance” is “related to music” (i.e. has a tie) but its Application was penalized.”
- “The EIU established that the .RADIO had cohesion solely on the basis of being “participants in this...[radio] industry.”¹⁷¹
- “[T]he .MUSIC Report penalized the Application under community establishment to the fullest extent possible (grading zero points) for lacking “cohesion” while the .SPA community applicant was given full points even though their definition of the spa community included a “secondary community” that “do[es] not relate directly” to the string. Contrary to the .MUSIC Report, DotMusic’s application is delineated and restricted to music categories and music subsets that only relate to music, yet it received no points for community establishment. ICANN assessed that the .SPA application’s defined community had the requisite awareness among its members because members of all the categories recognize themselves as part of the spa community by their inclusion in industry organizations and participation in their events:

*Members...recognize themselves as part of the spa community as evidenced...by their inclusion in industry organizations and participation in their events.*¹⁷²

In contrast, ICANN rejected DotMusic’s membership music categories and music subsets as not having the requisite awareness even though, similar to the spa community, all Music Community members also “participate” in music-related events and are included in music groups or music subsets as evidenced by DotMusic’s majority music (logical alliance) community support of organizations with members representing the overwhelming majority of music consumed globally.

¹⁶⁹ .HOTEL CPE, p.2

¹⁷⁰ .OSAKA CPE, p.2

¹⁷¹ Id., p.2

¹⁷² .SPA Report, p.2



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53. There has been no substantive engagement with the reasoning set out above in the FTI Reports. DotMusic’s reasoning is correct and DotMusic’s application meets all the criteria required under the Community Establishment section to score full points.

Nexus between Proposed String and Community

54. According to DotMusic’s Application, “[t]he **name** of the community served is the **“Music Community”** (“Community”).”¹⁷³
55. With respect to the “Nexus between Proposed String and Community,” DotMusic’s application states that “[t]he **“MUSIC”** string **matches** the name (“Name”) of the Community [**Music Community**] and is the established name by which the Community is commonly known by others.”¹⁷⁴ DotMusic explained “the relationship between the applied- or gTLD string and the community identified in 20A:” “The .MUSIC string relates to the Community by ... **completely representing the entire Community**. It **relates to all music-related constituents using an all-inclusive, multi-stakeholder model**...”¹⁷⁵ In other words, the string fully matches the music community. The music string has no other significant meaning beyond identifying the community described in the application.
56. This is consistent with the .SPA CPE Report that passed CPE and scored full points under Nexus. In fact, the DotMusic Nexus requirements exceeded the threshold that was applied by the CPE Panel in the case of the .SPA CPE to fulfill the criteria for full points. Even though DotMusic matched the community definition by “completely representing the entire Community” with the string by “relat[ing] to all music-related constituents using an all-inclusive, multi-stakeholder model,” DotMusic was not awarded a full score. In contrast, the CPE Panel awarded the .SPA community applicant a full score based on a lower threshold for meeting the full point criteria. In fact, the .SPA community admits that they did not completely represent the entire community but received a higher grade than DotMusic even though DotMusic completely represented the entire community. The CPE Panel permitted the .SPA community applicant to include a secondary community that was not directly related to spas and awarded the .SPA community applicant a full score: “The secondary community generally also includes holistic and personal wellness centers and organizations. While these **secondary community organizations do not relate directly to the operation of spas**, they nevertheless often overlap with and participate in the spa community and may share certain benefits for the utilization of the .spa domain.”¹⁷⁶

¹⁷³ DotMusic Application, 20A, para.1

¹⁷⁴ Id., 20A, para.3

¹⁷⁵ Id., 20D, para.1

¹⁷⁶ .SPA community application, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/123?t:ac=123>, 20A, para.3



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57. DotMusic's Application, Music Community members are delineated and restricted to music categories and music subsets that *only* relate to music. According to DotMusic's Application Materials, unrelated secondary communities that have a tangential relationship with the music community defined are not allowed, which is a stricter threshold than the one permitted by the CPE Panel to award full points for the .SPA community applicant under the Nexus between the Proposed String and Community section. DotMusic "restricts eligibility to Music Community members -- as explicitly stated in DotMusic's Application -- that have an active, non-tangential relationship with the applied-for string and also have the requisite awareness of the music community they identify with as part of the registration process. This public interest commitment ensures the inclusion of the entire global music community that the string .MUSIC connotes"¹⁷⁷ and "exclude[s] those with a passive, casual or peripheral association with the applied-for string."¹⁷⁸ In comparison, the .MUSIC CPE exceeded the threshold that was applied for the .SPA CPE to be awarded full points under the Nexus section.
58. Again, there has been no substantive engagement by FTI with DotMusic's application or Reconsideration Request, and DotMusic's application meets all the criteria required under the Nexus between Proposed String and Community section to score full points.

Community Endorsement

According to the AGB, "with respect to "Support," the plurals in brackets for a score of 2, **relate to cases of multiple institutions/organizations**. In such cases there must be documented support from **institutions/organizations representing a majority of the overall community addressed** in order to score 2."¹⁷⁹ ¹⁸⁰

59. According to DotMusic's Application Materials, there is support from multiple organizations with members representing over ninety-five percent of global music consumption, which is a **majority**.¹⁸¹
60. Another alternative for scoring 2 points in "Support" is having "documented support from recognized ¹⁸² community institution(s)/ member organization(s)." ¹⁸³ The music

¹⁷⁷ DotMusic Public Interest Commitments ("PIC"), PIC Enumerated Commitment #3, <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadpicposting/1392?t:ac=1392>, p.1

¹⁷⁸ Id., PIC Enumerated Commitment #4, p.2

¹⁷⁹ AGB, §4.2.3, Module 4, p.4-18 (emphasis added)

¹⁸⁰ CPE Guidelines, p.18

¹⁸¹ See Support Letters from multiple organizations for DotMusic's Application at <http://music.us/supporters> and <https://gtldresult.icann.org/applicationstatus/applicationdetails/downloadattachment/142588?t:ac=1392>; See over two-thousand (2,000) Support Letters at <https://icann.box.com/shared/static/bg7rpnj9zeg4jvt8ff7qaka2ot7ai4mg.pdf> (Exhibits A19-1, A19-2 and A19-3) and at <https://icann.box.com/shared/static/s2dab2ba5pf6hx9f1j7cq5x86acnrhli.pdf> (Exhibit A19-4); and <https://gtldcomment.icann.org/applicationcomment/viewcomments>

¹⁸² AGB, "'Recognized' means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community," pp. 4-17 to 4-18

¹⁸³ AGB, p.4-17



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organizations supporting the DotMusic Application are the most recognized and trusted music-related organizations in the world. They include many internationally-recognized organizations. Recognized organizations include the FIM and IFPI as mentioned earlier that have documented activities in areas that are representative of the community's united interests, such as the protection of music rights and copyright in general. As such, DotMusic's application has the documented support from the recognized community member organizations.

61. This is consistent with the .HOTEL CPE Report, in which the .HOTEL community applicant fulfilled both the options for meeting the AGB. According to the .HOTEL CPE Report, recognized organizations mainly dedicated to the hotel community included the American Hotel & Lodging Association (AHLA) and the China Hotel Association (CHA): **"These groups constitute the recognized institutions to represent the community, and a majority of the overall community as described by the applicant."**¹⁸⁴
62. If the American and China hotel associations would suffice as recognized organizations mainly dedicated to hotels then international organizations, such as FIM (formed in 1948) and IFPI (formed in 1933), recognized by the United Nations and the World Intellectual Property Organisation, exceed the requirements in comparison to the acceptable threshold adopted by the CPE Panel for the .RADIO CPE because both the FIM and the IFPI are **globally-based (as opposed to nationally-based)** and have **pre-existed** both the AHLA (formed in 1953) and CHA (formed in 1996).
63. DotMusic's support rationale and documentation is also consistent with the .RADIO CPE Report, in which the .RADIO community applicant fulfilled the AGB Support criteria: "[T]he applicant possesses documented support from institutions / organizations representing a **majority** of the community addressed... The applicant received support from a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant. These entities represented a majority of the overall community. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Support."¹⁸⁵ Under the same token, the DotMusic application also has the support from "a broad range of recognized community institutions/member organizations, which represented different segments of the community as defined by the applicant." As emphasized in DotMusic's application, its support comprised of recognized community organizations that "represented a majority of the overall community defined" by DotMusic.
64. In sum, DotMusic's Application meets both "Support" requirement options for attaining 2 points. DotMusic's application has "documented support from, the recognized community institution(s) / member organization(s)" as well as "documented support from institutions/organizations representing a majority of the overall community addressed."

¹⁸⁴ .HOTEL CPE Report, p.6

¹⁸⁵ .RADIO CPE Report, p.7



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DotMusic's application meets all the criteria required under the Support section of Community Endorsement to score full points.

Conclusion on .MUSIC CPE Analysis and CPE Comparison

65. DotMusic's application fulfills all the criteria under the sections of Community Establishment, the Nexus between the Proposed String and Community, and Support based on the AGB. In conclusion, **DotMusic should have passed CPE. Treating DotMusic's application differently from the decisions that have already been made in relation to RADIO, OSAKA and HOTEL would represent discriminatory treatment with no justification, in violation of ICANN's Bylaws.**¹⁸⁶ **DotMusic was close to passing, which makes the EIU's scoring inconsistencies even more troubling,** especially considering that DotMusic's community definition was disregarded, which in effect resulted to improperly awarding zero out of four points in Community Establishment. Applying the appropriate community definition as explicitly defined in 20A (not 20D) as mandated by the AGB would have led to a passing CPE grade for DotMusic.

FTI Reports Analysis

66. It is clear that the FTI Report was superficial in nature and did not fulfill the obligations that an independent investigation of this significance would warrant. ICANN's stated objective with the CPE Review was to conduct a **complete, independent investigation** that would answer all the questions that applicants raised through their reconsideration requests, especially in relation to accusations of discriminatory treatment and unfair and inconsistent grading by the EIU's CPE Panel.
67. The FTI Report raises more questions than it answers because it failed to conduct a comprehensive investigation to analyze the issues of inconsistency, unfairness and discriminatory treatment that everyone was expecting to be addressed based on ICANN's comments and representations. Only after such investigation is conducted can the ICANN Board make any determination concerning any of the pending reconsideration requests. There are many issues that the FTI did not adequately address in the CPE Process, including, whether:
- a. The EIU properly developed and applied additional criteria and processes after receiving the community applications in 2012 without

¹⁸⁶ ICANN Bylaws, Sections 1.2 and 3.1. See <https://www.icann.org/resources/pages/governance/bylaws-en>



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- giving the community applicants to change their applicants to reflect these changes.
- b. ICANN allowed the EIU to participate in the evaluation of community applications despite conflicts of interest.
 - c. ICANN allowed the EIU to grade community applications without having the necessary expertise, training and understanding of the CPE process and its rules.
 - d. The CPE Panel were indeed music experts, with suitable knowledge to score an application in relation to music.
 - e. The EIU permitted individuals who were not EIU CPE panelists (including ICANN Staff) to perform substantive tasks in CPE in violation of explicit rules.
 - f. The EIU acted consistently with the rules of the AGB in its collection of information and its interpretation of the AGB while applying the CPE criteria.
 - g. The EIU applied the CPE criteria consistent with the human rights principles and general principles of international copyright law and international conventions.
 - h. The EIU and ICANN improperly considered evidence supporting community applications, including reconsideration requests and expert opinions.
 - i. ICANN should have accepted CPE Reports despite these issues without reasonable and effective investigation or the option to appeal.
 - j. The CPE process adopted by ICANN conformed with ICANN's Core Principles.
 - k. ICANN's actions and inactions in relation to the CPE process were consistent with its own Bylaws and Articles of Incorporation.
68. What raises additional serious concerns is the decision by ICANN or ICANN's internal or external legal counsel to narrow the scope of the FTI Report to exclude many key issues that still remain unaddressed and are pending reconsideration request decisions by the ICANN board. How can the ICANN board make a determination on pending Reconsideration Requests with an incomplete investigation that did not address the most glaring issues?



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69. This leads to the inference that the FTI “compliance-focused investigation methodology” was constructed in part to exonerate ICANN of any accountability and responsibility. In its own admission, the FTI did:
- a. Not re-evaluate the CPE applications.
 - b. Not compare applications that passed CPE with applications that did not pass in light of issues concerning grading inconsistencies and discriminatory treatment.
 - c. Not evaluate the substance of the reference material.
 - d. Not assess the propriety or reasonableness of the research undertaken by the CPE Provider.
 - e. Not interview the CPE applicants to understand their concerns or objections to the treatment afforded to their application.
70. Without addressing these overarching issues, the FTI cannot reasonably conclude that:
- a. “There is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.”¹⁸⁷
 - b. “The CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook (“AGB”) and the CPE Guidelines throughout each CPE.”¹⁸⁸
 - c. “The CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).”¹⁸⁹
71. FTI purported to adopt a “compliance-focused investigation methodology” when evaluating the CPE Provider’s consistency in applying the AGB and the CPE Guidelines. It found that the “CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE.”¹⁹⁰

¹⁸⁷ Scope 1 Report, p. 17.

¹⁸⁸ Scope 2 Report, p. 3.

¹⁸⁹ Scope 3 Report, p. 4.

¹⁹⁰ Scope 2 Report, p. 21.



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72. According to FTI:

*The scoring decisions were not the result of any inconsistent or disparate treatment by the CPE Provider. Instead, the CPE Provider's scoring decisions were based on a rigorous and consistent application of the requirements set forth in the Applicant Guidebook and the CPE Guidelines.*¹⁹¹

73. However, FTI ignores publicly available evidence that casts serious doubts on its findings concerning the CPE Provider's consistent application of the AGB and the CPE Guidelines. Contrary to independent reports and opinions, such as the Council of Europe report, expert opinions as well as opinions expressed by members of the ICANN Board, such as the current ICANN Chairman Cherine Chalaby, the FTI presents a rose-tinted picture of the CPE process. It appears that the FTI concludes that the CPE process had no serious flaws and was executed in alignment with the AGB and ICANN's Bylaws. This conclusion is neither supported by FTI's analysis or its investigative methodology.

74. FTI's conclusions lack objectivity and are superficial and unreliable. It appears the intent of the investigation was to advocate in favor of ICANN and the EIU, while disregarding serious issues presented in Reconsideration Requests, expert opinions and independent reports (such as the CoE Report).

75. What raises further concern is FTI's decision to reject expanding the scope of the investigation, which if legitimately pursued would have led to conclusions that would suggest that ICANN and the EIU violated established process, ICANN's Bylaws and Articles of Incorporation. The conclusions it actually did reach appear pre-determined and rationalizations to protect ICANN from accountability and responsibility for the failures of the CPE program.

76. It is not credible for FTI to conclude that ICANN did not unduly influence the CPE Provider, taking into consideration the findings by the independent review process ("IRP") panel in Dot Registry v. ICANN.¹⁹² Indeed one is left with the troubling sense that ICANN carefully tailored the narrow scope of the investigation and cherry-picked documents and information to share with the FTI to protect itself.

77. However, the FTI concluded that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process."¹⁹³ The FTI's conclusion was based on.

¹⁹¹ Scope 2 Report, p. 21.

¹⁹² Dot Registry v. ICANN IRP Final Declaration (29 July 2016). See <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

¹⁹³ Scope 1 Report, p. 3.



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- a. Documents provided by ICANN concerning the CPE review process and evaluations.¹⁹⁴
 - b. Interviews of six ICANN staff members “who interacted with the CPE Provider over time regarding CPE;”¹⁹⁵
 - c. Interviews of only two CPE Provider staff members “of the core team for all CPEs that were conducted” between 2013 and 2016.¹⁹⁶
 - d. Working papers, draft reports, notes, and spreadsheets provided by the CPE Provider concerning the CPE process and evaluations.¹⁹⁷
78. Such a conclusion is unreliable and incomplete because it was based on (i) selective information provided by ICANN; (ii) a flawed understanding of issues based on this incomplete and inconsistent evidence; and (iii) the adoption of a flawed and inappropriate compliance-based investigative process by the FTI.
79. The evidence shows that the FTI’s conclusion that there were no procedural failures, inconsistencies or disparate treatment in the CPE process is unsupported and is not consistent with numerous independent reports and expert opinions. There appears to be a general consensus that the CPE Process lacked transparency, was flawed, inconsistent and unfair.
80. FTI’s finding that ICANN did not unduly influence the CPE Provider or engaged in any impropriety in the CPE Process is also **inconsistent with the IRP Panel’s final and binding declaration in the Dot Registry case, which concluded that ICANN was “intimately involved” in the CPE process.**¹⁹⁸ The FTI’s evaluation was based on inadequate and incomplete document collection from the EIU, self-serving and one-sided statements made by ICANN and the EIU, and lacking any participation from community applicants (despite requests by some applicants, such as DotMusic).
81. In contrast to the FTI investigation, the Dot Registry IRP Declaration was credible, neutral and trustworthy because: (i) it was determined by a neutral 3-person panel without any conflicts of interest or agenda; involved (ii) declarations under oath by 5 factual witnesses and 1 expert witness; (iii) seven hours of hearing; (iv) extensive documents produced by

¹⁹⁴ Scope 1 Report, pp. 3-7.

¹⁹⁵ Scope 1 Report, p. 13.

¹⁹⁶ Scope 1 Report, p. 14; see ICANN, Community Priority Evaluation (last visited 10 Jan. 2018), <https://newgtlds.icann.org/en/applicants/cpe>.

¹⁹⁷ Scope 1 Report, p. 6.

¹⁹⁸ *Dot Registry*, ¶ 93. The *Dot Registry* decision is final and binding on ICANN. See *Dot Registry*, ¶ 73; see also ICANN Bylaws (16 Feb. 2016), Art. IV, §§ 3.11(c), 3.11(d), 3.21.



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both ICANN and Dot Registry; and (v) extensive written submissions by both ICANN and Dot Registry. The *Dot Registry IRP* panel concluded that:

- a. "ICANN staff was intimately involved in the process. ICANN staff supplied continuing and important input on the CPE reports;"¹⁹⁹ and
 - b. The review of the documents concerning an ongoing exchange between the CPE Provider and ICANN concerning .INC revealed that the CPE report for .INC specifically states that certain determinations are based in the CPE Provider's research.²⁰⁰ The panel, however, found that the origin of this research "comes from ICANN staff" who not only told the CPE Provider that they wanted to add "a bit more to express the research and reasoning that went into [the] statement," but also proposed the *exact language* to include in the CPE.²⁰¹
82. FTI's conclusion that ICANN was not engaged in "any impropriety in the CPE Process" is deeply flawed, improper and inconsistent with the final and binding decision of the Dot Registry IRP panel. FTI's finding that "there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process"²⁰² appears to be based on incomplete and self-serving information provided largely by ICANN in a manner that would exonerate ICANN of any wrong-doing or failing to follow its Bylaws.
83. On 18 January 2017, Article 19,²⁰³ a U.K. based human rights organization, and the CoE organized a webinar on Community Top-level Domains (TLDs) and Human Rights to discuss the CPE process, ICANN's accountability mechanisms, and concepts for the next gTLD application rounds. The speakers included ICANN Chairman Cherine Chalaby, ICANN Government Advisory Committee Vice-Chair Mark Carvell, and ICANN Vice-Chairman Chris Disspain.
84. ICANN Chairman Cherine Chalaby confirmed in his personal capacity that he observed inconsistencies with the CPE process:

In terms of the community priority evaluation, I personally would comment that I have observed inconsistencies applying the AGB scoring criteria for CPE and that's a personal observation and there was an objective of producing adequate rationale for all scoring decisions but I understand from feedback that this has not been achieved in all cases. So this is one of the recommendations, the

¹⁹⁹ *Dot Registry*, ¶ 93.

²⁰⁰ *Dot Registry*, ¶ 94.

²⁰¹ *Dot Registry*, ¶ 98.

²⁰² Scope 1 Report, p. 3.

²⁰³ Article 19 (last visited 10 Jan. 2018), <https://www.article19.org>.



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recommendation of fixing that area, I think that it is an important recommendation that ought to be taken into account very seriously.²⁰⁴

85. Likewise, ICANN GAC Vice-Chair Mark Carvell stated:

But as the round progressed and many of these applicants found themselves in contention with wholly commercially-based applicants, they found that they were starting to lose ground and that they were not actually enjoying the process for favoring them, for giving them priority that they had expected.

[...]

*The GAC during this time, you know, could not intervene on behalf of individual applicants. I found that personally very frustrating because that was not what the GAC was there to do. We were there to ensure the process was fair and the design of the round and so on, all the processes would operate fairly. **That was not happening.** Became as I say an issue of increasing concern for many of us on the GAC.²⁰⁵*

86. In light of the Dot Registry IRP declaration, independent expert opinions and the findings of the Council of Europe Report directly discrediting and refuting FTI's conclusions, the FTI conclusion that the "CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE"²⁰⁶ is unreliable, especially considering ICANN members' own admission that there were indeed problems with the CPE process. Given such overwhelming evidence, it would be unreasonable for the ICANN Board to accept the conclusions of the FTI Report and reject DotMusic's Reconsideration Request 16-5. Accepting the FTI's conclusions without a holistic and substantive investigation would be considered gross negligence, a violation of ICANN's Bylaws and an attempt to purposefully conceal fundamental flaws in the CPE process that even ICANN's current Chairman (and other ICANN members) observed and recognized.
87. It is problematic for ICANN to announce that it was conducting "an **independent review**" of the CPE Process²⁰⁷ that would be comprehensive and neutral, when the facts indicate

²⁰⁴ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

²⁰⁵ ICANN, Transcript of Cross Community Working Group's Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), p. 12, https://community.icann.org/download/attachments/53772757/transcript_ccwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2 (emphasis added).

²⁰⁶ Scope 2 Report, p. 21.

²⁰⁷ Approved Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016) (emphasis added), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>; see Minutes | Board Governance



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a secretive and ICANN-controlled process that was incomplete and narrow in focus. The public comments made by ICANN legal counsel John Jeffrey and Vice-Chair Chris Disspain now appear inconsistent with the intent of the objective of conducting a fair, neutral and complete investigation that would address all the issues presented in pending Reconsideration Requests in order to assist the ICANN Board in its reconsideration decision-making.

John Jeffrey stated that the FTI:

*[The FTI would be “digging in very deeply,” have “a full look at the community priority evaluation,”²⁰⁸ and “to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very deeply and ... trying to understand the complex process of the new gTLD program and the community priority evaluation process.”²⁰⁹ “When the Board Governance Committee and the board’s discussions on it occurred, the request was that there be a **full look** at the community priority evaluation, as opposed to just a very limited approach of how staff was involved.”²¹⁰*

In an ICANN session with DotMusic’s Constantine Roussos at the Madrid ICANN GDD Summit in 2017, ICANN CEO Göran Marby (who was a session panelist²¹¹) and ICANN Vice-Chair Chris claimed that they did not know who the investigator was despite the investigation being in progress for months. Furthermore, the Vice-Chairman stated that DotMusic would be able to present to the Board after the FTI Report would be released before the Board would decide upon the Reconsideration Request 16-5:

Constantine Roussos:

Hi, this is Constantine from DotMusic. I have a question about timing and transparency...

One: Who is the auditor, their name?;

Two: How is this transparent when we don’t know who is doing it?; and

Three: When is there going to be a decision?

Committee (BGC) Meeting (18 Oct. 2016), <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

²⁰⁸ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²⁰⁹ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12, http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²¹⁰ John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (emphasis added), http://sched.ws/hosted_files/icann58copenhagen2017/60/I58CPH_Thu16Mar2017-Public%20Forum%202-en.pdf.

²¹¹ 2017 Global Domain Division (GDD) Summit Notes (9 May 2017), p.9. See <https://www.icann.org/en/system/files/files/notes-action-items-gdd-summit-madrid-30may17-en.pdf>



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...[W]e're sitting around waiting, sending letters and asking what is going on, please let us know. So, I do not want to sound harsh but we need some help here. It is not only us, it is a few other applicants as well. Everyone is doing their business but we're just sitting on the sidelines waiting.

Chris Disspain:

Hi. How are you? Annoyed, right?... It is a very difficult situation. We have an IRP decision that made some suggestions about stuff that was happening that we felt was important to investigate.

... As to presentations that you made and changes to the BGC or possibly a new committee, I understood and it would be in my view, it would not be sensible in my view for the currently constituted BGC or any newly constituted accountability mechanisms committee to make a decision without giving you an opportunity to present again ...It may be, to be perfectly honest, that stuff comes out from the investigation, the review, that that you might want to talk about in a presentation...

Constantine Roussos: *Who is the auditor?*

Chris Disspain:

Who is here that knows who the auditor is? Anyone? Does anyone know who the auditor is? Anyone know who is running the investigation? Someone? Do we have anyone from legal here who can answer that?

Göran Marby: *...Can't remember the name. I was jetlagged.*

Constantine Roussos: *Will they contact us?*

Chris Disspain:

...I don't know the answer to that question. ... Let me be very clear... If they decide they need to talk you, they will talk to you.... Right? But it is not for us to decide. It is up to them to decide. ...It is so independent that I do not know who it is. That's how independent it is.²¹²

88. Another issue that was problematic was ICANN engaging in a new process to create updated CPE Guidelines with the EIU that were finalized on 27 September, 2013,²¹³ nearly

²¹² ICANN GDD Industry Summit, Review of ICANN Process Documentation Initiative (9 May 2017). See <https://participate.icann.org/p4icilv7esy/?launcher=false&fcsContent=true&pbMode=normal> (0:46:50 to 0:53:10). Also see <https://www.icann.org/gddsummit>

²¹³ CPE Guidelines, <https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>



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a year and a half after community applicants such as DotMusic submitted their applications. This would be acceptable if community applicants were allowed to update their applications prior to CPE to reflect these critical updates that would be used to evaluate their community applications. However, ICANN decided to introduce new rules (published on 5 September 2014) that were not explicitly stated in the AGB that prohibited community applicants from changing relevant portions of their application²¹⁴ to reflect these new CPE Guidelines.

89. One of the areas that the CPE Guidelines required the EIU to follow was to consistently score community applications using the same approach for all applications. In other words, the grading thresholds and substantive rationales adopted must be consistent throughout all the CPE process. ICANN in return would provide the quality control required to ensure this:

“Consistency of approach in scoring Applications will be of particular importance...”²¹⁵

“The EIU will fully cooperate with ICANN’s quality control process...”²¹⁶

90. It is clear that the EIU and ICANN did not fulfill these obligations. What is striking is that the FTI purposely chose to follow a compliance-driven investigation methodology approach. This approach raises many unanswered questions. Why did the FTI narrow their scope and not conduct a comparative analysis of the grading inconsistencies and disparate treatment of applications that scored lower despite providing similar rationales? How can the same language of the AGB be interpreted differently and the scoring application from one application to another deviate so greatly? What exactly was the quality control process if it failed to meet both the AGB rules and the subsequent CPE Guidelines?
91. An IRP final declaration concerning the .ECO and .HOTEL community applications (the .ECO/.HOTEL IRP)²¹⁷ also outlines the serious concerns and glaring problems with the CPE process, including ICANN’s own admission that there was “no quality review or control process:”

²¹⁴

New gTLD Application Change Request Process and Criteria. See <https://newgtlds.icann.org/en/applicants/global-support/change-requests>. Also see ICANN New gTLD Advisory (Advisory number: R1-A01-CR), Change Requests (5 September 2014) at <https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>

²¹⁵ CPE Guidelines, p.22

²¹⁶ Id., pp.22-23

²¹⁷ Little Birch and Minds + Machines v. ICANN (.ECO) & Despegar Online SRL, Donuts, Famous Four Media, Registry, and Radix v. ICANN (.HOTEL) Independent Review Proceeding final Declaration, (the “.ECO/.HOTEL IRP”) (12 February 2016). See <https://icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>



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[A]t the hearing, ICANN confirmed that...the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.²¹⁸... [T]he Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.²¹⁹ ...ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure... ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.²²⁰ The combination of these statements gives cause for concern to the Panel.²²¹ The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.²²² In conclusion...the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.²²³

92. Despite the findings of the .HOTEL/.ECO IRP declaration (and the Dot Registry IRP), the FTI narrowed the investigation methodology to exclude any substantive review of applications that would address the issues of discriminatory treatment and inconsistent point distribution between community applicants who prevailed and those who did not and are subject to a reconsideration request. It appears from the .HOTEL/.ECO IRP declaration (and the instructions provided to the FTI in relation to what investigative methodology to adopt) that “the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the

²¹⁸ .ECO/.HOTEL IRP, ¶ 146, p.37

²¹⁹ Id., ¶ 147, pp.37-38

²²⁰ Id., ¶ 148, p.38

²²¹ Id., ¶ 149, p.38

²²² Id., ¶ 150, p.38

²²³ Id., ¶ 158, p.39



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EIU followed established policy or procedure.” As indicated in the .ECO/.HOTEL Panel, such a methodology is unacceptable and improper because it gives the EIU ultimate power to discriminate against certain applicants without any repercussions or the need to justify why one applicant was treated differently than another in relation to approach and marking. Since ICANN performed quality control, ICANN clearly did not follow establish policy or procedure and was in violation of its Bylaws and Core principles in relation to fairness and non-discrimination.

93. Another problematic area was the level and quality of the research that was undertaken by the CPE panel. The CPE Reports lacked adequate research citations and consistent judgment to reach conclusions that were compelling and defensible, including documentation. According to the EIU Panel Process document rules:

*“The Panel Firm exercises **consistent judgment** in making its evaluations in order to reach **conclusions that are compelling and defensible**, and **documents the way in which it has done so in each case.**”²²⁴*

94. According to the FTI Report (Scope 3), the primary research sources adopted by the EIU in making their determinations were two: Google searches and Wikipedia. As is well known, the CPE Guidelines mandate that “[t]he panel will be an internationally recognized firm or organization **with significant demonstrated expertise** in the evaluation and assessment of proposals **in which the relationship of the proposal to a defined...community plays an important role.**”²²⁵
95. It would be reasonable that any panel “with significant demonstrated expertise” in the area of a “defined community” (for example the music community) would not need to perform Google searches or resort to using Wikipedia as primary research and basis for decision-making. Both ICANN and the FTI never released the names of the experts that evaluated DotMusic’s application in numerous DIDP requests filed by DotMusic. As such, it is impossible to accept that the CPE Panel did possess the necessary qualifications for CPE or the necessary expertise or knowledge in relation to the music community (or many of the other communities graded). This absence of qualification is likely based on the low quality of the CPE Reports’ research and references.
96. Using Google searches as a credible source of references is problematic due to the “filter bubble” concern. This refers to a phenomenon that occurs with many of the websites that we use: algorithms (mathematical equations) use our search history and personal information to tailor results to us. So the exact same search, using exactly the same search words, can return different results for different individuals. This is called personalization.²²⁶

²²⁴ EIU Panel Process, <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf>, p.3

²²⁵ CPE Guidelines, p.22

²²⁶ University of Illinois at Urbana-Champaign, LibGuides, Ways of the Web: Filter Bubbles and the Deep Web: Home. See <http://guides.library.illinois.edu/filterbubbles>. Also see Eli Pariser, The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think (24 April 2012) at <https://www.amazon.com/Filter-Bubble-Personalized-Changing-Think/dp/0143121235>



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In other words, if the CPE Panel was inclined to fail an applicant and conducted specific research on Google towards that end then Google's algorithms would skew the results towards that end.

According to Google:

*"Previously, we only offered Personalized Search for signed-in users, and only when they had Web History enabled on their Google Accounts. What we're doing today is expanding Personalized Search so that we can provide it to signed-out users as well. This addition enables us to customize search results for you based upon 180 days of search activity linked to an anonymous cookie in your browser."*²²⁷

97. More troubling is the usage of Wikipedia as a credible source of research to reach compelling and defensible decisions. Wikipedia's "Wikipedia:Risk disclaimer"²²⁸ confirms that information on Wikipedia may be inaccurate or misleading:

USE WIKIPEDIA AT YOUR OWN RISK

PLEASE BE AWARE THAT ANY INFORMATION YOU MAY FIND IN WIKIPEDIA MAY BE INACCURATE, MISLEADING, DANGEROUS, ADDICTIVE, UNETHICAL OR ILLEGAL.

Some information on Wikipedia may create an unreasonable risk for readers who choose to apply or use the information in their own activities or to promote the information for use by third parties.

None of the authors, contributors, administrators, vandals, or anyone else connected with Wikipedia, in any way whatsoever, can be responsible for your use of the information contained in or linked from these web pages.

Furthermore, a look at Wikipedia's "Wikipedia:General disclaimer"²²⁹ makes no guarantee of the validity of information:

WIKIPEDIA MAKES NO GUARANTEE OF VALIDITY

Wikipedia is an online open-content collaborative encyclopedia; that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has

²²⁷ Google Official Blog, Personalized Search for everyone, (4 December 2009). See <https://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html>.

²²⁸ Wikipedia: Risk disclaimer. See https://en.wikipedia.org/wiki/Wikipedia:Risk_disclaimer.

²²⁹ Wikipedia: General disclaimer. See https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer



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necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information.

*That is not to say that you will not find valuable and accurate information in Wikipedia; much of the time you will. However, **Wikipedia cannot guarantee the validity of the information found here.** The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.*

98. British Medical Journal's Research has also warned against using Wikipedia as a trusted source of citations and research:

An increasing number of peer reviewed academic papers in the health sciences are citing Wikipedia. The apparent increase in the frequency of citations of Wikipedia may suggest a lack of understanding by authors, reviewers, or editors of the mechanisms by which Wikipedia evolves. Although only a very small proportion of citations are of Wikipedia pages, the possibility for the spread of misinformation from an unverified source is at odds with the principles of robust scientific methodology and could potentially affect care of patients. We caution against this trend and suggest that editors and reviewers insist on citing primary sources of information where possible.²³⁰

99. Many universities do not allow students to reference Wikipedia in their papers, thus demonstrating its inappropriateness for the use in expert evaluations such as CPE. According to the Massachusetts Institute of Technology:

Wikipedia is Not a Reliable Academic Source

Many of us use Wikipedia as a source of information when we want a quick explanation of something. However, Wikipedia or other wikis, collaborative information sites contributed to by a variety of people, are not considered reliable sources for academic citation, and you should not use them as sources in an academic paper.

The bibliography published at the end of the Wikipedia entry may point you to potential sources. However, do not assume that these sources are reliable – use the same criteria to judge them as you would any other source. Do not consider the Wikipedia bibliography as a replacement for your own research.²³¹

²³⁰ M Dylan Bould, Emily S Hladkovicz, Ashlee-Ann E Pigford, Lee-Anne Ufholz, Tatyana Postonogova, Eunkyung Shin, Sylvain Boet. BMJ Research, References that anyone can edit: review of Wikipedia citations in peer reviewed health science literature, DOI 348, (6 March 2014). See <https://doi.org/10.1136/bmj.g1585>.

²³¹ Massachusetts Institute of Technology,



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100. Yale University goes one step further to claim that the mere action of using and referencing Wikipedia as a source for your work will “position your work as inexperienced and immature.” Instead Yale advises “to move beyond Wikipedia and write from a more knowledgeable, expert stance.”

According to Yale University:

Wikipedia merits additional attention because of its recent growth and popularity. Some professors will warn you not to use Wikipedia because they believe its information is unreliable. As a community project with no central review committee, Wikipedia certainly contains its share of incorrect information and uninformed opinion. And since it presents itself as an encyclopedia, Wikipedia can sometimes seem more trustworthy than the average website, even to writers who would be duly careful about private websites or topic websites. In this sense, it should be treated as a popular rather than scholarly source.

But the main problem with using Wikipedia as an important source in your research is not that it gets things wrong. Some of its contributors are leaders in their fields, and, besides, some print sources contain errors. The problem, instead, is that Wikipedia strives for a lower level of expertise than professors expect from Yale students. As an encyclopedia, Wikipedia is written for a common readership. But students in Yale courses are already consulting primary materials and learning from experts in the discipline. In this context, to rely on Wikipedia—even when the material is accurate—is to position your work as inexperienced and immature.

...Of course, if you do use language or information from Wikipedia, you must cite it—to do otherwise constitutes plagiarism. The advice here is not to hide what Wikipedia contributes to your ideas, but rather to move beyond Wikipedia and write from a more knowledgeable, expert stance.²³²

101. Another key finding that was troubling is the research concerning: (i) whether or not certain supporting organizations for DotMusic were recognized organizations; (ii) whether or not there were organizations that were mainly dedicated to the music community with respect to music activities; and (iii) whether or not the supporting organizations collectively represented a majority of the community defined. In order to score the Community Establishment section and the Support section (in which DotMusic lost 5 points collectively) and answer these questions, the CPE panel should have investigated all of DotMusic’s supporters to determine whether the criteria set forth in the AGB was fulfilled. Support letters were sent by thousands of entities.

Academic Integrity at MIT - A Handbook for Students, Citing Electronic Sources. See <https://integrity.mit.edu/handbook/citing-your-sources/citing-electronic-sources>

²³² Yale University, Center for Teaching and Learning, Citing Internet Sources. See <https://ctl.yale.edu/writing/using-sources/citing-internet-sources>.



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102. However, the CPE panel only researched a few of these organisations according to the findings of the FTI Report. The organisations that independent experts deemed to be “recognized” and “mainly dedicated” to the defined community (such as the IFPI, the FIM and ReverbNation for example) were not researched or assessed. **There was some research conducted on a few of DotMusic’s supporters, but most of their international organizations were not investigated** according to the findings of the FTI Report (Scope 3). As such, **it would have been impossible to grade the sections of Community Establishment and Support without any knowledge of the supporting organizations, their international breadth and scope, and whether collectively they represented a majority of the “logical alliance” community definition that was presented in DotMusic’s application** (emphasis added). The lack of research by the CPE panel is inadequate to make conclusions that would be regarded as defensible, compelling and credible, let alone provide enough insight to grade the Community Establishment and Community Endorsement sections of the CPE process.
103. One factor that is important to weigh is whether or not the FTI Report can be regarded as independent and neutral. After all, ICANN has claimed that the investigation would be independent. The investigation was not independent. The key reasons that have led to this conclusion are the following:
- a. The scope of the investigation was too narrow and did not fulfil its obligations to conduct a holistic and comprehensive look at the CPE process and the issues that the ICANN Board was asked by applicants to reconsider. Most of these issues were not investigated because of the compliance-based investigative methodology adopted. For example, many crucial disputes that would have rendered the CPE process a violation of the AGB rules and ICANN Bylaws would be the lack of transparency of the CPE process (e.g. the names of the expert panellists were unknown), the lack of research and low quality sources used to make decisions, the appearance of conflicts of interest and the inconsistency of the approach and scoring of community applications that would suggest disparate treatment and discrimination.
 - b. None of the complaining parties that were subject to Reconsideration Requests were interviewed by the FTI. What was deeply concerning was that the affected parties, such as DotMusic, did request to be interviewed but the FTI declined and did not give applicants the opportunity to provide information, ask and answer questions and participate.
 - c. The scope of the investigation’s scope and methodology was not developed and determined by all affected parties (ICANN and the affected applicants). It was a controlled investigation driven by ICANN and its outside legal counsel Jones Day.



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104. The FTI contends that it “incorporated aspects of a traditional investigative approach promulgated by the Association of Certified Fraud Examiners (ACFE), the largest and most prestigious anti-fraud organization globally...”²³³
105. However, the steps taken by the FTI in its investigation would not lead to a conclusion by reasonable person that the investigation was independent or proper given that the expectations were that the investigation would be comprehensive, transparent and would allow all affected parties to participate in its development and execution.
106. ACFE Regent Emeritus Martin Biegelman and Bradley Bondi, LL.M., J.D. shared “Best Practices for Conducting Board-Managed, Independent, Internal investigations.”²³⁴ One of the best practices was to ensure that the investigator is aware that the interests of management may not be aligned with the purpose of the investigation, especially if the investigation is based on examining whether or not management violated certain processes and established rules. If the investigator does not adopt the necessary investigative methodology to ensure neutrality and prevent one-sided bias then the investigation will not be deemed independent, fair and impartial:

[I]f an allegation of fraud merits an independent investigation, that independence has to be diligently guarded.... Bondi and Biegelman shared many practical tips and strategies based on more than 56 years of combined experience, but kept returning to one common theme: if an allegation of fraud merits an independent investigation, that independence has to be diligently guarded [...] While an independent investigation shouldn't be antagonistic, pitting the investigators against management, it is important to realize “the interests of management and investigators may not be aligned.”

107. According to the Association of Certified Fraud Examiners (ACFE) 2015 Fraud Examiners Manual under “Investigation - Planning and Conducting a Fraud Examination,” the ACFE advocates adopting the following investigation methodology:

When conducting a fraud examination to resolve signs or allegations of fraud, the fraud examiner should assume litigation will follow, act on predication, approach cases from two perspectives, move from the general to the specific, and use the fraud theory approach.

[]

Fraud examinations must adhere to the law; therefore, fraud examiners should not conduct or continue fraud examinations without proper predication. Predication is

²³³ FTI Report (Scope 2), p.4

²³⁴ Roger Aradi, ACFE, Putting the 'Independent' into Board-Managed, Independent, Internal Investigations. See <http://www.acfe.com/article.aspx?id=4294973663>.



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the totality of circumstances that would lead a reasonable, professionally trained, and prudent individual to believe that a fraud has occurred, is occurring, and/or will occur. In other words, predication is the basis upon which an examination, and each step taken during the examination, is commenced.²³⁵

[]

If a fraud examiner cannot articulate a factual basis or good reason for an investigative step, he should not do it. Therefore, a fraud examiner should reevaluate the predication as the fraud examination proceeds. That is, as a fraud examination progresses and new information emerges, the fraud examiner should continually reevaluate whether there is adequate predication to take each additional step in the examination.

[]

Fraud examiners should approach investigations into fraud matters from two perspectives: (1) by seeking to prove that fraud has occurred and 2) by seeking to prove that fraud has not occurred. To prove that a fraud has occurred, the fraud examiner must seek to prove that fraud has not occurred. The reverse is also true. To prove fraud has not occurred, the fraud examiner must seek to prove that fraud has occurred. The reasoning behind this two-perspective approach is that both sides of fraud must be examined because under the law, proof of fraud must preclude any explanation other than guilt.²³⁶

[]

In most examinations, fraud examiners should start interviewing at the periphery of all possible interview candidates and move toward the witnesses appearing more involved in the matters that are the subject of the examination.²³⁷

[]

Generally, the investigation portion of the initial assessment will involve:

- *Contacting the source, if the investigation was triggered by a report or complaint.*
- *Interviewing key individuals.*
- *Reviewing key evidence.²³⁸*

²³⁵ ACFE 2015 Fraud Examiners Manual, Investigation - Planning and Conducting a Fraud Examination, p.3.104. See https://acfe.com/uploadedFiles/Shared_Content/Products/Books_and_Manuals/2015%20Sample%20Chapter.pdf

²³⁶ Id., p.3.105

²³⁷ Id., p.3.106

²³⁸ Id., p.3.122



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108. According to the ACFE Fraud Examiners Manual:

An investigation must have goals or a purpose, which should be identified at the outset so the team members can achieve them. Goals also help keep the investigation focused and on task, and they can serve as an energizer, as long as they are specific, well defined, and measurable. []

Although the basic goal for most fraud investigations is to determine whether fraud occurred, and if so, who perpetrated it, fraud investigations might be designed to achieve a number of different goals, such as to:

- *Prevent further loss or exposure to risk.*
- *Determine if there is any ongoing conduct of concern. []*
- *Review the reasons for the incident, investigate the measures taken to prevent a recurrence, and determine any action needed to strengthen future responses to fraud.²³⁹*

[]

When planning an investigation, the stakeholders should identify the scope (the boundaries or extent of the investigation), which will vary depending on the facts and circumstances.

To determine the scope, those responsible should use the following guidelines:

- *Consider the ultimate goals of the investigation.*
- *Develop a list of key issues raised in the initial assessment.*

[]

- *Consider broadening the scope if the allegations indicate a failure in the company's compliance program.²⁴⁰*

[]

²³⁹ Id., p.3.137

²⁴⁰ Id., p.3.138



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Before beginning a fraud examination, the investigation team should develop a course of action to make sure it addresses every relevant issue.²⁴¹

109. The FTI did not follow most of these recommendations, thus undermining its own credibility and its reliance on the AFSCE approach. It is a reasonable inference that its failure to do so was because its objective was to exonerate ICANN and the CPE panel. The opaqueness, lack of transparency and narrow scope of the investigation would lead a reasonable person to conclude this.
110. The Association of Certified Fraud Examiners, Institute of Internal Auditors, and The American Institute of Certified Public Accountants co-authored a guide titled *“Managing the Business Risk of Fraud: A Practical Guide”* (“the Guide”).²⁴² The Guide “provides credible guidance from leading professional organizations that defines principles and theories for fraud risk management and describes how organizations of various sizes and types can establish their own fraud risk management program.”²⁴³
111. The Guide notes that one of the most important factors to consider in an investigation plan are the goals of the investigation and what “[s]pecific issues or concerns should appropriately influence the focus, scope, and timing of the investigation.”²⁴⁴

Specifically, the Guide frameworks how an investigation should be conducted, outlining that investigations generally include many key tasks, one of which is:

Interviewing, including:

- i. Neutral third-party witnesses.
 - ii. Corroborative witnesses.
 - iii. Possible co-conspirators.
 - iv. The accused.²⁴⁵
112. The FTI inappropriately rejected DotMusic’s request to be interviewed for the purposes of conducting an independent review of the CPE Process because specific issues or concerns influenced the focus, scope, and timing of the investigation.
 113. On 10 June 2017, soon after ICANN issued the CPE Process Review Update to announce that ICANN selected FTI in November 2016 to undertake an independent review of various

²⁴¹ Id., p.3.141

²⁴² Association of Certified Fraud Examiners (ACFE), Institute of Internal Auditors, The American Institute of Certified Public Accountants. *Managing the Business Risk of Fraud: A Practical Guide*, See https://www.acfe.com/uploadedfiles/acfe_website/content/documents/managing-business-risk.pdf.

²⁴³ Id., pp. 5 - 6

²⁴⁴ Id., p. 41

²⁴⁵ Id., p. 43



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aspects of the CPE process,²⁴⁶ DotMusic requested ICANN to speak with FTI.²⁴⁷ It was only *after* FTI completed its investigation and its findings were published by ICANN that DotMusic learned about FTI’s decision not to interview the CPE applicants, including DotMusic, because neither the AGB nor the CPE Guidelines “provide for applicant interviews.”²⁴⁸ However, FTI believed it was necessary to interview six ICANN employees “to learn about their interactions with the CPE Provider;”²⁴⁹ and two CPE Provider staff members even when the AGB and CPE Guidelines are silent on the question of interviews of ICANN and the CPE Provider. And, further, FTI reviewed materials, including claims raised in all relevant reconsideration requests that were available only after the CPE evaluation was complete.²⁵⁰

114. FTI, however, believed that it was “not necessary or appropriate” to interview the CPE applicants because: (1) the AGB and the CPE Guidelines do not provide for applicant interviews; and (2) the CPE Provider did not interview applicants during its evaluation process. FTI’s decision is irreconcilable with its duty to conduct an independent investigation.
115. As a neutral and impartial investigator instructed by ICANN to conduct “an independent review”²⁵¹ of the CPE Process, FTI should have also attempted to gather additional information and alternate explanations from community priority applicants (e.g. DotMusic) to ensure a fair and thorough investigation was conducted about the CPE Process. This is a contributing factor to FTI’s findings being unreliable, unfair, and incorrect.

H. Conclusion

116. The Dot Registry IRP decision highlights ICANN’s obligation to exercise due diligence and care, independent judgment, and transparency in reviewing community applications. The DotMusic Reconsideration Request has been pending for nearly 2 years, which is an unreasonably long time for the Board to make a decision. ICANN’s Bylaws mandate the ICANN Board to make decisions based on procedural fairness, non-discrimination and transparency while settling disputes in a predictable and timely manner.

Constantine Roussos
 Founder
 DotMusic Limited

Jason Schaeffer
 Legal Counsel
 DotMusic Limited

²⁴⁶ ICANN, Community Priority Evaluation Process Review Update (2 June 2017), <https://newgtlds.icann.org/en/applicants/cpe/process-review-update-02jun17-en.pdf>.

²⁴⁷ Letter from Arif Ali on behalf of DotMusic Limited to ICANN Board (10 June 2017), <https://www.icann.org/en/system/files/correspondence/ali-to-disspain-levee-10jun17-en.pdf>.

²⁴⁸ Scope 2 Report, p. 8.

²⁴⁹ Scope 1 Report, p. 13.

²⁵⁰ See Scope 1 Report, pp. 3-6; ICANN Bylaws (22 July 2017), Art. 4.

²⁵¹ Resolution of the ICANN Board, 17 Sept. 2016 (emphasis added).

22 February 2018

ICANN
Board Accountability Mechanisms Committee (BAMC)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536, USA

By email: reconsideration@icann.org

Dear Members of the BAMC,

Re: Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)

We refer to our letters, sent by email, of 16 January 2018 and 1 February 2018 and to the BAMC meetings of 17 January 2018 and 2 February 2018.

In our letter of 1 February 2018, Requesters complained *inter alia* about the lack of transparency regarding the BAMC's consideration of the FTI CPE review reports. ICANN has never published the preliminary report of the BAMC meeting of 17 January 2018 at which it discussed the FTI CPE review reports.

ICANN has now published the minutes of the BAMC meeting of 17 January 2018. It appears from the meeting minutes that the BAMC did not take into account our letter of 16 January 2018. Shortly after that meeting, ICANN informed us that it had received our email of 16 January 2018 and that it would provide the email to the BAMC for consideration.

On 1 February 2018, we have sent a second letter to the BAMC. ICANN acknowledged receipt of the second letter on 2 February 2018. Also on 2 February 2018, ICANN posted the agenda of the BAMC meeting of 2 February 2018. The agenda mentions as first item: "Recent Correspondence to the ICANN Board re Community Priority Evaluation Process Review Reports". As the agenda does not identify the correspondence, it is yet unclear whether the BAMC considered both our letters at its meeting of 2 February 2018.

By now, ICANN should have informed Requesters about the discussions at the BAMC meeting of 2 February 2018, as it was under the obligation to publish the preliminary report of said meeting at the latest on 14 February 2018, pursuant to Article 3(5)(c) of ICANN's Bylaws. Article 3(5)(c) sets forth a simple and unambiguous rule, which is designed to ensure openness and transparency.

Requesters fail to understand why ICANN decided not to publish the preliminary report of the meeting of 2 February 2018 after Requesters already gave notice to ICANN about its previous failure to publish a preliminary report on the same topic.

As explained in more detail in Reconsideration Request 16-11 and previous correspondence, the lack of transparency surrounding the CPE and the CPE review is appalling. The finding that, for the second consecutive time and while being put on notice, ICANN is ignoring the simple and explicit rule of Article 3(5)(c) can only be explained by the fact that ICANN is being non-transparent about the CPE deliberately.

By failing to provide the necessary transparency, ICANN makes it impossible for affected parties to evaluate whether ICANN has been acting accountably, whether meeting minutes are accurate or whether they are influenced by events that occurred after the meeting.

In any event, ICANN should not proceed as suggested in the meeting minutes of 12 February 2018 pertaining to the BAMC meeting of 17 January 2018. According to said meeting minutes, the BAMC considered that as a result of FTI's findings, there will be no overhaul or change to the CPE process in the current New gTLD round. As explained in our letters of 16 January 2018 and 1 February 2018, FTI's findings are inconclusive. FTI's report is also non-transparent, containing gaps and lacking diligence and care. Nevertheless, the report reveals a lack of independence of the CPE provider, requiring ICANN to intervene and disregard the CPE result on .hotel.

ICANN confirmed that the BAMC would take our letters into account. The content of our letters leaves the BAMC no choice but to reconsider its findings of 17 January 2018. Please inform us immediately whether the BAMC has done so.

Requesters also urge ICANN to provide full transparency on its consideration of the CPE process and to list and give access to all material the BAMC considered during its meetings on the CPE process.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,


Flip Petillion



National LGBT Chamber of Commerce

March 1, 2018

Via E-Mail

ICANN Board of Directors
c/o Mr. Cherine Chalaby, Chair
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Support for dotgay LLC's Community Priority Application

Dear Members of the ICANN Board:

The National LGBT Chamber of Commerce ("NGLCC") submits this letter to the ICANN Board in order to express its support for dotgay LLC's ("dotgay") community priority application for the .GAY gTLD.

NGLCC is the largest global nonprofit organization creating economic opportunities for the lesbian, gay, bisexual, and transgender (LGBT) business owners and entrepreneurs. And while our organization and our partners represent a vast array of sexual orientations and gender identities, colloquially we are sometimes referred to as the "gay" community. We are the voice for the 1.4 million business owners that would be served by the .GAY gTLD in the United States, and the \$1.7 trillion that their enterprises add to the national economy each year. Over 190 corporations - including esteemed businesses such as IBM, Intel, and Ernst & Young - and prominent executive leaders support our organization and its goals.

Our members and we work to promote the gay community both in and out of the business world and thus support the promotion of the LGBT community in the Internet domain space. Dotgay plans to use the .GAY TLD to provide a form of self-empowerment for the LGBT community. The unique online space proposed by dotgay would be designed, governed, and managed by those it serves in order to protect and advocate for a population historically discriminated against around the world. We believe that dotgay will promote our community's interests by operating the .GAY gTLD in the Internet domain space and by providing a common, safe platform for NGLCC's constituents, and their businesses, to communicate and network. If dotgay does not manage .GAY, there simply exists no guarantee that the gay community's online experience can improve.

We have been following dotgay's application before ICANN with considerable interest, and indeed disappointment, by the manner in which it has been handled by ICANN. Despite the significant benefits that the .GAY gTLD will provide to the gay community, we understand that dotgay's application has not received community priority status, notwithstanding the considerable evidence that supports such status. As Professor William Eskridge explains in his Second Expert Opinion, ICANN has denied dotgay's community priority application in spite of the clear support that it received from LGBT organizations around the world, recognizing the clear nexus between the term "gay" and the LGBT community. As an application designed for, vetted by, and globally



National LGBT Chamber of Commerce

endorsed by the LGBT community, dotgay's application for the .GAY gTLD clearly meets all of the requirements for a community priority application.

We are therefore surprised that FTI Consulting, Inc. ("FTI") found no inconsistencies in any of the CPEs - especially dotgay's CPE. FTI's independent review of the CPE process, which was supposed to be a thorough and fair analysis of the CPEs, is clearly unreliable and underscores the seemingly discriminatory fashion in which dotgay's application has been treated. We have reviewed FTI's three reports (the "FTI Reports") and determined that: (1) FTI's first report is one-sided, as it only examined documents from ICANN and the CPE Provider; (2) FTI's second report concludes that there was no discrimination in the CPEs *without* performing any substantive evaluation or outreach to subject matter experts like the NGLCC; and (3) FTI's third report serves no function other than a cursory cite-checking exercise. As such, FTI's independent review of the CPE process is inherently flawed and their conclusions regarding dotgay's community application must be rejected by ICANN.

We urge the ICANN Board to comply with dotgay's request to (1) review and agree with Professor Eskridge's Second Expert Opinion; (2) reject the findings made by FTI in the FTI Reports; and (3) grant dotgay's community priority application.

Sincerely,

Justin G. Nelson
Co-Founder & President

Chance Mitchell
Co-Founder & CEO

JONES DAY

Contact information redacted

March 5, 2018

VIA E-MAIL ONLY

Arif Ali, Esq.

Contact information redacted

Re: CPE Process Review

Dear Mr. Ali:

This letter responds to yours of January 31, 2018, where you submitted to the ICANN Board the “Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.’s Independent Review of the Community Priority Process” in support of dotgay LLC’s application for the .GAY gTLD. Your letter is posted on the ICANN organization’s correspondence page at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

The ICANN Board is in the process of considering the issues raised in your letter and accompanying Second Expert Opinion. However, the Board has asked us to respond to certain baseless and offensive statements that must be immediately addressed and rejected at the outset.

Specifically, your bald assertion that “a strong case could be made that the purported investigation was undertaken with a pre-determined outcome in mind” has no basis whatsoever, in fact. Neither dotgay LLC nor Professor Eskridge has offered any evidence to support this baseless claim, because no such evidence exists. All dotgay LLC offers is Professor Eskridge’s report, which simply disagrees with the scope of FTI Consulting, Inc.’s (FTI) investigation and the findings set forth in FTI’s reports addressing the CPE Process Review, as they relate to dotgay LLC’s application for the .GAY gTLD. While dotgay LLC may have preferred a different evaluation process and may have desired a different outcome, that is not evidence that FTI undertook its investigation “with a pre-determined outcome in mind.”

Your accusations in this regard are as offensive as they are baseless. The Board initiated the CPE Process Review in its oversight role of the New gTLD Program to provide greater transparency into the CPE process. There was no pre-determined outcome in mind and FTI was never given any instruction that it was expected to come to one conclusion over another. FTI

March 5, 2018
Page 2

was chosen to conduct the CPE Process Review because FTI is the leader in this field, and has the requisite skills and expertise to undertake this investigation.

Your assertions that FTI would blatantly violate best investigative practices and compromise its integrity is insulting and without any support, and ICANN rejects them unequivocally.

Very truly yours,



Kate Wallace

JONES DAY

contact information redacted

March 5, 2018

VIA E-MAIL ONLY

Constantine Roussos
Jason Schaeffer
DotMusic

Contact information redacted

Re: CPE Process Review

Dear Mr. Roussos and Mr. Schaeffer:

This letter responds to yours of February 2, 2018, where you submitted to the ICANN Board the “Analysis of .MUSIC Community Priority Evaluation Process & FTI Reports” in support of DotMusic’s application for the .MUSIC gTLD. Your letter is posted on the ICANN organization’s correspondence page at <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf>.

The ICANN Board is in the process of considering the issues raised in your letter and accompanying Analysis. However, the Board has asked us to respond to certain baseless and offensive statements that must be immediately addressed and rejected at the outset.

Specifically, your bald assertion that “the FTI ‘compliance-focused investigation methodology’ was constructed in part to exonerate ICANN of any accountability and responsibility” has no basis whatsoever, in fact. DotMusic has not offered any evidence to support this baseless claim, because no such evidence exists. DotMusic simply disagrees with the scope of FTI Consulting, Inc.’s (FTI) investigation and the findings set forth in FTI’s reports addressing the CPE Process Review, as they relate to DotMusic’s application for the .MUSIC gTLD. While DotMusic may have preferred a different evaluation process and may have desired a different outcome, that is not evidence that FTI undertook its investigation “to exonerate ICANN of any accountability and responsibility.”

Your accusations in this regard are as offensive as they are baseless. The Board initiated the CPE Process Review in its oversight role of the New gTLD Program to provide greater transparency into the CPE process. There was no pre-determined outcome in mind and FTI was never given any instruction that it was expected to come to one conclusion over another. FTI

March 5, 2018
Page 2

was chosen to conduct the CPE Process Review because FTI is the leader in this field, and has the requisite skills and expertise to undertake this investigation.

Your assertions that FTI would blatantly violate best investigative practices and compromise its integrity is insulting and without any support, and ICANN rejects them unequivocally.

Very truly yours,

A handwritten signature in blue ink that reads "K. Wallace". The signature is written in a cursive, flowing style.

Kate Wallace



OPERATING EUROVISION AND EURORADIO

DATE

06 March 2018

Mr. Jamie Baxter

DOT.gay LLC

307 Seventh Avenue #305

New York, NY 10001

USA

BY EMAIL

Contact Information Redacted

COPY

ICANN-Board@icann.org

SUBJECT

Community Application

Dear Sir,

I am writing you today in my capacity as Head of Institutional Relations at EBU to share with you our disappointing experience with the Community Priority Evaluation (CPE) process.

At the time, I was in charge of following on behalf of my organization all the policy implications of the application we submitted as a community for the DOT.radio TLD. Together with Mr. Artero, TLD project manager, we went through the CPE process and our experience was that such process was far from being impartial and flawless. These considerations, as well as related concerns about the CPE, have already been directed to the ICANN Ombudsman and the Council of Europe (CoE) experts who prepared the report on TLD and Human Rights and are identical to those which affected the evaluation of the DOT.gay application.

The EBU was given 14 points out of the achievable 16 points on the rating scale, i.e., just enough points for DOT.radio to be recognized as a "community applicant" and granted community priority.

We obtained :

- 3 out of 4 points for Community Establishment
- 3 out of 4 points for Nexus between String and Community
- 4 out of 4 points on Registration Policies
- 4 out of 4 points for Community Endorsement

As we pointed out to the Ombudsman and the CoE experts, the criteria used by the EIU evaluators appeared completely unpredictable and unstable. No coherence could be found in the analyses carried out on various applications. As we have already stated publicly, there were frequent contradictions even within the same application, especially when compared to other parts of the ICANN's gTLD process.

EUROPEAN BROADCASTING UNION

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These inconsistencies, as well as others, were brought to the attention of the Ombudsman and the CoE experts, but for obvious reasons, the EBU at that time was not very vocal, as we were still in the middle of the attribution process for DOT.radio. Now that we have been granted the DOT.radio TLD, we feel more free to bring to light the numerous and evident inconsistencies of the evaluation process. We also believe that had the process adhered more consistently to ICANN's own evaluation principles, our application would have been awarded all 16 points.

Unfortunately this was not the case either in relation to your application for TLD DOT.gay. Similarly, such inconsistencies and incoherencies had a devastating impact and, as a final result, prevented DOT.gay from obtaining community priority and recognition.

My purpose here is to sum up what happened to us in a very similar case to yours, hoping that the ICANN Board will arrive at the recognition that DOT.gay was refused community priority because of evident failures in the CPE process and inconsistent attribution of points. In the case of DOT.gay (as our experience shows as well) the evaluation score was wrongly calculated, due to inconsistencies against the criteria set by ICANN and even other EIU evaluations.

We find it shocking that the FTI Consulting investigation has ignored these inconsistencies and incoherencies, in spite of ICANN's responsibility as an organization to adhere to its non-discriminatory commitments in carrying out CPE and to ensure that all community applicants are treated equally and fairly. We hope that the ICANN Board will achieve enough clarity to set aside the FTI reports when addressing the case of DOT.gay.

At your disposal to provide further evidence if requested, I remain,

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G. Mazzone', written in a cursive style.

Giacomo Mazzone
Head of Institutional Relations at EBU
(in charge of relations with ICANN)

EBU

OPERATING EUROVISION AND EURORADIO

ARIF HYDER ALI

Contact information
Redacted

March 7, 2018

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Jones Day Letter to DotMusic in relation to DotMusic’s CPE Review Analysis

Dear Members of the ICANN Board and Jones Day:

We write on behalf of our client, DotMusic Limited (“DotMusic”), in regards to a March 5, 2018 letter sent to DotMusic by Jones Day (the “Jones Day Reply”).¹ The Jones Day Reply purports to be sent at the direction of the ICANN Board in response to DotMusic’s CPE Process Review Analysis, dated February 2, 2018 (the “.MUSIC CPE Analysis”).²

It is curious that, in response to a 66-page analysis, Jones Day does not respond to the in-depth discussion presented, but rather chose to selectively misrepresent the .MUSIC CPE Analysis. It appears an individual at Jones Day (or the ICANN Board) reviewed the .MUSIC CPE Analysis and chose to reference items entirely out of context and in bad faith.

We were surprised by the incendiary language used by Jones Day to describe our analysis. Incredulously, Jones Day states that:

[T]he [ICANN] Board has asked us to respond to certain **baseless and offensive statements** that must be immediately addressed and rejected at the outset. [...]

Specifically, your **bald assertion** that “the FTI ‘compliance-focused investigation methodology’ was constructed in part **to exonerate ICANN** of any accountability and responsibility” has no basis whatsoever [...].³

We are surprised by the language used in the Jones Day Reply. Our response is described as baseless, offensive and bald, even though, as shown by the following excerpts, we respectfully

¹ See Kate Wallace (Jones Day) letter to Constantine Roussos and Jason Schaeffer (DotMusic), Re: CPE Review (March 5, 2018), <https://www.icann.org/en/system/files/correspondence/wallace-to-roussos-schaeffer-05mar18-en.pdf> (hereinafter, “Jones Day Reply”).

² See Constantine Roussos and Jason Schaeffer, Analysis of .MUSIC Community Priority Evaluation and FTI Reports prepared for ICANN Board (January 31, 2018), <https://www.icann.org/en/system/files/correspondence/roussos-to-marby-02feb18-en.pdf> (hereinafter, “.MUSIC CPE Analysis”).

³ Jones Day Reply (emphasis added).

stated, after a comprehensive and thoroughly referenced discussion and analysis that, among many other things:

69. This leads to the **inference** that the FTI “compliance-focused investigation methodology” was constructed in part to exonerate ICANN of any accountability and responsibility.

82. [...] FTI’s finding that “there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process” **appears** to be based on incomplete and self-serving information provided largely by ICANN in a manner that would exonerate ICANN of any wrong-doing or failing to follow its Bylaws.

109. The FTI did not follow most of these recommendations, thus undermining its own credibility and its reliance on the AFSCE approach. It is a **reasonable inference** that its failure to do so was because its objective was to exonerate ICANN and the CPE panel. The opaqueness, lack of transparency and narrow scope of the investigation **would lead a reasonable person to conclude this**.⁴

The language selected by DotMusic was respectful – not “offensive” – and supported by evidence and facts.

DotMusic’s position is backed by a 66-page detailed analysis with supporting evidence. When the .MUSIC CPE Analysis is coupled with the results of the Dot Registry IRP, the Council of Europe Report, and other public statements, it clearly gives rise to fair questions about the propriety and validity of FTI’s “independent” review. Based on these reports, it is clear that FTI failed to perform a proper and complete review of the CPE process. FTI did not re-evaluate the CPE applications, rely upon the substance of the reference material, assess the propriety or reasonableness of the research undertaken by the CPE Provider, and interview the CPE applicants. Given these failures, it is reasonably inferable that FTI’s conclusions are nothing more than attempt to defend a clearly problematic evaluation process.⁵

⁴ .MUSIC CPE Analysis, pp. 48, 51, 65 (emphasis added).

⁵ FTI concludes that (1) “there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process;” (2) “the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook ([“AGB”]) and the CPE Guidelines throughout each CPE;” and (3) “the CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1);

The Jones Day Reply unjustifiably criticizes the .MUSIC CPE Analysis as being without “any evidence.”⁶ DotMusic has even attempted to obtain further supporting evidence from ICANN. It submitted *three* document requests pursuant to ICANN’s Documentary Information Disclosure Policy⁷ for materials related to FTI’s review—such as FTI’s investigative plan.⁸ ICANN has continuously refused to disclose any documents regarding FTI’s review,⁹ and now criticizes us for lacking evidence.

The .MUSIC CPE Analysis was provided to the ICANN Board in good faith to allow the Board to conduct its own due diligence in making a reasoned determination in response to Reconsideration Request 16-5 and rebut the FTI Reports, which are inconsistent with other findings regarding the CPE Process.

It would be helpful for all concerned parties to proceed without resorting to misrepresentation and engaging in disparate and discriminatory treatment against DotMusic as highlighted by the Jones Day Reply.

DotMusic reserves all of its rights and remedies all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali

AAA

(ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).” Scope 1 Report, p. 17; Scope 2 Report, p. 3; Scope 3 Report, p. 4.

⁶ Jones Day Reply (emphasis added).

⁷ Request No. 20170505-1 (May 5, 2017); Request No. 20170610-1 (June 10, 2017); Request No. 20180110-1 (January 10, 2018).

⁸ Request No. 20180110-1 (January 10, 2018).

⁹ Request No. 20170505-1, ICANN DIDP Response (June 4, 2017); Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017); Request No. 20180110-1, ICANN DIDP Response (February 9, 2018).

ARIF HYDER ALI

Contact information
Redacted

March 7, 2018

VIA E-MAIL

Kate Wallace, Esq.
Jones Day
100 High Street, 21st Floor
Boston, Massachusetts 02110-181

Re: ICANN's 5 March 2018 Letter Regarding the CPE Process Review

Dear Ms. Wallace:

We write on behalf of our client, dotgay LLC (“dotgay”), regarding your 5 March 2018 letter in which you “respond” and “immediately address[]” “certain baseless and offensive statements” in our 31 January 2018 letter and accompanying Second Expert Opinion of Professor William N. Eskridge, Jr. to the ICANN Board.

Specifically, your letter hyperbolically claims there is no evidence that (1) FTI Consulting, Inc. (“FTI”) “undertook its investigation” of the CPE Review Process “with a pre-determined outcome in mind”; and that (2) “FTI would blatantly violate best investigative practices and compromise its integrity.” This bombastic and nonsensical rhetoric is based on a selective reading of dotgay’s 31 January submission and made in obvious ignorance of the arguments made by Professor Eskridge in his two expert reports and the Council of Europe’s report, titled “Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective.” It is a blatant, feigned attempt to mask FTI’s failure to undertake an “*independent review*” and “*full look*” of the CPE Review Process.¹

¹ This is despite ICANN’s assurances to the CPE applicants that it would undertake an independent review of the CPE Review Process. *See, e.g.*, Adopted Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en> ([T]he Board intends this review to help gather additional facts and information that may be helpful in addressing uncertainty about staff interaction with the CPE provider.”); *see also* John Jeffrey, ICANN58 | Copenhagen Public Forum 2 (16 Mar. 2017), p. 12 (stating that (1) FTI will be “digging in very deeply;” (2) there will be “a full look at the community priority evaluation, as opposed to a very limited approach of how staff was involved;” and (3) ICANN instruction FTI “to look thoroughly at the involvement of staff with the outside evaluators and outside evaluators’ approach to it, and they’re digging in very

As the ICANN Board “is in the process of considering the issues raised in [dotgay’s] letter and accompanying Second Expert Opinion,” we urge the Board to review Professor Eskridge’s first legal opinion and the Council of Europe’s report. The Board will find that FTI astonishingly gives a clean chit to the CPE process, standing at odds with several independent expert opinions and opinions expressed by ICANN Board members, such as Cherine Chalaby.² In light of FTI’s failure to even acknowledge—let alone address—their arguments, its finding that the “CPE Provider consistently followed the same evaluation process in all CPEs and that it consistently applied each CPE criterion and sub-criterion in the same manner in each CPE”³ is superficial and unreliable.

It is clear that FTI failed to perform an “independent review” of the CPE process, including re-evaluation of the CPE applications, examination of the substance of the reference material cited in its own reports, assessment of the propriety or reasonableness of the research undertaken by the CPE Provider, and interview of the CPE applicants—including dotgay. Nonetheless, based on self-serving materials provided only by ICANN and interviews of two employees of the CPE Provider, FTI reaches sweeping conclusions that (1) “there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process;”⁴ (2) “the CPE Provider consistently applied the criteria set forth in the New gTLD Applicant Guidebook ([“AGB”]) and the CPE Guidelines throughout each CPE;”⁵ and (3) “the CPE Provider routinely relied upon reference material in connection with the CPE Provider’s evaluation of three CPE criteria: (i) Community Establishment (Criterion 1); (ii) Nexus between Proposed String and Community (Criterion 2); and (iii) Community Endorsement (Criterion 4).”⁶ FTI’s findings are

deeply and ... trying to understand the complex process of the new gTLD program and the community priority evaluation process”).

² Cherine Chalaby, Chairman of the ICANN Board, stated that “I have observed inconsistencies applying the (AGB) scoring criteria for (CPE)’s and that’s a personal observation and there was an objective of producing adequate rational for all scoring decisions but I understand from feedback that this has not been achieved in all cases.” ICANN, Transcript of Cross Community Working Group’s Community gTLD Applications and Human Rights Webinar (18 Jan. 2017), pp. 20-21, https://community.icann.org/download/attachments/53772757/transcript_cwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2.

³ Scope 2 Report, p. 21.

⁴ Scope 1 Report, p. 17.

⁵ Scope 2 Report, p. 3.

⁶ Scope 3 Report, p. 4.

incredulous and as argued by Professor Eskridge at length in his legal opinion, they must be rejected.

Furthermore, your letter claims that the “Board initiated the CPE Process Review in its oversight role of the New gtLD Program to provide *greater transparency* into the CPE Process.” That is false. In fact, the entire “independent review” of the CPE Review Process was cloaked in secrecy. After the Board announced in September 2016 that it would conduct an “independent review” of the CPE review process, ICANN dragged its feet in completing the review for nearly *13 months*⁷ while continually concealing FTI’s true mandate and evaluation methodology from the CPE applicants. During that period, dotgay asked ICANN *five* times for information related to the review.⁸ It was only on 13 December 2017, *after* FTI completed its investigation of the CPE process without interviewing a single CPE applicant, that ICANN published any substantive information on FTI’s evaluation—FTI’s three-report conclusion on the CPE process.

Moreover, we even attempted to obtain further supporting evidence from ICANN by submitting *three* document requests pursuant to ICANN’s Documentary Information Disclosure Policy⁹ for materials related to FTI’s review—such as FTI’s investigative plan, FTI’s terms of engagement, and communications regarding the scope of FTI’s independent review.¹⁰ ICANN has continuously refused to disclose any documents regarding FTI’s review,¹¹ and now criticizes us for lacking evidence. If ICANN wanted to provide “greater

⁷ Adopted Board Resolutions | Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁸ See Letter from A. Ali to ICANN Board (30 Jan. 2017) (“dotgay has not received *any* communication from ICANN regarding the status of the Independent Review or Request for Information from the CPE Provider.”); Letter from A. Ali to ICANN Board (12 March 2017) (“ICANN’s continued lack of responsiveness to dotgay’s inquiries about the status of its request [is] troubling, particularly in light of ICANN’s commitments to transparency.”); Email from Jamie Baxter to Steve Crocker (17 April 2017) (“reiterat[ing] our ongoing concerns with the lack of transparency that affected parties are receiving on” the CPE review); Letter from A. Ali to Chris Disspain and Jeffrey A. LeVeé (10 June 2017) (“ICANN’s CPE Process Review Update confirms that ICANN is in violation of its commitments to operate transparently and fairly under its bylaws.”); Letter from A. Ali to ICANN Board (8 Aug. 2017) (highlighting dotgay’s “concern with and seek[ing] remedy with respect to the ongoing delays in the Board Governance Committee’s CPE investigation”).

⁹ Request No. 20170518-1 (18 May 2017); Request No. 20170610-1 (10 Jun. 2017); Request No. 20180115-1 (18 Jan. 18).

¹⁰ Request No. 20180115-1 (18 Jan. 18).

¹¹ Request No. 20170518-1, ICANN DIDP Response (18 June 2017); Request 20170610-1, ICANN DIDP Response (Jul. 10, 2017); Request No. 20180115-1, ICANN DIDP Response (Feb. 14, 2018).

transparency into the CPE Process,” then it must disclose the documents underlying the FTI Reports.

dotgay reserves all of its rights and remedies all available fora whether within or outside of the United States of America.

Sincerely,

A handwritten signature in black ink, appearing to read 'Arif Hyder Ali', with a long horizontal flourish extending to the right.

Arif Hyder Ali

AAA



P.O. Box 1233 * Milford, PA 18337 * seroproject.com * 646-642-4915

February 18, 2018

SENT VIA EMAIL

Mr. Cherine Chalaby
ICANN Board Chair
12025 Waterfront Drive, Ste 300
Los Angeles, CA 90094

RE: dotgay LLC Application for .GAY

Dear ICANN Board Directors,

Sero would like to express our ongoing support of dotgay LLC's community application for .GAY and also express our frustration with the inexplicable complacency and lack of action on the demonstrative evidence surrounding discriminatory treatment .GAY has received.

Sero is a U.S.-based network of people living with HIV and allies fighting for freedom from HIV-related stigma and injustice. Sero is also a founding partner in the HIV Justice Worldwide consortium, a network of HIV-related human rights organizations around the globe.

In Sero's quest to address HIV-related homophobia, stigma and injustice we combat ignorance and indifference. Sometimes it is rooted in misplaced fear, other times it is simply the unwillingness of leadership to take action that may embarrass, disrupt or expose unfair practices within their purview. Our voice helps to ensure facts and data are properly considered in order to better inform reactions and decisions.

Our support for the dotgay LLC community application (.GAY) remains strong. Since *gay* is unequivocally a globally utilized and recognized term for the community of LGBTQIA persons, having community operation and oversight of the .GAY domain is imperative. Knowing the tremendous disadvantage and marginalization continuing to face the global gay community, it is astonishing that ICANN is complicit in preventing .GAY from its proper stewardship in the hands of the LGBTQIA community and dotgay LLC.

As Executive Director of Sero, I have remained engaged in dotgay LLC's pursuit of accountability at ICANN. I assumed that the facts and analysis presented in the initial report from Professor William Eskridge would lead ICANN to understand and acknowledge the manner in which dotgay LLC has been mishandled.

Describing the process and repeated assertions of *no wrongdoing* by FTI Consulting does not address the glaring mistreatment and discriminatory treatment of .GAY. Dotgay

LLC was clearly cheated of points and burdened by standards beyond other community applications and requirements of the Applicant Guidebook.

To ignore such obvious facts and refuse to even acknowledge the many shortcomings of the FTI Consulting reports only implicates the ICANN Board further.

As a network of longtime advocates that stand up against injustice, we request that the ICANN Board act within its empowered authority and be the interruption required in the mistreatment of dotgay LLC. The Board needs to end what has amounted to no less than egregious inconsistencies in CPE scoring and award community priority status to .GAY. Doing the right thing is never a liability, especially when the facts support it.

Sincerely,

A handwritten signature in blue ink that reads "Sean Strub". The signature is written in a cursive, slightly slanted style.

Sean Strub
Executive Director

REFERENCE MATERIALS – BOARD SUBMISSION NO. 2018-03-15-2b

TITLE: **Further Consideration of *Gulf Cooperation Council vs. ICANN* Independent Review Process Final Declarations**

The following attachments are relevant to the Board’s further consideration of the Panel’s Final Declaration as to the merits and the Final Declaration As To Costs in the Gulf Cooperation Council (GCC) vs. ICANN Independent Review Process (IRP):

- Attachment A is the Panel’s [Final Declaration](#) on the merits issued on 19 October 2016.
- Attachment B is the Panel’s [Final Declaration As To Costs](#) issued on 15 December 2016.

Other Relevant Materials:

The documents submitted during the course of the GCC IRP are available at:

<https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en>.

GAC Early Warning against the .PERSIANGULF application, issued on 20 November 2012, is available at:

<https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197754/Persianguf-AE-55439.pdf>.

The Independent Objector’s decision to not file an objection against the .PERSIANGULF application is available at: <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/persianguf-general-comment/>.

GAC Beijing Communiqué is available at:

<https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.

NGPC Resolution 2013.06.04.NG01 is available at: <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en>.

GAC Durban Communiqué is available at:

<http://archive.icann.org/en/meetings/durban2013/bitcache/GAC%20Communiqu%C3%A9%20-%20Durban,%20South%20Africa.pdf>.

NGPC Resolution 2013.09.10.NG03 is available at: <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.c>.

GAC Durban Meeting Minutes are available at IRP Request Annex 34:

<https://www.icann.org/en/system/files/files/gcc-irp-request-annex-26-05dec14-en.pdf>.

ICC expert determination on 30 October 2013 that the GCC's Community Objection against the .PERSIANGULF application did not prevail is available at:

<https://newgtlds.icann.org/sites/default/files/drsp/12nov13/determination-1-1-2128-55439-en.pdf>.

9 November 2017 letter from the General Secretariat of the Gulf Cooperation Council (GCC) to the ICANN Board regarding the Final Declaration in the GCC IRP is available at:

<https://www.icann.org/en/system/files/correspondence/latif-to-crocker-09nov17-en.pdf>.

Submitted by: Amy Stathos, Deputy General Counsel
Date Noted: 2 March 2018
Email: amy.stathos@icann.org

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
Pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the *ICDR Supplementary Procedures for ICANN Independent Review Process*

_____)	
Gulf Cooperation Council (GCC))	
)	
Claimant)	
)	
and)	ICDR Case
)	No. 01-14-0002-1065
Internet Corporation for Assigned Names and Numbers (ICANN))	
)	
Respondent)	
_____)	

**PARTIAL FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS
PANEL**

Independent Review Panel

Lucy Reed, Chair
Anibal Sabater
Albert Jan van den Berg

I. INTRODUCTION

1. This case concerns the dispute between the Gulf Cooperation Council (“GCC”), and the Internet Corporation for Assigned Names and Numbers (“ICANN”) over the generic Top-Level-Domain name (“gTLD”) “.persiangulf”.
2. The underlying dispute is a broader one, concerning the name for the body of water separating the Arabian Peninsula from the Islamic Republic of Iran (“Iran”), which is a non-Arab nation historically called Persia. The Arab states, including members of the GCC, use the name “Arabian Gulf”, while Iran uses the name “Persian Gulf”. The sensitivity of this geographical name dispute, which has gone on for over 50 years, is well-known. It is representative of deeper disputes between GCC members and Iran over matters of religion, culture and sovereignty, prompting sanctions such as the banning of maps and censorship of publications that use either “Arabian Gulf” or “Persian Gulf”. (For purposes of neutrality, we will use the simple term “Gulf” in this Declaration.)
3. The particular dispute has its origins in the July 2012 application by a Turkish company founded by Iranian nationals, Asia Green IT System Bilgisayar San. Ve Tic. Ltd Sti (“**Asia Green**”), for registration of the “.persiangulf” gTLD as an international forum for people of Persian descent and heritage. The GCC has contested this application at every step of the ICANN gTLD review process, primarily on grounds that “.persiangulf” targets the Arabian Gulf Arab community, which was not consulted and opposes this use of the disputed geographical name.
4. The GCC initiated this Independent Review Process (“IRP”) in December 2015 to challenge the ICANN Board’s taking any further steps to approve registration of “.persiangulf” gTLD to Asia Green, alleged to violate the ICANN Articles and Bylaws.
5. Based on the IRP Panel’s review and assessment of the Parties’ submissions and evidence, our Partial Declaration is in the GCC’s favor. At the Parties’ joint request, the IRP Panel will allocate costs in a Final Declaration at a later stage.

II. THE PARTIES AND COUNSEL

6. The Claimant GCC is a political and economic alliance established in 1981 among six countries: the United Arab Emirates (“UAE”), Saudi Arabia, Kuwait, Qatar, Bahrain and Oman. The GCC is based in Saudi Arabia. Its address is Contact Information Redacted
7. The GCC is represented by Natasha Kohne and Kamran Salour of Akin Gump Strauss Hauer & Feld LLP, Sawwah Square, Al Sila Tower, 21st Floor, P.O. Box 55069, Abu Dhabi, UAE.
8. The Respondent ICANN is a non-profit public benefit corporation established under the laws of the State of California, USA. ICANN’s mission is “*to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems*”, including the domain name system.¹ ICANN’s address is 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA.
9. ICANN is represented by Jeffrey A. LeVee, Eric P. Enson, Charlotte Wasserstein and Rachel Zernik of Jones Day, 555 South Flower Street, 50th Floor, Los Angeles, CA 90071, USA.

III. BACKGROUND FACTS

10. We set out below the basic background facts, which are undisputed except where otherwise noted. More detailed background facts are included in the separate sections below on the jurisdiction and merits issues in dispute.

A. ICANN’s New gTLD Program

11. As set out in Article 3 of its Articles of Incorporation, ICANN is mandated to develop procedures to expand the number of top level domains and increase the number of companies approved to act as registry operators and sell domain name registrations. In

¹ ICANN’s Response to Gulf Cooperation Council’s Request for Emergency Relief (“**Response to Emergency Request**”), ¶ 6.

June 2011, ICANN launched a significant expansion with the “New gTLD Program”. According to ICANN, this Program is its “most ambitious expansion of the Internet’s naming system”. To illustrate, ICANN approved only seven gTLDs in 2000 and another small number in 2004-2005² and then received almost 2000 applications in response to the New gTLD Program.³

12. ICANN developed an Applicant Guidebook through several iterations, with Version 4 of the New gTLD Application Guidebook dated 4 June 2012 (“**Guidebook**”) being relevant here.⁴ The Guidebook, running to almost 350 pages, sets out comprehensive procedures for the gTLD application and review process. It includes instructions for applicants, procedures for ICANN’s evaluation of applications, and procedures for objections to applications. In line with ICANN’s policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment. ICANN may take such community comments into account in deciding whether an application meets the criteria for approval of a new gTLD registry operator.
13. Decisions on applications for new gTLDs are made by the New gTLD Program Committee of the ICANN Board (“**NGPC**”).

B. The “.persiangulf” New gTLD Application

14. On 8 July 2012, Asia Green applied for the “.persiangulf” gTLD. In its application form, Asia Green identified the mission/purpose of the proposed gTLD in relevant part as follows:

There are in excess of a hundred million of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .PERSIANGULF gTLD will help change this.⁵

² Response to Emergency Request, ¶¶ 12-13.

³ <https://newgtlds.icann.org/en/about/program>.

⁴ Response to Emergency Request, Exh. R-ER-3/R-2 (“**Guidebook**”).

⁵ Request for Independent Review Process (“**Request for IRP**”), ¶¶ 31 and 66.

15. Asia Green has also applied for a number of other gTLDs. Its application for “.pars” (referring to the ancient Persian homeland of Pars), which was based on essentially the same mission/purpose as “.persiangulf” to unite the Persian community, was successful and led to a registry agreement in 2014.⁶ Its applications for “.islam” and “.halal”, however, were not accepted by ICANN.⁷

C. The GCC’s Objections to Asia Green’s “.persiangulf” gTLD Application

16. The GCC objected to Asia Green’s application within the mechanisms provided by ICANN.

1. Concerns Raised with the Governmental Advisory Committee to ICANN

17. ICANN, which is a complex global organization, relies on committees to provide advice from different constituencies. As relevant here, the Governmental Advisory Committee to ICANN (“GAC”) consists of members appointed by and representing governments. The GAC was created to:

*consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements, or where they may affect public policy issues.*⁸

18. Module 3.1 of the Guidebook, which is entitled “GAC Advice on New gTLDs”, allows GAC members to raise governmental concerns about a gTLD application. Such concerns are considered by the GAC as a whole, which may agree on advice to forward to the ICANN Board. Such GAC advice to the ICANN Board is one of two methods of governmental recourse against an application for a gTLD. (The second method, an “Early Warning Notice”, is discussed below.)
19. As set out in Module 3.1 of the Guidebook, the advice from the GAC to the ICANN Board may take one of the following three forms:
 - a. A “Consensus GAC Advice”, in which the GAC, on consensus, provides public policy advice to the ICANN Board that an application **should not** proceed, creating a strong

⁶ Request for IRP, ¶ 65.

⁷ Ibid., ¶ 61.

⁸ Guidebook, Module 3.1, p. 1.

- presumption of non-approval of the application by the ICANN Board; there is no equivalent form of consensus GAC advice that an application **should** proceed;
- b. The expression of **concerns** in the GAC about an application, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those concerns, and to give reasons for its ultimate decision; or
 - c. Advice that the application should not proceed unless remediated, creating a strong presumption that the ICANN Board should not allow the application to proceed unless the applicant implements a remediation method available in the Guidebook.
20. On 14 October 2012, the UAE wrote to the GAC and ICANN expressing its disapproval and non-endorsement of Asia Green’s “.persiangulf” application.⁹ Similar letters from Oman, Qatar and Bahrain followed.¹⁰ As members of the GCC and GAC, these governments objected to registration of “.persiangulf” as a new gTLD on grounds that the proposed domain refers to a geographical place subject to a long historical naming dispute and targets countries bordering the Gulf that were not consulted and did not support the domain, confirming that there was not community consensus in favor of the new gTLD. (The subsequent GAC consideration of these concerns is described below.)

2. Early Warning Process

21. During the public comment period for gTLD applications, the Guidebook (Module 1.1.2.4) also allows the GAC to issue an “Early Warning Notice” to the ICANN Board flagging that one or more governments consider the application to be sensitive or problematic. The Board in turn notifies the applicant for the gTLD. As the Early Warning is merely a notice, and not a formal objection, it alone cannot lead to ICANN’s rejection of the application.
22. On 20 November 2012, the governments of Bahrain, Oman, Qatar and the UAE raised their concerns about Asia Green’s “.persiangulf” application through the GAC Early Warning process. The reasons mirrored those of their GAC objections: “*The applied for*

⁹ Request for IRP, Annex 6.

¹⁰ Ibid., Annexes 7-9.

*new gTLD is problematic and refers to a geographical place with disputed name”; and “Lack of community involvement and support”.*¹¹

3. Independent Objector Review

23. The Guidebook (Module 3, Articles 3.2.1–3.2.5) also provides an “Independent Objector” process, when there has been negative public comment before any formal objection. ICANN appoints an Independent Objector whose role, as the name indicates, is to exercise independent judgement in the public interest to determine whether to file and pursue a “Limited Public Interest Objection” or a “Community Objection” to the application.
24. In December 2012, the Independent Objector for the “.persiangulf” gTLD application, Professor Alain Pellet, issued his comments aimed at “*informing the public of the reasons why the [Independent Objector] does not consider filing an objection*” in relation to the “.persiangulf” application.¹² Professor Pellet concluded that a Limited Public Interest Objection was not warranted, because there were no binding international legal norms to settle the naming dispute. Likewise, he found a Community Objection to be “*unadvisable*”.¹³ Although Professor Pellet found that there was a clearly delineated Gulf community at least implicitly targeted by Asia Green’s application and that a significant portion of that community opposed delegation of “.persiangulf”, he considered it “*most debateable*” that the gTLD would “*create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community*” (meaning the Arab portion), which is a necessary criterion in the Guidebook for a Community Objection.¹⁴ He stated in this regard that:

*it is a matter of fact that there is a long-term dispute over the name of the Gulf and that both designation[s] [i.e. Persian Gulf and Arabian Gulf] are in use. It is indeed not the mission of the gTLD strings to solve nor to exacerbate such a dispute; but they probably should adapt to the status quo and the [Independent Objector] deems it unsuitable to take any position on the question. He notes that it is open to the Arabian Gulf community to file an objection as well as the same community could have applied for a “.Arabiangulf” gTLD.*¹⁵

¹¹ Ibid., Annex 10.

¹² Independent Objector’s Comments on Controversial Applications, Response to Emergency Request, Exh. R-ER-5.

¹³ Ibid., p. 6.

¹⁴ Ibid., p. 5.

¹⁵ Ibid., pp. 5-6.

4. Formal Community Objection by the GCC

25. Module 3 of the Guidebook also provides for formal objection by third parties to challenge a gTLD application. There are four types of formal objections, of which a “Community Objection” is one.
26. A Community Objection is made on the basis that “[t]here is *substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*” (Module 3.2). Pursuant to Paragraph 3.2.3 of the Guidebook, the International Centre of Expertise of the International Chamber of Commerce (“ICC”) administers disputes brought by Community Objection. One expert hears a Community Objection (Paragraph 3.4.4).
27. On 13 March 2013, the GCC filed a Community Objection to the “.persiangulf” application. The ICC appointed Judge Stephen M. Schwebel as the Expert Panelist to hear the Objection (Case No. EXP/423/ICANN/40). (Judge Schwebel’s determination, which he issued on 30 October 2013, is discussed below.)

D. GAC Advice to the ICANN Board

28. Concurrent with the various opposition avenues described above, the GAC was considering the GCC’s concerns in the course of its regular meetings.
29. In its 11 April 2013 meeting in Beijing, China, the GAC issued advice to the ICANN Board concerning a number of gTLD applications, using the typical format of a post-meeting Communiqué. Certain of the advice in the Beijing Communiqué was Consensus GAC Advice against gTLD applications, creating a presumption that the ICANN Board should **not** approve the relevant applications. In the case of certain geographically-based strings, including “.persiangulf”, the Beijing Communiqué reflected that the GAC required time for further consideration. On that basis, the GAC advised the ICANN Board not to proceed beyond initial evaluation of Asia Green’s application.¹⁶

¹⁶ Request for IRP, Annex 23, p. 3.

30. The NGPC of the ICANN Board accepted this advice. The NGPC documented its decision in a Resolution with an annexed “Scorecard” setting out its response to each item in the GAC’s Beijing Communiqué.¹⁷
31. In its 13-18 July 2013 meeting in Durban, South Africa, the GAC gave further consideration to the Asia Green application for “.persiangulf”: Mr Abdulrahman Al Marzouqi, who represented the UAE and the GCC at the Beijing and Durban GAC meetings, testified that no consensus was reached to oppose or support the application. In his words:

5. I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC’s opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because “Persian Gulf” is a disputed name. A substantial amount of GAC members in attendance shared these concerns.

6. Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the “Persian Gulf” name, and Iran’s GAC representative obviously does not share the other GAC members’ concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson... pulled me to the side to express her frustration that GAC could not reach a consensus.¹⁸

32. The Minutes of the Durban meeting (“**Durban Minutes**”), on which the GCC relies in these IRP proceedings, reported:

*The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was **clear that there would not be consensus of an objection regarding this string** and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name.¹⁹ (Emphasis added.)*

33. The 18 July 2013 Durban Communiqué, on which ICANN relies as the document formally providing GAC advice to the ICANN Board, reported:

¹⁷ Response to Emergency Request, Exhs. R-ER-6 and R-ER-7.

¹⁸ Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, Witness Statement of Abdulrahman Al Marzouqi (22 December 2014) (“**Al Marzouqi Statement**”), paras. 5-6.

¹⁹ Request for IRP, Annex 34.

The GAC has finalised its consideration of the following strings, and does not object to them proceeding:

...

ii. *.persiangulf* (application number 1-2128-55439).²⁰ (Emphasis added.)

34. On 10 September 2013, relying on the Durban Communiqué, the NGPC of the ICANN Board passed a resolution to continue to process the “.persiangulf” gTLD application, with a notation that there was a Community Objection:

*ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.*²¹ (Emphasis added.)

35. The NGPC resolution and related Scorecard were posted on the ICANN website on 12 September 2013. The Board Minutes and related materials were posted more than two weeks later, on 30 September 2013.
36. It is the ICANN Board’s decision on 10 September 2013 to continue to process Asia Green’s “.persiangulf” gTLD application that the Claimant GCC challenges in these IRP proceedings.

E. Expert Determination of the Community Objection

37. On 30 October 2013, one month after ICANN’s posting of the Durban Minutes, Judge Schwebel issued his Expert Determination dismissing the GCC’s Community Objection.²²
38. Judge Schwebel first found that the GCC had standing to object to the “.persiangulf” application, as an institution created by treaty and having an ongoing relationship with a clearly delineated community, namely the Arab inhabitants of the six GCC states on the Gulf. He then proceeded to find in the GCC’s favor on the first three of the four elements required by the Guidebook for a successful Community Objection (which, it bears noting, are not the same as the elements applicable to these IRP proceedings). Judge Schwebel found that: (a) the community invoked is a clearly delineated community; (b) the relevant

²⁰ Ibid., Annex 24.

²¹ Response to Emergency Request, Exhs. R-ER-9 and R-ER-10.

²² Case No. EXP/423/ICANN/40, Expert Determination of Judge Stephen M. Schwebel, Request for IRP, Annex 2.

community was substantially opposed to the “.persiangulf” application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string.

39. Judge Schwebel, however, then found against the GCC on the fourth element, on grounds that the GCC had failed to prove that the targeted community would “*suffer the likelihood of material detriment to their rights or legitimate interests*”. In his assessment, even though geographical name disputes such as the Arabian Gulf-Persian Gulf dispute can have significant impacts on international relations, “*it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute*”.²³ Like the Independent Objector before him, Judge Schwebel noted that the GCC could apply for its own “.arabiangulf” string.
40. This Independent Review Process followed.

IV. THE INDEPENDENT REVIEW PROCESS: THE ARCHITECTURE

41. Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), of the ICANN Bylaws sets out the procedure for independent review of actions taken by the ICANN Board.
42. Paragraph 2 of Article IV, Section 3, provides:

Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board’s alleged violation of the Bylaws of the Articles of Incorporation, and not as a result of third parties acting in line with the Board’s action.

43. Paragraph 7 of Article IV, Section 3, provides that “[a]ll IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN”. As stated in the Supplementary Procedures for ICANN Independent Review Process (“**Supplementary Procedures**”), the ICANN Board has designated and approved

²³ Ibid., p. 11.

the International Centre for Dispute Resolution (“ICDR”) as the Independent Review Panel Provider.²⁴

44. The Supplementary Procedures apply to these proceedings, in addition to the ICDR International Arbitration Rules (“ICDR Rules”). Pursuant to Article 2 of the Supplementary Procedures, in the event of any inconsistency between the Supplementary Procedures and the ICDR Rules, the former prevail.
45. The Parties dispute whether the ICANN Bylaws are also applicable to this procedure, in particular in relation to the determination of costs. (This is discussed in Section IX below.)
46. The ICANN Bylaws provide a three-question standard of review for the Independent Review Process. As set out in Paragraph 4 of Article IV, Section 3:

Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

47. Article 8 of the Supplementary Procedures replicates this standard of review in similar terms.

V. THE INDEPENDENT REVIEW PROCESS: PROCEDURAL HISTORY

48. On 5 December 2014, the GCC filed its Request for Independent Review Process with the ICDR (“**Request for IRP**”). The Claimant attached a number of Annexes, and the Expert Report of Mr. Steven Tepp.

²⁴ The standing panel of reviewers contemplated in Article, IV, Section 3, Paragraph 6, of the ICANN Bylaws has not been established. Claimant’s Supplementary Request for Independent Review Process (“**Supplementary IRP Request**”), Annex S-8.

49. The Request for IRP invokes ICANN's accountability mechanisms for the independent review of ICANN Board action, as set out in Article IV, Section 3, of the ICANN Bylaws.
50. Also on 5 December 2014, the Claimant filed a Request for Emergency Arbitrator and Interim Measures of Protection ("**Emergency Request**"). In the Emergency Request, the GCC sought:
 - a. Timely appointment of an Emergency Arbitrator to hear its request for emergency relief to preserve its right to a meaningful independent review; and
 - b. An order enjoining ICANN from executing the ".persiangulf" registry agreement with Asia Green while the Request for IRP was pending.
51. On 9 December 2014, ICANN consented to the appointment of an Emergency Panelist. Mr. John A.M. Judge was appointed on the same day to fulfil that role.
52. On 17 December 2014, the Respondent submitted its Response to Gulf Cooperation Council's Request for Emergency Relief, asking that the Emergency Request be denied.
53. On 22 December 2014, the Claimant filed its Reply in Support of its Request for Emergency Arbitrator and Interim Measures of Protection. This submission included the Witness Statement of Mr. Al Marzouqi ("**Al Marzouqi Statement**").
54. On 23 December 2014, the Emergency Panelist conducted a hearing by telephone conference call.
55. On 20 January 2015, ICANN submitted its Response to Claimant's Request for Independent Review Process.
56. On 12 February 2015, Mr. Judge issued his Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"). The Conclusion of the Emergency Declaration provided as follows:

96. Based on the foregoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:

- a. *ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;*
- b. *This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;*
- c. *This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and*
- d. *The costs of this Request for Interim Measures shall be reserved to the IRP panel.*²⁵

- 57. Following the Emergency Declaration, the present IRP Panel was constituted. The chair was appointed on 4 December 2015.
- 58. On 6 January 2016, the IRP Panel held a preparatory conference call with the Parties. The Panel issued Procedural Order No. 1 on 8 January 2016 (corrected 13 January 2016), establishing the submissions and setting the timetable for the proceedings. The merits hearing by telephone conference call was scheduled for 17 May 2016.
- 59. Pursuant to Procedural Order No. 1, the GCC filed its Supplementary Request for Independent Review Process ("**Supplementary IRP Request**") on 12 February 2016. This submission included the Supplementary Witness Statement of Mr. Al Marzouqi ("**Supplementary Marzouqi Statement**"), which described the GCC's unsuccessful attempts to conduct a conciliation process with both ICANN and Asia Green after the GCC filed its Request for IRP.
- 60. On 14 March 2016, ICANN filed its Response to Claimant's Supplementary IRP Request ("**Response to Supplementary IRP Request**"). As was the case in the emergency proceedings, ICANN did not file any witness statements.
- 61. On 29 March 2016, the GCC submitted its Reply in Support of its Supplementary Request for IRP, with no additional witness statements. ICANN's Response followed on 12 April 2016, ("**Rejoinder to IRP Request**"), again with no witness statements.

²⁵ Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"), ¶ 96.

62. On 7 May 2016, the Claimant requested that the hearing be postponed until July 2016. ICANN did not oppose. The IRP Panel rescheduled the hearing for 7 July 2016.
63. The hearing took place by telephone conference call on 7 July 2016, lasting approximately two hours. The IRP Panel heard submissions from counsel for both Parties. As agreed by the Parties, there was no fact or expert witness testimony.
64. Having determined that there was no need for further submissions, the Panel declared the hearing officially closed on 19 October 2016, except as to costs.

VI. THE RELIEF SOUGHT

65. The Claimant GCC seeks a Declaration:
 - a. stating that the ICANN Board violated ICANN's Articles, Bylaws and the New gTLD Application Guidebook of 4 June 2012;
 - b. recommending to the Board that ICANN take no further action on the ".persiangulf" gTLD, including by enjoining ICANN from signing the registry agreement with Asia Green, or any other entity;
 - c. awarding the GCC its costs in this proceeding; and
 - d. awarding such other relief as the Panel may find appropriate or that the GCC may request.²⁶
66. The Respondent ICANN seeks a Declaration:
 - a. denying the GCC's IRP Request;
 - b. awarding ICANN its reasonable fees and costs incurred, including legal fees, if it is the prevailing party.²⁷

²⁶ Supplementary IRP Request, ¶ 63.

²⁷ Response to Supplementary IRP Request, ¶¶ 30 and 32.

VII. JURISDICTION: TIMELINESS OF THE REQUEST FOR IRP

A. The Issue and Legal Framework

67. A preliminary jurisdictional issue for decision is whether the GCC's Request for IRP is time-barred. ICANN argues that the Request is time-barred; the GCC disagrees.
68. As a starting point, the 30-day deadline for challenging an ICANN Board action appears in Article IV, Section 3, Paragraph 3 of the ICANN Bylaws ("**IRP Deadline**"), which provides in relevant part:

A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.

69. Article IV, Section 3, of the ICANN Bylaws, together with the ICANN document entitled "Cooperative Engagement Process – Requests for Independent Review" dated 11 April 2013 ("**CEP-IRP Document**"),²⁸ codify two exceptions to the IRP Deadline.
- a. The IRP Deadline is tolled if the parties are engaged in a Cooperative Engagement Process ("**CEP**"), referred to in Paragraph 14 of Article IV, Section 3, of the ICANN Bylaws:

Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

Pursuant to the CEP-IRP Document (pp. 1-2):

If ICANN and the requestor have not agreed to a resolution of issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.

²⁸ Response to Claimant's Request for Independent Review Process ("**Response to IRP Request**"), Exh. R-5; Supplementary IRP Request, Exh. S-10.

b. Pursuant to the CEP-IRP Document (para. 6), ICANN and an IRP requestor may agree, in writing, to extend the IRP Deadline.

70. To recall, certain relevant facts are undisputed. Following the Durban GAC meeting and Communiqué, ICANN posted the Durban Minutes and related materials on 30 September 2013. The GCC filed its Request for IRP on 5 December 2014. Obviously, 5 December 2014 is more than 30 days after the 30 September 2013 posting of the Durban Minutes and related materials.
71. It is also undisputed that the Parties neither initiated a formal CEP nor agreed in writing to extend the IRP Deadline.
72. Accordingly, the issue before the IRP Panel is whether the 30-day IRP Deadline was tolled or otherwise extended despite the absence of a CEP or written extension of the IRP Deadline.

B. The Respondent's Position

73. ICANN takes the firm legal position, as advocated in both its written submissions and during the 7 July 2016 hearing, that the IRP Deadline is mandatory and cannot be tolled or extended for non-codified reasons. To allow equitable tolling in general would be to create unacceptable uncertainty for gTLD applicants and IRP applicants. To allow tolling in the instant circumstances for the GCC, which waited over a year to file its IRP Request, would be to provide impermissible special treatment.
74. As for the specific circumstances alleged by the GCC (described below), ICANN denies that any dealings and communications between its officials and GCC representatives effectively substituted for the CEP process or excused the GCC's failure to initiate the CEP process. To recall, as in the Emergency Request proceedings, ICANN presented no witness statements from named or unnamed representatives or any other factual evidence.

C. The Claimant's Position

75. The GCC presents an equitable reliance defense to its delayed initiation of the IRP process. The GCC argues, as a general matter, that ICANN should acknowledge non-written tolling

circumstances and, in the specific circumstances here, that the IRP Deadline must be deemed tolled by reason of the explicit and/or implicit representations made by ICANN officials to Mr. Al Marzouqi between October 2013 and November 2014.

76. The GCC asserts that *“following the Board’s September 2013 Board Action, ICANN represented repeatedly – through its words and actions – to the GCC that the deadline to file the IRP had not yet passed”*.²⁹
77. The GCC relies primarily on the Al Marzouqi Statement, and a 9 July 2014 letter from Mr. Mohammed Al Ghanim, Director General of the UAE Telecommunications Regulatory Authority, to ICANN CEO Mr. Fadi Chehade, to support this assertion. According to Mr. Al Marzouqi:
 - a. He and other GAC members expected that ICANN would treat the “.persiangulf” gTLD application in the same way it had treated the “.islam” and “.halal” applications, because all three applications *“lack community support, and the .PERSIANGULF gTLD application, unlike the .ISLAM and .HALAL gTLD applications, also is strongly opposed by the Arab community because ‘Persian Gulf’ is a disputed name”*.³⁰
 - b. After the posting of the ICANN Board decision to proceed with the “.persiangulf” application on 30 September 2013, he *“reached out to [his] ICANN counterparts to initiate an attempt at resolution”* and they *“instructed [him] to wait until the Independent Expert issued a declaration on the GCC’s Community Objection”*, which he did.³¹
 - c. After Judge Schwebel dismissed the Community Objection on 30 October 2013, Mr. Al Marzouqi again reached out and his *“ICANN counterparts advised they would get back to [him]”*.³²

²⁹ Supplementary IRP Request, ¶ 35.

³⁰ Al Marzouqi Statement, ¶ 7.

³¹ Ibid., ¶¶ 8-10.

³² Ibid., ¶ 11.

- d. “After several months of dialogue with [his] ICANN counterparts proved unsuccessful”, he arranged for “high-level” meetings “in hopes of facilitating a resolution”, which arrangements took substantial time due to schedules.³³
- e. In June 2014, Mr. Al Marzouqi and other GCC representatives met with the ICANN CEO, Mr. Chehade, during the GCC Telecom Council Ministers Meeting in Kuwait City.³⁴ According to Mr. Al Marzouqi, GCC representatives reiterated their objections to the “.persiangulf” application in that meeting.
- f. Mr. Al Marzouqi’s testimony about the meeting is corroborated by a 9 July 2014 letter from Mr. Al Ghanim to Mr. Chehade.³⁵ Mr. Al Ghanim reiterated the GCC’s concerns about lack of community involvement and support for the gTLD, which is “*problematic and refers to a geographical place with disputed name*”, and added:

While the GAC did not issue an advice objecting against the Application (due to lack of consensus because one particular country did not agree to the objection), this does not mean those countries which are part [sic] of the community targeted by the Application are agreeing to the Application to proceed and this certainly does not mean that ICANN should ignore this fact and continue to allow the Application to proceed.

.... The security, functionality and stability of Internet rely greatly on a successful operation of the DNS system. It is worrying to see how a TLD being opposed by majority of the community targeted would be able to operate and sustain. We believe the motive behind this Application has nothing to do with Internet community interest, nor commercial interest. We request ICANN to analyze the Application from financial and sustainability angle given that the community continues to oppose the Application.³⁶

- g. Thereafter, Mr. Al Marzouqi’s “ICANN counterparts again advised [him] that they had taken the GCC’s position under advisement and would get back to the GCC with an answer”.³⁷ That answer, testified Mr Al Marzouqi, came in September 2014, when Mr. Al Marzouqi’s “ICANN counterparts ... suggested to

³³ Ibid., ¶¶ 12-13.

³⁴ Ibid., ¶ 14.

³⁵ Ibid., attached Letter from Mr. Mohammed Al Ghanim to Mr. Fadi Chehade, 9 July 2014 (“Al Ghanim Letter”).

³⁶ Al Ghanim Letter, p. 2.

³⁷ Al Marzouqi Statement, ¶ 15.

[him] *that the GCC's only recourse toward resolution may be to file a request for independent review of ICANN's Board action*" (emphasis in original).³⁸

- h. Mr. Al Marzouqi spoke again with his "*ICANN counterparts*" in October 2014 at ICANN meetings in Los Angeles. As "*ICANN's handling of geographic gTLD applications was a topic of discussion at those meetings*", he "*remained hopeful that the GCC and ICANN could finally resolve the dispute*".³⁹
- i. In November 2014, there having been no resolution at the October meetings, Mr. Al Marzouqi advised the GCC to proceed with the IRP process.⁴⁰ He learned only in December 2014 that ICANN intended to sign the registry agreement for ".persiangulf", after which he advised the GCC to file the Emergency Request "*to ensure that the independent review process would not be rendered meaningless*".⁴¹
- j. According to Mr. Al Marzouqi: "*At no time from September 2013 to November 2014 did ICANN state, let alone suggest, that if the GCC engaged in resolution efforts it would be time-barred from seeking an independent review of the September 2013 Board action*".⁴²

78. Mr. Marzouqi, in his Supplementary Witness Statement, describes further attempts at conciliation with both ICANN and Asia Green after the GCC filed its IRP Request.⁴³ These attempts proved unsuccessful.

79. The GCC also relies, in support of its equitable reliance defense, on an email dated 19 December 2014 from Mr. Eric Enson, outside counsel to ICANN, to Mr. Kamran Salour, outside counsel to the GCC ("**ICANN Counsel Email**").⁴⁴ The relevant language is as follows:

³⁸ Ibid., ¶16.

³⁹ Ibid., ¶ 17.

⁴⁰ Ibid., ¶ 18.

⁴¹ Ibid., ¶ 22.

⁴² Ibid., ¶ 19.

⁴³ Supplementary Marzouqi Statement, Exh. S-9, ¶¶ 2-16.

⁴⁴ Supplementary Request for IRP, Exh. S-11.

Fourth, during the call yesterday, you mentioned the possibility of entering a Cooperative Engagement Process (“CEP”), as set forth in ICANN’s Bylaws. A CEP is supposed to take place before the filing of an IRP in the hope of avoiding, or at least minimizing, the costs associated with an IRP. That, obviously, did not happen in this matter. In addition, a CEP is supposed to be a dialogue between the parties, rather than counsel for the parties. ICANN is always willing to discuss amicable resolutions of issues, but I think we need additional information from the GCC before agreeing to engage in a CEP, at this point. First, ICANN would like to know whether the GCC believes that there is a realistic possibility that the GCC would dismiss its IRP based on CEP discussions. The reason this is important to ICANN is because ICANN representatives informed GCC representative[s], on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP.

80. The GCC considers this email to evidence ICANN’s earlier tolling of the 30-day IRP Deadline, because ICANN expressed willingness to enter into a CEP despite the GCC’s initiation of the IRP process on 5 December 2014.⁴⁵

D. The IRP Panel’s Analysis and Decision

81. Turning first to the Parties’ general arguments on whether and how the IRP Deadline can be tolled or extended other than by the two codified exceptions, we do not consider it our role as an IRP Panel to issue general directives. It suffices to record that, under an equitable reliance theory, a requesting party should be allowed to request an IRP after expiry of the 30-day IRP Deadline if that party can show reliance on a representation or representations by ICANN inviting or allowing extension of the IRP Deadline. Otherwise, ICANN would be allowed “to blow hot and cold” and ultimately undermine its own mandate. Such contradictory actions would be inconsistent with, for example, the core value set out in Article 1, Section 2, of the ICANN Bylaws, of ICANN’s “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness”.
82. Beyond that general proposition, our Declaration must be focused on the facts and circumstances of the case before us. The issue is whether ICANN did make such a representation or representations here, either explicitly or implicitly by conduct.

⁴⁵ Claimant’s Reply in Support of its Supplementary Request for IRP, ¶ 26.

83. We have carefully examined the GCC’s evidence of contacts and communications between GCC and ICANN representatives between September 2013 and November 2014. Although the Marzouqi Statement was conclusory and short on detail, for example, in not providing names for his “*ICANN counterparts*” who participated in discussions after September 2013, he did provide a credible account of a series of communications with ICANN, commensurate with the credible level of serious GCC concerns about registry of “.persiangulf” as a new gTLD.
84. We have not been helped by any contradictory or confirming witness statements, or other evidence, from ICANN, about that alleged series of contacts and communications. It is striking that ICANN does not dispute the fact that the meeting with its most senior representative, CEO Chehade, occurred in June 2014. ICANN does dispute other points of Mr. Al Marzouqi’s testimony, for example, his description of the instruction by unnamed ICANN officials that the GCC wait until after the Expert Panelist’s decision on the Community Objection to commence an IRP process, and his testimony that unnamed ICANN officials suggested an IRP process in September 2014 and participated actively in negotiations thereafter. However, ICANN provided no witness statements from ICANN representatives who did participate in the June 2014 meeting, no copy of any written response from ICANN to the Al Ghanim letter about the content of the discussions in that meeting, or any other factual evidence whatsoever countering Mr. Al Marzouqi’s account.
85. Having weighed such evidence as there is in the record, we find as follows, on the balance of probabilities:
 - a. In October 2013, ICANN requested the GCC, through Mr. Al Marzouqi, not to commence dispute resolution proceedings – which by definition encompass an IRP process – until the Expert Panelist had resolved the GCC’s Community Objection to the “.persiangulf” gTLD application. This request was in effect a representation that the IRP Deadline was tolled until Judge Schwebel issued his expert decision, regardless of when that might be.
 - b. The GCC relied on that representation from ICANN, to the effect that the 30-day IRP Deadline was not yet running, in not filing an IRP request within 30 days

after the posting of the GAC's Durban Minutes and related materials on 30 September 2013.

- c. After Expert Panelist Schwebel dismissed the GCC's Community Objection on 30 October 2013, which happened to be the expiry of the IRP Deadline, ICANN continued to welcome – if not actively encourage – a series of communications and meetings to discuss the GCC's objections to registration of “.persiangulf”. Having previously tolled the IRP Deadline, if ICANN at that point believed that the 30-day deadline was running or had expired, it is reasonable to assume that ICANN would have told the GCC. It is thus reasonable – indeed, necessary – to conclude that, while those communications and meetings were taking place, the IRP Deadline remained tolled.
- d. By far the most compelling evidence is that the ICANN CEO himself, Mr. Chehade, met with Mr. Al Marzouqi and other GCC representatives in June 2014 to discuss the GCC's objections to the “.persiangulf” gTLD application, a meeting testified to by Mr. Al Marzouqi and corroborated by the 9 July 2014 Al Ghanim Letter. Regardless of whether ICANN officials thereafter expressly advised the GCC that ICANN had taken the GCC's objections under advisement, as Mr. Al Marzouqi testified, CEO Chehade's personal involvement made it reasonable for the GCC to consider that their opposition to “.persiangulf” remained under active consideration by the ICANN Board through July 2014.
- e. Not long thereafter, in September 2014, an ICANN representative or representatives suggested to Mr. Al Marzouqi that an IRP request might be the GCC's only recourse toward resolution. Considering that the 30-day IRP Deadline had passed over a year before, and assuming good faith on the part of ICANN throughout, it is reasonable that the GCC considered the IRP Deadline to remain tolled at this time.
- f. The GCC pursued a further settlement attempt with ICANN at meetings in Los Angeles in October 2014, which reflects that the GCC continued to rely on ICANN's holding the IRP Deadline open in hopes of settlement. Those hopes

dissipated by November 2014 when the GCC received nothing positive from the Los Angeles meetings.

- g. At this point, absent any further representations from ICANN about further negotiations, the limitations period reasonably ceased to be tolled and the IRP Deadline started to run.
 - h. On 5 December 2014, within the 30-day IRP Deadline, the GCC filed its Request for IRP.
86. Exchanges thereafter – in specific, the ICANN Counsel Email confirming that ICANN had entertained a CEP process – support the conclusion that ICANN itself considered the deadline for the submission of an IRP to have been tolled. Those exchanges show that ICANN could and did continue discussions with the GCC aimed at resolving the “.persiangulf” gTLD dispute by way of a formal or informal CEP process even after the 30-day IRP Deadline had passed and before the GCC filed a Request for IRP. As confirmed in the ICANN Counsel Email, the CEP is a dispute resolution mechanism that typically precedes, and is aimed at avoiding, an IRP filing. We need not interpret Mr. Enson’s email as confirmation that a CEP took place before the IRP was filed, to find that ICANN reasonably appeared to the GCC to remain open to a CEP, with certain conditions, well after 30 October 2013.
87. While there was no formal CEP, we conclude from the evidentiary record overall that ICANN explicitly and implicitly cooperated in a shadow conciliation process with the GCC. It was reasonable for the GCC to continue to participate in that process, without concern that ICANN would retroactively impose a strict 30 October 2013 time-bar for an IRP request should the shadow conciliation process fail.
88. In coming to this conclusion, we have not been swayed by the GCC’s umbrella argument that ICANN should have formally notified the GCC, at very least in the December 2014 ICANN Counsel Email, that the IRP Deadline was mandatory and had expired by 30 October 2014. Nor have we been swayed by ICANN’s mirror argument that the GCC should have formally reserved and documented its position that the IRP Deadline was tolled by ICANN’s conduct. It is because neither Party took such formal action that this

dispute comes before this Panel, and we are tasked with evaluating the legal import of the actions the Parties did take.

89. Nor have we been swayed by the political context. While the well-known sensitivities around the disputed names “Persian Gulf” and “Arabian Gulf” cannot **excuse** ICANN’s ignoring its own IRP Deadline for over a year, which implicitly encouraged the GCC to postpone filing its IRP Request, those sensitivities perhaps **explain** ICANN’s reluctance to apply the IRP Deadline strictly in this case. It would seem that both Parties hoped that such a political dispute would somehow resolve itself.
90. Although neither Party asked the IRP Panel to take any formal action in relation to the status of the Emergency Declaration, it should be clear from our conclusion that we agree with the assessment of Mr. Judge that “*the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable*”.⁴⁶ The Emergency Panelist cautioned that “*the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself*”,⁴⁷ but, as it transpired, ICANN did not provide any such additional evidence concerning the conduct of its officials.
91. To conclude, the Panel finds that: (a) at no point did the GCC cease its objections to ICANN’s registration of the “.persiangulf” gTLD; (b) through its conduct, ICANN made representations that the IRP Deadline, measured against the 30 September 2013 Board action, was tolled; (c) the GCC relied on those representations, in hopes of a resolution, in postponing a formal IRP process; and (d) the GCC timely submitted its IRP Request on 5 December 2014.

⁴⁶ Emergency Declaration, ¶ 83.

⁴⁷ Ibid., ¶¶ 83 and 86.

VIII. THE MERITS

A. The Standard of Review

92. As a preliminary matter, the Panel considers the standard of review to be clear. Pursuant to Article IV, Section 3, Paragraph 4, of the ICANN Bylaws (echoed in Article 8 of the Supplementary Procedures), we are:

*charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. . . . [and] **must apply a defined standard of review to the IRP request, focusing on:***

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

93. The IRP Panel agrees with the GCC that this is a *de novo* standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.⁴⁸ This is consistent with the very name of the IRP process – an **independent** review of the contested Board action. Other IRP Panels have recognized and applied this *de novo* standard of review.⁴⁹
94. We also agree with ICANN that an IRP Panel cannot abuse this independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion.⁵⁰ This proposition is reflected in the language of Article IV, Section 3, Paragraph 4, of the Bylaws: an IRP Panel is not entrusted with second-

⁴⁸ Supplementary IRP Request, ¶¶ 9-11.

⁴⁹ Relying upon Annex S-3, 19 February 2010, Final Declaration in *ICM Registry LLC v. ICANN*; Annex S-4, 3 March 2015, Final Declaration in *Booking.com v. ICANN*; Annex S-5, 9 July 2015 Final Declaration in *DotConnectAfrica Trust v. ICANN*.

⁵⁰ Response to Claimant's Supplementary IRP Request ("Response to Supplementary IRP Request"), ¶ 5; Annex S-2, 9 October 2015, Final Declaration in *Vistaprint v. ICANN*, ¶ 124; Exh. R-24, Final Declaration in *Merck v. ICANN*, ¶ 21; Annex S-4, Final Declaration in *Booking.com v. ICANN*, ¶ 108.

guessing the Board, but rather “*with declaring whether the Board has acted consistently with the provisions of [the ICANN] Articles of Incorporation and Bylaws*”.

95. To recall, the contested ICANN Board action here is the Board’s decision on 10 September 2013 to proceed with the “.persiangulf” gTLD application. It is irrelevant whether the IRP Panel considers this decision to be right or wrong on the merits, much less to be politically wise or unwise. Our role is to examine the **process** of the Board’s decision-making, in specific to answer the questions in Article IV, Section 3, Paragraph 4, of the Bylaws: (a) did the Board act without conflict of interest? (b) did the Board exercise due diligence and care in having a reasonable amount of facts? and (c) did the Board members exercise independent judgment, believed to be in the best interests of ICANN?

96. If the answer to any of those questions is “no”, the GCC will prevail in this Request.

B. The Claimant’s Standing to Pursue the IRP

97. A second preliminary question goes, as we find below, to the GCC’s standing to pursue this IRP proceeding.

98. The Parties devoted substantial attention in their written and oral submissions to the question of the type and level of harm that the GCC must establish it has suffered or will suffer as a result of the contested ICANN Board action. This question arises from the IRP-related test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws:

*Any person **materially affected** by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws **may submit a request for independent review** of that decision or action. In order to be **materially affected**, the person must suffer **injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation**, and not as a result of third parties acting in line with the Board's action. (Emphasis added.)*

99. The Parties agree that the term “*materially affected*” must be distinguished from the term “*material detriment*”, which is relevant in assessing the merits of a Community Objection to a gTLD application. One of the four elements to be proven for a successful Community Objection is that the application “*creates a likelihood of **material detriment** to the rights or legitimate interests of a significant portion of the community to which the string may be*

explicitly or implicitly targeted” (emphasis added). Factors evidencing material detriment go to actual operation of the gTLD by the applicant, including the likelihood that operation will cause reputational, security, and/or economic harm to the community represented.

100. ICANN, however, effectively equates the two terms “*materially affected*” and “*material detriment*” by using them interchangeably. The basic inquiry for both tests, according to ICANN, is whether an IRP requestor will be materially injured or harmed by the actual operation of the relevant string.⁵¹ In ICANN’s view, the GCC, however, has failed to identify any legally recognizable harm it will suffer if “.persiangulf is registered; the contention that a “.persiangulf” gTLD will create the false impression that the Gulf Arab nations accept the disputed name “Persian Gulf” is not a cognisable harm.⁵² To support its position, ICANN puts substantial weight on the findings of the Independent Objector and the Expert Panelist that the GCC fell short of proving that it would suffer harm reaching the level of “*material detriment*”.⁵³

101. In comparison, the GCC in its Supplementary IRP Request argues that the only relevant inquiry is whether it suffered injury or harm connected to ICANN’s alleged action inconsistent with the ICANN Articles or Bylaws.⁵⁴ The IRP Panel, according to the GCC, is to examine only whether that action – here, the Board’s 10 September 2013 decision to allow processing of the “.persiangulf” application – did cause harm “*materially affect[ing]*” the GCC and its members.⁵⁵ The GCC identifies that harm to be the denial of its due process rights to an ICANN decision on the contested “.persiangulf” gTLD application in which its objections were fully considered by the Board, and apparent discrimination against its Arab members in favor of Iran.⁵⁶

102. The IRP Panel agrees with ICANN that the question of whether the GCC was “*materially affected*” for purposes of Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is one

⁵¹ Rejoinder to ICANN’s Response to Gulf Cooperation Council’s Reply in Support of Supplementary Request for Independent Panel Review (“**Rejoinder to IRP Request**”, ¶ 15.

⁵² Ibid., ¶¶ 13-15; Response to Supplementary IRP Request, ¶ 25.

⁵³ Rejoinder to IRP, ¶ 14.

⁵⁴ Supplementary IRP Request, ¶ 41. The GCC took a position closer to ICANN’s in this respect in its original Request for IRP; see, e.g., ¶¶ 70-74.

⁵⁵ Supplementary IRP Request, ¶ 49.

⁵⁶ Ibid., ¶ 42.

of standing.⁵⁷ This is the logical meaning of the language in Paragraph 2 that a “*person materially affected*” by an ICANN Board action perceived to be inconsistent with the Bylaws or Articles “*may submit a request for independent review*”; this cannot and does not presuppose a successful request for IRP. As a standing question, this question precedes the core IRP question of whether the ICANN Board acted inconsistently with its Articles or Bylaws.⁵⁸

103. However, we cannot agree with ICANN’s effective conflation of the two tests of “*materially affected*” and “*material detriment*”. Only the former test appears in, and is relevant to, the IRP-related standing test in Article VI, Section 3, Paragraph 2, of the ICANN Bylaws. To apply the “*material detriment*” test, which is a critical component of the Community Objection evaluation process under the Guidebook, would be to put the IRP Panel into a role it does not have – to examine and offer its views on the merits of the “.persiangulf” gTLD application under the relevant ICANN criteria. The determinations of the Independent Objector and the Expert Panelist, which were made in the Community Objection context and hence necessarily focused on the likelihood of “*material detriment*” to the interests of the Gulf community, are therefore irrelevant.⁵⁹
104. In this connection, we do not need to address the submissions of the Parties as to whether the GCC could have minimized or avoided injury or harm by applying for an “.arabiangulf” gTLD, and whether such an application is or is not foreclosed in the future. This may have been a factor for the Independent Objector and the Expert Panelist to consider in the Community Objection context, but it is not a proper issue of standing in an IRP case.
105. We recognize that the “*materially affected*” test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is defined in relation to “*injury or harm that is directly or causally connected to the Board’s alleged violation of the Bylaws or the Articles*”. As Paragraph 2 goes to standing, however, it cannot reasonably be interpreted as requiring an IRP panel to find proof of concrete and measurable injury or harm at the time an IRP request is filed. It

⁵⁷ Rejoinder to IRP Request, ¶ 16.

⁵⁸ *Ibid.*, ¶ 16.

⁵⁹ Supplementary IRP Request, ¶¶ 43-49; The Gulf Cooperation Council’s Reply in Support of its Supplementary Request for Independent Review Process (“**Reply to IRP Request**”), ¶ 21.

must suffice for the IRP requestor, to meet the standing test, to allege reasonably credible injury or harm connected to the contested ICANN Board action. We are satisfied that the GCC has done so here by describing the harm caused to its Gulf members' due process rights, by definition, if the processing of the ".persiangulf" gTLD application were to continue on the basis of a Board decision made without regard to the GCC's objections. We now turn to the core merits question of whether the GCC has proven such inconsistent action by ICANN.

C. The Claimant's Position

106. The GCC's main submission is that ICANN failed to follow the GAC's advice from the Durban meeting, as well as the Guidebook procedures, in deciding in September 2013 to allow further processing of the ".persiangulf" gTLD.
107. The GCC relies on Module 3.1 of the Guidebook, which sets out three possible forms for GAC advice to the ICANN Board. These are set out at paragraph 19 above. Given that the GAC did not issue Consensus GAC Advice that the ".persiangulf" gTLD application should **not** proceed or advice that the application should not proceed unless remediated, by elimination the only available form of advice was an "*expression of concerns in the GAC*" about Asia Green's application, meant to prompt a dialogue between the GAC and the Board.⁶⁰ The GAC did identify such concerns, in the Durban Minutes, which explicitly: (i) referred to the opinions of GAC members from the UAE, Oman, Bahrain and Qatar that the application should not proceed; (ii) noted that the GAC had heard "*opposing views*" on the application; and (iii) concluded that "*it was clear that there would not be consensus on an objection*".⁶¹ In the GCC's view, these vigorous comments were a fully recognizable expression of its members' concerns.
108. The GCC disagrees with ICANN that only the Durban Communiqué constituted recognizable GAC advice to the ICANN Board. The GCC relies on Principle 51 of GAC's Operating Principles, which does not limit the GAC's advice to a communiqué.⁶² Further, ICANN's failure to review the Durban Minutes before passing its resolution on the

⁶⁰ Supplementary IRP Request, ¶ 20.

⁶¹ Ibid., ¶ 18; Reply to IRP Request, ¶ 6.

⁶² Reply to IRP, ¶ 8.

“.persiangulf” application was, in itself, a failure to exercise due diligence in making the decision, in violation of Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws.⁶³

109. In light of the foregoing, the ICANN Board was obligated to enter into a dialogue with the GAC to understand its members’ concerns, and to give reasons for its ultimate decision to allow Asia Green’s application to move forward – which ICANN failed to do.
110. The GCC argues in the alternative that, even if ICANN was somehow correct in following the GAC’s non-compliant advice to allow the “.persiangulf” application to proceed, ICANN violated several other Articles and Bylaws. Among others, the GCC identifies:

a. Bylaws, Article I, Section 2:

In performing its mission, the following core values should guide the decisions and actions of ICANN:

....

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

....

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

....

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.

b. Bylaws, Article II, Section 3:

ICANN shall not apply its standards, policies, procedures or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

c. Bylaws, Article III, Section 1:

⁶³ Reply to IRP Request, ¶ 10.

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. ,

d. Articles of Incorporation, Article 4:

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

111. The GCC puts special emphasis on Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs, which directs that “*New gTLDs should respect: ... the sensitivities regarding terms with national, cultural, geographic and religious significance*”.
112. Against this backdrop of ICANN constituent documents, the GCC argues that the ICANN Board failed to collect and independently assess all relevant facts before resolving to allow the “.persiangulf” gTLD application to proceed. The Board failed to review the GAC’s Durban Minutes, which flagged that there were serious objections to the application and hence no consensus in favor of its proceeding. Nor did the Board explain, or even give any indication of, the reasons for its decision to allow the vigorously contested application to proceed. The bare Board resolution of 10 September 2013 gives no hint that the Board fulfilled its obligation to assess and balance the competing core values of ICANN. Neither that resolution nor any other document contains any reference to the ICANN core values guiding the Board in its 10 September 2013 decision on the “.persiangulf” application or any statement as to how the Board balanced core values that it found to be competing.
113. The Board also discriminated against the GCC by giving credence only to the Iranian position at the GAC and by ignoring the GCC’s Community Objection and strong government opposition. If registered with Asia Green, the “.persiangulf” string will be discriminatory because “it will falsely create the perception that the GCC accepts the disputed ‘Persian Gulf’ name”.⁶⁴ This is particularly egregious because the Persian

⁶⁴ Request for IRP, ¶ 58.

community already has the benefit of the “.pars” string, already registered with Asia Green for purposes overlapping with the “.persiangulf” application.

114. Further, according to the GCC, the Board handled Asia Green’s “.persiangulf” application inconsistently with Asia Green’s “.halal” and “.islam” applications. In those cases, although the Independent Expert dismissed the Community Objections because he did not find substantial community opposition, the Board intervened to stop the processing of both strings. Here, where the Community Objection and the Durban Minutes documented substantial community opposition, the Board nonetheless decided to allow continued processing of the “.persiangulf” application.
115. Overall, says the GCC, the Board’s NGPC acted unfairly in a non-transparent and discriminatory manner, without sensitivity to the national, cultural and geographic issues in the Gulf.⁶⁵ In reviewing the Board’s decision to allow Asia Green’s “.persiangulf” application to go forward, the Panel should follow the path of the IRP Panel in the *DotConnectAfrica Trust v ICANN* case. There, the IRP Panel held that the Board had breached its transparency obligations by simply adopting the GAC’s consensus advice not to proceed with the application for the “.africa” gTLD, stating that it “*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust’s application*”.⁶⁶

D. The Respondent’s Position

116. ICANN’s defense to the GCC’s argument that the Board failed to follow the GAC’s advice is straightforward: the ICANN Board followed the GAC’s advice to the letter. According to ICANN, the GAC did **not** advise of any member concerns regarding the “.persiangulf” gTLD application, and so the proper course was for the Board’s NGPC to allow Asia Green’s application to progress. The Durban Communiqué expressly stated that the GAC had “*finalised its consideration ... and does not object to [the “.persiangulf” application] proceeding*”, without advising of any concerns whatsoever. ICANN emphasizes that the Board did not make a decision to approve the “.persiangulf application” based on the

⁶⁵ Supplementary IRP Request, ¶ 23-26; Reply to IRP Request, ¶¶ 16-18.

⁶⁶ *Ibid.*, Exh. S-5; Final Declaration, *DotConnectAfrica Trust v ICANN*, 9 July 2015, ¶ 113.

GAC's advice, but simply resolved to allow the ICANN staff to continue to process the application.⁶⁷

117. ICANN relies on GAC Operating Principles 51 to argue that the Durban Minutes, to the extent those Minutes say anything more than the Durban Communiqué, are not an official statement of GAC advice to the ICANN Board.⁶⁸ Nor were the Durban Minutes approved or posted until November 2013, and so they were not even before the Board for consideration at its meeting on 10 September 2013 to review and pass resolutions on the Durban Communiqué and Scorecard items. Further, in ICANN's view, the Durban Minutes are consistent with the Dublin Communiqué in reporting that there was no advice against the “.persiangulf” application proceeding. Comments made by individual GAC members at the Durban meeting, recorded in the Minutes, do not constitute GAC advice triggering Board duties under Module 3 of the *Guidebook*.⁶⁹
118. As for the GCC's alternative argument based on ICANN's failure to meet its mission and core value standards, ICANN denies both the theory and the facts. In ICANN's view, the Board independently evaluated the “.persiangulf” gTLD application, in an open and transparent fashion, as evidenced by: the posting of the Durban Communiqué and subsequent public comment period; the Board meetings to determine actions based on the GAC's advice in the Durban Communiqué, with a public record of the discussion on each item in the Durban Scorecard responding to the GAC's advice; and a unanimous vote adopting resolutions based on the Scorecard, again publicly posted. Nor can it be inferred that the Board failed to consider ICANN's core values simply because the Board did not explicitly state how it did so; it would be impossible for the Board to spell this out for the hundreds of resolutions it must manage each year.⁷⁰ Further, the Bylaws do not oblige the Board to accept any and all advice from the GAC; Article XI, 2.1.j of the Bylaws only requires the Board to take GAC advice into account and, if the advice is not followed, to provide reasons for not doing so.

⁶⁷ Response to IRP Request, ¶ 21.

⁶⁸ Ibid., ¶ 10, Exh. R-25.

⁶⁹ Reply to IRP Request, ¶ 9.

⁷⁰ Response to IRP Request, ¶¶ 13-20.

119. ICANN argues that the IRP Panel’s Declaration in the *DotConnectAfrica* case is inapposite, because the GAC provided Consensus Advice against the string proceeding. Similarly, as for the alleged inconsistent treatment of Asia Green’s applications for “.halal” and “.islam”, ICANN points out that in those cases, unlike the instant case, the GAC did in fact express concerns to the Board base on community concerns about the obvious religious sensitivities.
120. In sum, the ICANN Board’s NGPC considered and followed the GAC’s advice exactly as it was supposed to, fully consistently with the ICANN Articles and Bylaws.
121. Should the Tribunal find in the GCC’s favor, ICANN contests the GCC’s request for a declaration ordering ICANN to refrain from signing the registry agreement with Asia Green or any other entity. ICANN argues that, pursuant to Article IV, Section 3, Paragraph 3.11, of the Bylaws, an IRP Panel is limited to stating its opinion by “*declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws*” and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.

E. The IRP Panel’s Analysis and Decision

122. We turn first to the GCC’s main submission that the ICANN Board failed to follow the GAC’s advice from the Durban meeting, as well as the Guidebook, in deciding on 10 September 2013 to allow the “.persiangulf” gTLD to proceed in the application process.
123. This turns on whether the GAC did in fact properly provide post-Durban advice to the Board. We find this to be a difficult question, which overlaps with the GCC’s alternative submission concerning ICANN’s overall compliance with its mission and core values under the Bylaws and Articles.
124. To recall, Module 3.1 of the Guidebook envisions three forms of GAC advice to the Board: (a) Consensus GAC Advice that an application should **not** proceed, creating a strong presumption of non-approval; (b) the expression of **concerns** within the GAC, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those

concerns and then give reasons for its decision; or (c) advice that the application should not proceed unless **remediated**. It is undisputed, and we agree, that the GAC did not issue Consensus GAC Advice against the “.persiangulf” application or suggest remediation, leaving only the second form of advice – the expression of **concerns**, meant to prompt interaction with the Board.

125. If, as ICANN argues, only the Durban Communiqué could provide GAC advice to the Board, then the GAC clearly did **not** express concerns about the “.persiangulf” gTLD application. That Communiqué stated no more than this: “*The GAC has finalised its consideration of [the application] and does not object to [it] proceeding*”. This underlies ICANN’s main defense that the ICANN Board followed the GAC’s advice to the letter, by resolving to allow Asia Green’s application to proceed.
126. We find ICANN’s defense to be unduly formalistic and simplistic.
127. As we see it, the GAC sent a missive to the ICANN Board that fell outside all three permissible forms for its advice. The GAC’s statement in the Durban Communiqué that the GAC “*does not object*” to the application reads like consensus GAC advice that the application **should** proceed, or at very least non-consensus advice that the application should proceed. Neither form of advice is consistent with Module 3.1 of the Guidelines. Yet the ICANN Board proceeded to resolve to allow the application to proceed, as a routine matter, based on the Durban Communiqué.
128. Some of the fault for the outcome falls on the GAC, for not following its own principles. In particular, GAC Operating Principle 47 provides that the GAC is to work on the basis of consensus, and “[w]here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board”.⁷¹ The GAC chair clearly did not do so. Mr. Al Marzouqi testified to the views he expressed at the Durban meeting and that consensus proved impossible, which testimony stands unrebutted by ICANN here (quoted in paragraph 31 above):

⁷¹ ICANN Response to IRP Request, Exh. R-25.

5. *I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC's opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because "Persian Gulf" is a disputed name. A substantial number of GAC members in attendance shared these concerns.*

6. *Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the "Persian Gulf" name, and Iran's GAC representative obviously does not share the other GAC members' concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson pulled me to the side to express her frustration that GAC could not reach a consensus.*

129. If the GAC had properly relayed these serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board. The directive of Module 3.1, which is a **procedural** protection for opponents to gTLD applications, bears emphasis:

The GAC advises ICANN that there are concerns about a particular application "dot.example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

130. It is difficult to accept that ICANN's core values of transparency and fairness are met, where one GAC member can not only block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue.
131. In any event, the IRP Panel is not convinced that just because the GAC failed to express the GCC's concerns (made in their role as GAC members) in the Durban Communiqué that the Board did not need to consider these concerns. The record reveals not only substantial sensitivity with respect to Asia Green's ".persiangulf" application, but also general discord around religious or culturally tinged geographic gTLD names. In addition to the Durban Minutes, the pending Community Objection, and public awareness of the sensitivities of the "Persian Gulf"- "Arabian Gulf" naming dispute, the Durban Communiqué itself – on which ICANN relies so heavily here – contained an express recommendation that "ICANN collaborate with the GAC in refining, for future rounds, the Applicant Guidebook with

regard to the protection of terms with national, cultural, geographic and religious significance".⁷² These materials and this general knowledge could and should have come into play, if not as a matter of following GAC advice then as part of the Board's responsibility to fulfil ICANN's mission and core values.

132. Although it is not necessary to the outcome of this IRP, the Panel cannot accept ICANN's argument that the GAC may provide official advice to the Board only through a Communiqué. It is Principle 46 of the GAC's Operating Principles that provides that "[a]dvice from the GAC to the ICANN Board shall be communicated through the Chair", while Principle 51 speaks only of the Chair's authority to "issue a communiqué to the Media" following a meeting.
133. Even if, as a matter of practice, ICANN is correct that the Durban Minutes were not a form of official communication from the GAC, the Minutes do express serious GAC member concerns and confirm that there was, in fact, no consensus in Durban in favor of the ".persiangulf" gTLD application proceeding. As quoted in paragraph 32 above, those Minutes recorded as follows:

The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was clear that there would not be consensus of an objection regarding this string and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. (Emphasis added.)

Given this language, we cannot accept ICANN's argument that the Durban Minutes are consistent with the Durban Communiqué, which succinctly stated that the GCC "*does not object to [the application] proceeding*", thereby creating the impression that GAC members took the position – whether by consensus or not – that the application **should** proceed.

134. It is difficult to accept that the Board was not obliged to consider the concerns expressed in the Durban Minutes if it had access to the Minutes. If it was not given the Minutes, it is equally difficult to accept that the Board – as part of basic due diligence – would not have

⁷² Request for IRP, Annex 24, Durban Communiqué, para. 7.

asked for draft Minutes concerning GAC discussions of such a geo-politically charged application.

135. This failure of due diligence is compounded by the fact that, as noted by the NGPC itself in the Minutes of the critical 10 September 2013 meeting, the GCC's Community Objection was pending. The relevant Board resolution bears quoting again:

ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF. (Emphasis added.)

136. Yet there is no evidence or indication in the record that the NGPC bothered to consider the content of the Community Objection, before allowing the processing of the obviously controversial string application to proceed. Certainly, that the Expert Panelist – some three weeks later – dismissed the Community Objection cannot support the procedural propriety of the Board's decision on 10 September 2013 to allow the “.persiangulf” application to proceed.

137. In sum, ICANN may be correct that the Board followed all the routine steps of posting information about the application, meeting to review the application, and acting strictly on the basis of the Durban Communiqué and Scorecard items. The Board did post the Durban Communiqué on 1 August 2013 for public comment – but it contained only the one-line conclusion that the GAC had “finalised its consideration of the [“.persiangulf”] string, and does not object to its proceeding”. The Board did meet on 13 August 2013 – but the only discussion was whether to respond to the Durban Communiqué advice by Scorecard. The Board did meet on 10 September 2013 to discuss each of the Durban Scorecard items, and did vote unanimously in favor of continuing to process the “.persiangulf” application – but the relevant entry on the Scorecard merely repeated the one-line Durban Communiqué reporting that the GAC “does not object” to the “.persiangulf” application proceeding. The Minutes of the Board meetings were publicly posted.

138. In the IRP Panel's assessment, these were empty steps. ICANN's insistence in its Response to the Supplementary IRP Request (at paragraph 2) and Rejoinder to IRP Request (at paragraph 10) is equally empty. At the end of the day, there is simply no

evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC’s serious concerns before resolving to allow the “.persiangulf” application to proceed. ICANN’s willingness to meet GCC representatives after the 10 September 2013 decision to allow the application to proceed was belated and could not cure or validate its failure to conduct due diligence and engage with the GCC before that uninformed decision.

139. If the Board had undertaken a modicum of due diligence and independent investigation, it would readily have learned about the GCC’s serious concerns as raised in the GAC meetings in Durban and in Beijing, and how and why the GAC failed to reach consensus in Durban against the “.persiangulf” application. The GCC may be right or wrong in submitting that it was Iran’s solitary support for the application in Durban that motivated the message in the Durban Communiqué. The correctness of the GCC’s position on this point is irrelevant in this IRP. The relevant issue is whether the Board’s decision to allow the “.persiangulf” application to proceed was consistent with the Bylaws and Articles.

140. While not binding upon this Panel, the IRP precedent that we find most helpful is the decision concerning the application by DotConnectAfrica Trust for the “.africa” string, in which the IRP Panel found that the actions and inactions of the ICANN Board were inconsistent with its Articles and Bylaws. In particular, the IRP Panel held that the ICANN Board had breached its transparency obligations by rotely adopting the GAC’s Consensus Advice not to proceed with that application. The Panel stated that it “*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust’s application*”.⁷³ Contrary to ICANN’s attempt to distinguish the DotConnectAfrica case, we find that ICANN’s transparency obligations arose here despite the absence of Consensus GAC Advice. Indeed, transparency and the related need for further due diligence were more compelling in this case, given the pending Community Objection concerning a sensitive application.

141. Overall, based on the submissions and evidence in the record, we are constrained to find that the Board passed a bare-bones resolution, based on a bare-bones GAC Communiqué

⁷³ Note 66, *supra*.

and Scorecard, to allow Asia Green's ".persiangulf" application to proceed, to virtually certain registration and operation. We can only regard the Board's routine treatment of the non-routine ".persiangulf" gTLD application to have been non-transparent, unfair and essentially oblivious to the well-known geo-political sensitivities associated with the name "Persian Gulf". This treatment consequently fell far short of the mission and core values enshrined in ICANN's Articles of Incorporation and Bylaws, specifically Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.

142. In this connection, we are sympathetic to ICANN's argument that the Board cannot be expected to spell out considerations going to mission and core values in every resolution passed on every gTLD application. However, our finding is not based on inferences from the lack of discussion about mission and core values in the Board's 10 September 2013 decision to allow the ".persiangulf" application to proceed. As noted, there was **no** discussion of **any** factors whatsoever in that decision. This cannot be reconciled with the requirement in Article 1, Section 2, of the Bylaws that ICANN "*exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values*".
143. In related vein, we are not here second-guessing the Board's assessment of a difficult application against the backdrop of its mission and core values. That is because, if nothing else, we have no evidence or indication of what, if anything, the Board **did** assess in taking its decision. Our role is to review the **decision-making process** of the Board, which here was virtually non-existent. By definition, core ICANN values of transparency and fairness were ignored.
144. Having made findings on the Board's duties to make decisions fairly and transparently, we do not need to make an additional finding on the GCC's allegation that the Board discriminated against the GCC, or failed to provide the GCC with consistent treatment, in failing to intervene to stop the ".persiangulf" application as it did with Asia Green's application for the ".halal" and ".islam" gTLDs, to which the GCC had also objected. We do note that it would seem mechanistic indeed for ICANN to justify the different treatment

of “.halal” and “.islam” on the basis that the GAC expressed member concerns about those strings based on community objections and religious sensitivity, when the GAC failed to relay similar member concerns about “.persiangulf”. This is despite the glaring fact that the Independent Expert reviewing the GCC’s Community Objections against all three strings dismissed them all on the same grounds.

145. In conclusion, turning to the IRP standard of review in Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws, we conclude that the ICANN Board failed to “*exercise due diligence and care in having a reasonable amount of facts in front of them*” before deciding, on 10 September 2013, to allow the “.persiangulf” application to proceed. We find, on the balance of probabilities on the basis of the Parties’ submissions and evidence, that this decision effectively was an unreasoned vote on an unreasoned Scoreboard entry reciting the one-line Durban Communiqué statement that the GAC “*does not object*” to the application proceeding. Under the circumstances, and by definition, the Board members could not have “*exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company*”, as they did not have the benefit of proper due diligence and all the necessary facts. This reflects Board action inconsistent with the Articles and Bylaws, contrary to Article IV, Section 3, Paragraph 4(c), of the ICANN Bylaws.
146. As a final matter, we do not accept ICANN’s position that we lack authority to include affirmative declaratory relief. Like the IRP Panel in the *DotConnectAfrica Trust* case, we consider that Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws does give us “*the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act*” inconsistently with its Articles of Incorporation and Bylaws.⁷⁴ That Bylaw bears repeating:

*The IRP Panel shall have the authority to recommend that the Board stay any action or decision or that the Board take any interim action, until such time as the Board reviews and acts upon the **opinion** of the IRP. (Emphasis added.)*

147. Recalling that, under Article IV, Section 3, Paragraph 2, of the Bylaws, the IRP process is designed to provide a remedy for any person “*materially affected*” by suffering injury or harm causally connected to the relevant Board violation, we agree with the

⁷⁴ Ibid, ¶ 126.

DotConnectAfrica Trust IRP Panel that the “*language and spirit*” of Paragraph 11(d) empowers us to recommend redress for such injury or harm.⁷⁵ The words “*shall*” and “*opinion*” reflect that, similar to any decision maker, the Panel may and should recommend affirmative steps to be taken by the Board to correct the consequences of actions it took inconsistent with the Bylaws and Articles of Incorporation. Here, given the harm caused to the GCC’s due process rights by the Board’s decision – taken without even basic due diligence despite known controversy – to allow Asia Green’s “.persiangulf” gTLD application to go forward, adequate redress for the GCC requires us to recommend not a stay of Asia Green’s application but the termination of any consideration of “.persiangulf” as a gTLD. The basic flaws underlying the Board’s decision cannot be undone with future dialogue. In recognition of ICANN’s core values of transparency and consistency, it would seem unfair, and could open the door to abuse, for ICANN to keep Asia Green’s application open despite the history. If the issues surrounding “.persiangulf” were not validly considered with the first application, the IRP Panel considers that any subsequent application process would subject all stakeholders to undue effort, time and expense.

IX. FIXING OF COSTS

148. The Parties disagree on whether the procedural rules governing this IRP include the ICANN Bylaws. This is potentially relevant because of differences in language between the costs sections of the Bylaws and the Supplementary Procedures, connected to the good faith pursuit of the cooperative engagement and conciliation processes.

149. Article 9 of the ICANN Supplementary Procedures provides:

The IRP shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties’ positions and their contribution to the public interest.

⁷⁵ Ibid, ¶ 128.

150. Article IV, Section 3, of the ICANN Bylaws provides:

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

18.... The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

151. The Parties agreed to postpone final submissions on costs, including on the question of whether Paragraphs 16 and 18 of Article IV, Section 3, of the ICANN Bylaws apply in this IRP.

152. As the IRP Panel has determined that the GCC is the prevailing party, no question arises as to the application of Paragraph 16 of Article IV, Section 3, of the ICANN Bylaws.

153. We will await further submissions from the Parties before allocating all or a percentage of the costs of the proceedings to the GCC.

X. DECLARATION

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

1. The action of the ICANN Board with respect to the application of Asia Green relating to the “.persiangulf” gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN. These are, in specific: Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.
2. Pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, the IRP Panel recommends that the ICANN Board take no further action on the “.persiangulf” gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the “.persiangulf” gTLD.

3. The GCC is the prevailing Party in this IRP.
4. The Parties are to file submissions on costs by 18 November 2016. Following those submissions, all or a percentage of costs will be allocated against ICANN in favor of the GCC.

This Partial Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Partial Declaration of this IRP Panel

<u>19 OCTOBER 2016</u>	<u>Lucy Reed</u>
Date	Lucy Reed, Panelist - Chair
<u>19 October 2016</u>	<u>[Signature]</u>
Date	Anibal Sabater, Panelist
<u>19 OCTOBER 2016</u>	<u>[Signature]</u>
Date	Albert Jan van den Berg, Panelist

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
Pursuant to the Bylaws of the Internet Corporation for Assigned Names and
Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the
Supplementary Procedures for ICANN Independent Review Process

Gulf Cooperation Council (GCC)))
Claimant))
and)	ICDR Case
Internet Corporation for Assigned Names)	No. 01-14-0002-1065
and Numbers (ICANN))	
Respondent)	

**FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL AS TO
COSTS**

Independent Review Panel

Lucy Reed, Chair
Anibal Sabater
Albert Jan van den Berg

I. INTRODUCTION

1. The Independent Review Panel, in our Partial Final Declaration of 19 October 2016 (“**Partial Declaration**”), declared the Claimant Gulf Cooperation Council (“**GCC**”) to be the prevailing Party. We found that the action of the Respondent Internet Corporation for Assigned Names and Numbers (“**ICANN**”) with respect to the application by Asia Green for the generic Top-Level-Domain name (“**gTLD**”) “.persiangulf” was inconsistent with several Articles of Incorporation and Bylaws of ICANN. We further recommended, pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, that the ICANN Board take no further action on the “.persiangulf” gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the “.persiangulf” gTLD. At the Parties’ request, we postponed final submissions and the decision as to costs.
2. This Final Declaration awards all costs to the GCC as the prevailing Party, for the reasons set forth below.

II. THE APPLICABLE STANDARD

3. Starting first with the applicable standard, it is undisputed that all costs of the Independent Review Process (“**IRP**”), which include the fees and expenses of the Panelists and the ICDR as the IRP Provider, are to be awarded to a prevailing claimant except in extraordinary circumstances, taking into account the reasonableness of the parties’ positions and their contribution to the public interest. This standard appears in both Article 11 of the ICANN Supplementary Procedures and Article IV, Section 3, paragraph 18 of the ICANN Bylaws.¹

Article 11 of the ICANN Supplementary Procedures provides:

¹ In extraordinary circumstances, Article 11 of the ICANN Supplementary Procedures envisions allocation of up to half of the total costs to the prevailing party while Article IV, Section 3, paragraph 18 of the ICANN Bylaws may limit that allocation to the IRP Provider administrative costs. Neither Party has argued for such a limitation here.

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

Article IV, Section 3, of the ICANN Bylaws provides, in relevant part:

18.... The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

4. The issue for decision, therefore, is whether the circumstances here are extraordinary and hence warrant allocating up to half of the total IRP process costs to the GCC despite its status as prevailing Party.

III. THE PARTIES' POSITIONS

A. The Claimants' Position

5. The GCC submits that no extraordinary circumstances exist. In short, the GCC argues that ICANN's position "*was anything but reasonable*" throughout its treatment of the ".persiangulf" application, citing the Panel's conclusion that ICANN's actions were "*unduly formalistic and simplistic*" (Partial Declaration, para. 126). Nor, argues the GCC, did ICANN's position contribute to the public interest, because the ICANN Board "*picked a side on a decades-long divisive Gulf naming dispute and its treatment of the .PERSIANGULF gTLD application was, as this Panel declared, 'essentially oblivious to the well-known geo-political sensitivities associated with that dispute'*" (Partial Declaration, para. 141).

B. The Respondent's Position

6. ICANN submits that the GCC should bear its own costs because this IRP was extraordinary, for three main reasons. First, both sides presented “*reasonable and thorough positions on novel issues of geopolitical sensitivity*”. Second, the Parties’ briefing of these issues served the public interest. Third, the GCC failed to engage in ICANN’s Cooperative Engagement Process before initiating the IRP, and so failed to narrow the issues and reduce the costs.

IV. THE PANEL’S ANALYSIS AND DECISION

7. Having considered the Parties’ submissions against the background of the overall record and the Partial Declaration, the Panel cannot find any extraordinary circumstance warranting deviation from the undisputed standard that all IRP process costs go to the GCC as the prevailing Party. As this conclusion is based on the unique circumstances of this case, we did not find the IRP precedents cited by the Parties – also based on unique circumstances – helpful. Our analysis can be brief.
8. First, we weigh the reasonableness criterion in the GCC’s favour. While ICANN is correct that both sides put forth thorough reasons for their positions, we state and explain in our Partial Declaration why the ICANN Board did not act reasonably in allowing the “.persiangulf” application to proceed without at least entering into a dialogue with the Government Advisory Council to discuss member concerns. We found “*simply no evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC’s serious concerns*” (Partial Declaration, para. 138) and, absent any independent investigation, the only possible conclusion was that the ICANN Board’s position was “*simplistic and formalistic*” (Partial Declaration, para. 126) rather than reasonable.
9. Second, we do not consider that the public interest criteria favors either side’s position in relation to costs. The GCC is correct that we found ICANN to be “*essentially oblivious to the well-known geo-political sensitivities associated with the name ‘Persian Gulf’*”

(Partial Declaration, para. 141). However, it is important to recall that our mandate was to review the Board's process and not the merits of the “.persiangulf” application. The Parties' agreement that the geopolitical issues associated with “Persian Gulf” are themselves extraordinary does not make the ICANN Board process issues extraordinary. We do not see that the GCC contributed to the broader public interest by prevailing in this process review or that the ICANN Board failed to benefit the public in taking the stance it took. The public interest factor, to us, is neutral.

10. This is not the case with ICANN's third argument, which faults the GCC for not first invoking the Cooperative Engagement Process and thereby narrowing issues and reducing costs. In this situation where ICANN is not the prevailing Party as addressed in the second paragraph of Article 11 of the ICANN Supplementary Procedures, it is unclear whether this argument goes to the reasonableness or public interest factor, but the outcome would be the same. In our jurisdictional analysis in the Partial Declaration, we found that “*ICANN explicitly and implicitly cooperated in a shadow conciliation process*” (Partial Declaration, para. 87), which obviously proved unsuccessful. There is no reason to believe that a formal Cooperative Engagement Process would have been any more successful than this informal conciliation process proved to be, or that it would have reduced the GCC's ultimate costs.
11. In sum, in the absence of any extraordinary circumstances, the GCC is entitled to reimbursement of its full costs in relation to the IRP process. This includes the administrative expenses of the ICDR, the Independent Review Panel panelists' fees and expenses, and the emergency IRP panelist's fees and expenses. ICANN did not contest the GCC's claim for the fees and expenses of the emergency IRP panelist in addition to this Panel's fees and expenses and the ICDR administrative expenses.
12. As per the last sentence of Article IV, Section 3, paragraph 18 of the ICANN Bylaws, each Party shall bear its own expenses, including legal representation fees.

V. DECLARATION AS TO COSTS

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

1. There are no extraordinary circumstances to justify allocating less than full costs to the Claimant GCC as the prevailing Party, under Article 11 of the ICANN Supplementary Procedure and Article IV, Section 3, paragraph 18 of the ICANN Bylaws.
2. The Respondent ICANN is to bear the totality of the GCC's costs in relation to the IRP process, including: (a) the ICDR administrative expenses of \$7,500.00; (b) the Independent Review Panel panelists' fees and expenses of \$ 150,273.30; and (c) the emergency IRP panelist's fees and expenses of \$50,575.00. Accordingly, ICANN shall reimburse the GCC the sum of \$107,924.16 upon demonstration by GCC that these incurred costs have been paid.
3. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Final Declaration of this IRP Panel.

15 December 2016

Date



Lucy Reed, Panelist – Chair

15 December 2016

Date



Anibal Sabater, Panelist

15 December 2016

Date



Albert Jan van den Berg, Panelist

REFERENCE MATERIALS – BOARD SUBMISSION NO. 2018-03-15-2c

TITLE: **Consideration of the Asia Green IT System v. ICANN Independent Review Process Final Declaration**

The following attachment is relevant to the Board’s consideration of the Panel’s Final Declaration in the Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (AGIT) vs. ICANN Independent Review Process (IRP):

- Attachment A is the Panel’s [Final Declaration](#) issued on 30 November 2017.

Other Relevant Materials:

The documents submitted during the course of the AGIT IRP are available at:

<https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en>.

Governmental Advisory Committee (GAC) Early Warnings against the .HALAL and .ISLAM applications, issued on 20 November 2012, are available at:

- <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197890/Halal-AE-60793.pdf>
- <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197891/Islam-AE-23450.pdf>
- <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197987/Halal-IN-60793.pdf>
- <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197989/Islam-IN-23459.pdf>

GAC Beijing Communiqué is available at:

<https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>.

New gTLD Program Committee (NGPC) Resolution 2013.06.04.NG01 is available at:

<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en>.

Letters from entities expressing concern regarding AGIT's applications for .HALAL and .ISLAM:

- 25 July 2013 letter from the State of Kuwait to ICANN, available at: <https://www.icann.org/en/system/files/correspondence/al-qattan-to-icann-icc-25jul13-en.pdf>.
- 4 September 2013 letter from the Lebanese GAC representative to the NGPC Chair, available at: <https://www.icann.org/en/system/files/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf>.
- 4 November 2013 letter from the Secretary General of the Organisation of Islamic Cooperation (OIC) to the GAC Chair, available at: <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-11nov13-en.pdf>.
- 24 December 2013 letter from the Ministry of Communication and Information Technology of Indonesia to the NGPC Chair, available at: <https://www.icann.org/en/system/files/correspondence/iskandar-to-chalaby-24dec13-en.pdf>.

International Centre for Expertise of the International Chamber of Commerce (ICC) expert determinations on 24 October 2013 that the UAE's Community Objections against the .HALAL and .ISLAM applications did not prevail are available at:

<https://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-2131-60793-en.pdf> and <https://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-2130-23450-en.pdf>.

GAC Buenos Aires Communiqué is available at:

<https://www.icann.org/en/system/files/correspondence/gac-to-board-20nov13-en.pdf>.

11 November 2013 letter from the ICANN Board Chair to the GAC Chair is available at:

<https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-11nov13-en.pdf>.

29 November 2013 letter from the GAC Chair to the ICANN Board Chair is available at:

<https://www.icann.org/en/system/files/correspondence/dryden-to-crocker-29nov13-en.pdf>.

4 December 2013 letter from AGIT to the ICANN Board Chair is available at:

<https://www.icann.org/en/system/files/correspondence/abbasnia-to-crocker-04dec13-en.pdf>.

19 December 2013 letter from the OIC to the ICANN Board Chair is available at:

<https://www.icann.org/en/system/files/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf>.

30 December 2013 letter from AGIT to the ICANN Board Chair is available at:

<https://www.icann.org/en/system/files/correspondence/abbasnia-to-crocker-30dec13-en.pdf>.

NGPC Resolution 2014.02.05.NG01 is available at: <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en#1.a>.

7 February 2014 letter from the ICANN Board Chair to AGIT is available at:

<https://www.icann.org/en/system/files/correspondence/crocker-to-abbasnia-07feb14-en.pdf>.

Submitted by: Amy Stathos, Deputy General Counsel

Date Noted: 27 February 2018

Email: amy.stathos@icann.org

1.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PROCESS
ICDR CASE NO. 01-15-0005-9838

In the Matter of an Independent Review Process

Between:

ASIA GREEN IT SYSTEM
BILGISAYAR SAN. VE TIC. LTD. STI., ("AGIT")
Claimant

Vs.

INTERNET CORPORATION for ASSIGNED
NAMES AND NUMBERS ("ICANN")
Respondent

FINAL DECLARATION

Independent Review Process Panel:

Calvin Hamilton, FCI Arb (Chair)

Honourable William Cahill (Ret.)

Klaus Reichert SC

PROCEDURAL HISTORY

2. The relevant procedural history of this Independent Review Process ("IRP") is set out in the following paragraphs. The Panel has only recorded those matters which it considers, in its appreciation of the file of this IRP, necessary for this Final Declaration.
3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: Mike Robenbaugh
Robenbaugh Law
548 Market Street (Box No 55819)
San Francisco, CA 94104

Respondent: Eric Enson, Jeffrey A. LeVee, Kelly Ozurovich
Jones Day
555 South Flower Street 50th Floor
Los Angeles, CA 90071

4. The authority for the IRP is found at Article IV, Section 3 of the ICANN Bylaws. The IRP Panel is charged with “declaring whether the Board has acted consistently with the Provision of ICANN’s Articles of Incorporation and Bylaws.”
5. The applicable procedural rules are the International Centre for Dispute Resolution’s (ICDR) International Dispute Resolution Procedures, as amended and in effect as of 1st June 2014, as augmented by ICANN’s Supplementary Procedures, as amended and in effect as of 2011.
6. On 7th February 2014, ICANN’s chairman informed AGIT that, following the New gTLD (“gTLD”) Programme Committee (“NGPC”) decision and subsequent Resolution made on 5th February 2014, “the NGPC will not address the applications further until such time as the noted conflicts have been resolved”.¹ AGIT submit that from this point, their applications were “On Hold”.²
7. On 26th February 2014, AGIT filed a Request for Reconsideration with ICANN’s Board Governance Committee (“BGC”). AGIT’s request was summarily dismissed by the BGC on 13th March 2014, and this decision was accepted by the NGPC.³
8. On 21st February 2014, AGIT requested that ICANN engage in a “Cooperative Engagement Process” in accordance with the Bylaws of ICANN.⁴ The Cooperative Engagement Process was terminated on 13th November 2015 and no resolution was reached.
9. AGIT submitted a Request for Independent Review Process (“IRP Request”) on 16th December 2015, which ICANN responded to on 1st February 2016. AGIT submitted a supplemental brief on 6th January 2017, which ICANN responded to on 3rd February 2017.

¹ See Annex 12 I

² This status was confirmed by Mr Enson in paras 13 – 25, pg 95 – Telephonic Hearing

³ See Annex 14

⁴ S3, Article IV, ICANN Bylaws

10. A preparatory conference call was held on 19th April 2016 during which a procedural calendar was agreed upon (Procedural Order No.1).
11. Pursuant to Procedural Order No. 1, AGIT submitted their ‘Observations on the Scope of Panel Authority’ on 3rd May 2016, which ICANN responded to on 13th May 2016.
12. With respect to document requests, pursuant to Procedural Order No. 1, AGIT were required to submit their request for document production on 3rd May 2016. ICANN were to answer by 13th May and, if appropriate, were to both request documents and object to AGIT’s request. On 23rd May 2016, AGIT were to both reply to ICANN’s objection, and file their own objection against ICANN’s request if appropriate. ICANN were to answer AGIT’s objection by 2nd June 2016. The 2nd June 2016 was set for ICANN’s document production, and 13th June 2016 for AGIT. The issue of document disclosure was eventually resolved by the parties themselves with little involvement by the Panel.
12. A telephonic hearing took place on 4th May 2017. Present for the hearing were the IRP Panel (Calvin Hamilton (Chair), Honourable William Cahill, Klaus Reichert SC), Mike Rodenbaugh for AGIT (“the Claimant”), Eric Enson for ICANN (“the Respondent”). Amy Stathos and Casandra Fure were also present on behalf of the Respondent. The hearing was reported by Jana J. Bommarito.

PANEL AUTHORITY

13. The authority of this Panel is set out in the following paragraphs.
14. Article IV, Section 3.4 ICANN Articles of Incorporation and Bylaws:

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a) Did the Board act without conflict of interest in taking its decision?;

- b) Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c) Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

15. As articulated by the IRP Panel in *Merck KGaA v ICANN*⁵ and as stipulated by the parties in this IRP:

“The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for comparison requires careful assessment of the action itself rather than its characterisation by either the complainant or ICANN. The Panel, of course, does take careful note of the characterisations that are advanced by the Claimant and ICANN.

As regards the substantive object of the comparison exercise, namely, was there consistency as between the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit in focusing on three specific elements. The phrase “defined standard of review” undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word “consistent” as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.⁶”

FACTS OF THE CASE

16. The salient facts are set out in the following paragraphs.

17. ICANN is a non-profit, multi-stakeholder organisation incorporated in California, United States of America. It was established in 1998, and is charged with registering and administering both top and second level domain names. ICANN operates pursuant to its Articles of Incorporation and Bylaws.

⁵ International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604

⁶ *Merck KGaA v ICANN* International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604IRP Final Declaration Paras 16-18

18. From 2004-2011, the Generic Names Supporting Organisation (“GNSO”) of ICANN developed a programme to introduce new top-level domain names into the domain name system (gTLD). An applicant guidebook (“Guidebook”) was developed by ICANN in consultation with stakeholders, detailing a “transparent and predictable criteria” for applications.⁷

19. The Guidebook includes detailed procedures for applying for and objecting to the issuance of top level domain names. ICANN aimed to create “an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”⁸ Applicants must provide detailed responses to 50 questions, which seek to establish the competency of applicant. The objection process includes an Independent Objector (“IO”) and the prospect of an objection by one or more of the Governments that make up ICANN’s Government Advisory Committee (“GAC”). The IO can lodge an objection, which ordinarily results in the appointment of one or more independent experts to consider and determine the merits of the objection.⁹

20. In addition to the IO and GAC formal objections, GAC members are permitted to file an “Early Warning Notice”, detailing concerns about applications.¹⁰ Early Warning Notices simply act to place an applicant on notice. It is not a formal objection, however it “raises the likelihood that the application could be the subject of GAC Advice on New gTLDs or of a formal objection at a later stage in the process.”¹¹ Concerning GAC Advice, in situations where members of the GAC provide “consensus” advice against an application, a strong presumption is created against that application. Should the Board of ICANN decide to act contrary to this advice, they must provide a rationale for doing so.¹² Concerning formal objections, the objection must fall within one of four specified grounds - String Confusion, Legal Rights, Limited Public Interest or Community Objection.¹³ In determining whether an objector has standing to object, they must satisfy one of these four identified Objection Grounds which are dependent of the ground being

⁷ Recommendation One, S.1.1.5, ICANN, gTLD Final Applicant Guidebook.

⁸ Preamble, ‘New gTLD Program Background’ gTLD Applicant Guidebook Version 2012-06-04

⁹ S3.2.5 Applicant Guidebook

¹⁰ S1.1.2.4 Applicant Guidebook

¹¹ Ibid (1.1.2.4)

¹² S1.1.2.7 Applicant Guidebook

¹³ S3.2.1 Grounds for Objection

used.¹⁴ In addition, a Limited Public Interest Objection comment process¹⁵ is available, which allows for the “participation of many stakeholder groups in a public discussion.”¹⁶

21. In early 2012, Asia Green IT System (“AGIT”), a Turkish cooperation, submitted two applications to ICANN under the new gTLD programme to operate the .ISLAM and .HALAL top-level domains. Following their applications, Early Warning Notices were submitted by the United Arab Emirates (UAE) and India¹⁷ in November 2012, to which AGIT filed formal responses.¹⁸ Within their responses, AGIT included a proposed Governance Model and Public Interest Commitments (“PICs”), which it hoped would alleviate the concerns raised in the Early Warning Notices.¹⁹

22. In addition, the IO, Dr Pellet, was instructed to evaluate the applications. The UAE then filed two formal objections under the grounds of a Community Objection against each of the applications. The Applicant Guidebook details those with standing to submit a Community Objections as “(e)stablished institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection.”²⁰ Following this, Mr Cremades, a Panellist from the International Chamber of Commerce, was instructed to consider the objections.

23. On 11th April 2013, the GAC, in accordance with the Applicant Guidebook,²¹ published a Communique to the ICANN Board following a meeting in Beijing to consider the two applications. The Communique noted:

“The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.”²²

¹⁴ See 3.2.2 Applicant Guidebook,

¹⁵ See telephonic pg 69 lines 20-25

¹⁶ See Guidebook I.1.2.3

¹⁷ India did not post formal objections following their Early Warning Notices.

¹⁸ See Annex 6

¹⁹ Ibid - 6

²⁰ See 3.2.2.4

²¹ S3.1 Applicant Guidebook

²² See full text of Communique at <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

24. Following this, a scorecard system was produced to assist in the evaluation of the applications, and a subsequent meeting took place in Durban in July 2013.
25. On 25th July 2013, both Kuwait and the Gulf Cooperation Council (“GCC”) expressed objections to the applications by AGIT and support of the Community Objection by the UAE.²³
26. On 30th August 2013, AGIT were informed that both the .ISLAM and the .HALAL applications were accepted by ICANN’s expert evaluation Panels,²⁴ and that their applications had passed Initial Evaluation²⁵.
27. On 4th September 2013, Lebanon expressed objections to the applications by AGIT and support of the Community Objection by the UAE.
28. On 24th October 2013, Mr Cremades published a report evaluating the Community Objection filed by the UAE against both applications. In his decision, Mr Cremades found there was neither substantial opposition to the applications, nor would the applications create a “likelihood of any material detriment to the rights or legitimate interests of a significant portion of the relevant community.”²⁶
29. On 4th November 2013, a letter was received by the ICANN Board, and subsequently sent to the GAC, from the Organisation of Islamic Council (“OIC”). The letter contained a formal objection to the use of top-level domain names by “any entity not representing the collective voice of the Muslim people.”²⁷ Following receipt of this letter, dialogue was recommended and a meeting held in Buenos Aires. It is submitted by ICANN that the letter of objection by the OIC was received as part of their “public comment” process,²⁸ which allows for the “participation of many stakeholder groups in a public discussion”²⁹ thereby giving a platform to interested parties outside of the formal objection process. Time constraints are provided for the consideration of comments during the Initial

²³ See telephonic pg 67 Lines 6-1

²⁴ See Annex 2

²⁵ Ibid

²⁶ See Annex 8

²⁷ See pg10 AGIT’s request for an IRP wherein they note: “in November 2013, the Chair of the ICANN Board forwarded to the GAC Chair a letter from the OIC which requested the GAC to “kindly consider this letter as an official opposition of the Member States of the OIC ... [to] use of these [TLDs] by any entity not representing the collective voice of the Muslim people.”

²⁸ See telephonic pg 69 lines 20-25

²⁹ See Guidebook 1.1.2.3 and telephonic g 61 lines 10 - 16

Evaluation review (the formal objection period runs for seven months following the posting of applications³⁰), however the Guidebook allows for comments received after this period to be “stored and available (along with comments received during the period) for other considerations, such as the dispute resolution process, as described below.”³¹

30. On 19 December 2013, the OIC informed ICANN that a unanimous resolution had been adopted by the 57 Member States of the OIC objecting to the operation of .ISLAM and .HALAL by “any entity not reflecting the collective voice of Muslim people”.³² The Panel notes that this resolution is not amongst the materials placed before it.

31. On 24th December 2013, the Government of Indonesia filed its objection with ICANN to both of the applications.

32. On 5th February 2014, the NGPC applied the objections raised to the scorecard, and on 7th February 2014, AGIT were informed “the NGPC will not address the applications further until such time as the noted conflicts have been resolved.”³³ The letter informed AGIT that two IGOs and two Government representatives (the GCC, the OIC, Lebanon and Indonesia) had indicated conflicts with AGIT’s Governance model and the PIC.

33. The task of this Panel is to determine whether ICANN have acted in a manner consistent with ICANN’s Articles of Incorporation, Bylaws and Guidebook.

PROVISIONS OF ICANN’S ARTICLES OF INCORPORATION, BYLAWS AND THE APPLICANT GUIDEBOOK

34. The salient provisions of these governance documents are listed below:

35. Article 4, Articles of Incorporation

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and

³⁰ Guidebook 1.1.2.6

³¹ Ibid

³² See telephonic pg 70 lines 8-13

³³ See Annex 12

consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

36. S3 (4) Article IV Bylaws and Rule 8 of ICANN Supplementary (Independent Review of Board Actions)

The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. *Did the Board act without conflict of interest in taking its decision?*
- b. *Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

37. S2 Article I Bylaws (Core Values)

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- a. *Core Value 3*
- b. *To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- c. *Core Value 7*
- d. *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- e. *Core Value 8*
- f. *Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- g. *Core Value 9*
- h. *Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*

38. Article II, Section 2 (3) Bylaws (Non-Discriminatory Treatment)

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

39. Article II, Section 2 (1) Bylaws (General Powers)

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors.

40. Article III, Section 3 (6) Bylaws (Notice and Comment on Policy Actions)

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

- i. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;*
- ii. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), prior to any action by the Board; and*
- iii. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.*

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.

41. Article VI, S 4 (6) Bylaws and Article I Supplemental Procedures

There shall be an omnibus standing Panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The Panelists shall serve for terms that are staggered to allow for continued review of the size of the Panel and the range of expertise. A Chair of the standing Panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing Panel. In the event that an omnibus standing Panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member Panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more Panelists, as required, from outside the omnibus standing Panel to augment the Panel members for that proceeding.

42. §1.1.5 Applicant Guidebook

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process (...)

a. Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider Panel that finds in favor of

the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD

43. §3.1 Applicant Guidebook

The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.³⁴

44. §3.1 (II) Applicant Guidebook

GAC Advice may take one of the following forms:

(...)

II. The GAC advises ICANN that there are concerns about a particular application “dot-example.” The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

45. §3.2 Applicant Guidebook

As described in section 3.1 above, ICANN’s Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

46. §5.1 Applicant Guidebook

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

³⁴ “May” no requirement to adhere to advice of experts, or indeed to appoint in the first place. Cf pg 21 AGIT Request for IRP

47. GNSO Recommendations:

ICANN GNSO, Final Report — Introduction of New Generic Top-Level Domains:³⁵

Recommendation No. 1: The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

Recommendation No. 9: There must be a clear and pre-published application process using objective and measurable criteria.

Recommendation No. 12: Dispute resolution and challenge processes must be established prior to the start of the process.

Principle G:

The String Process must not infringe on the applicant's freedom of expression rights that are protected under internationally recognised principles of law.

PARTIES' POSITIONS

48. Having set forth the procedural history, the relevant facts and the applicable provisions of ICANN's governing documents, the Panel now sets forth the issues raised by the parties.

POSITION OF THE CLAIMANT

49. AGIT seeks a declaration that the Board of ICANN acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its granting of an "On Hold" status to AGIT applications for .HALAL and .ISLAM. AGIT makes the following contentions, set out below.

50. ICANN consulted in secret with the GAC and Objectors regarding the delay or denial of AGIT's application, in violation of Core Values 7 and 9. Core Value 7 mandates open and transparent policy development that promote well informed decisions based on expert advice. Core Value 9 mandates ICANN to act promptly while, as part of the decision-making process, obtaining informed input from those entities most affected.

³⁵ See AGIT Request for IRP – pg 18

51. In particular, through meetings in Beijing and Durban, and via correspondence with the OIC:

Beijing meeting:

Only ICANN staff, executives and Board members were allowed in the room – Restricted to “Members Only”³⁶ (although this policy changed shortly afterwards) No minutes, transcripts or rationales from the meeting were released;

Durban meeting:

Closed meeting held with “some GAC representatives”. No transcript has ever been produced outside of the 32 minute recording.³⁷

52. No effort was made to reach out to AGIT to participate in the discussion or provide input. The meeting was only attended by a “few GAC members” without inviting or informing the entire GAC what took place, or informing AGIT, the public or the GNSO of what occurred at the meeting.

53. Despite requests, no Board member met with AGIT CEO/MD while in Durban.

54. ICANN held a number of meetings with the OIC, despite the untimely and undocumented procedure for further objections. AGIT were unable to obtain further information on these meetings.

55. ICANN failed to obtain informed input from either AGIT or the Objectors prior to reaching its 5th February 2014 resolution, in violation of Core Value 9.

56. ICANN violated Core Value 8 by failing to inform AGIT of the conflicts which it must resolve in order to progress from “On Hold” status.

57. ICANN have violated Core Values 3, 7 and 8, along with §3.1 of the Guidebook by deciding in a manner inconsistent with expert advice, and this action is discriminatory.

³⁶ Annex 20

³⁷ See telephonic pg 22 lines 22 – 25

58. ICANN have acted in a discriminatory manner, contrary to Article II, §2 (3) Bylaws (Non-Discriminatory Treatment) by differentiating between the treatment of .KOSHER/.SHIA with .HALAL/.ISLAM.
59. Under Module 3³⁸, the GAC were responsible for rejecting any applications which violated public interest. By the GAC failing to recommend rejection of AGIT's applications to the Board as per the Guidebook §3.1, they provided implicit consent to both applications. This should have been taken into account by the Board.
60. ICANN have violated §1.1.5 of the Guidebook by acting in a manner inconsistent with the scenarios laid down.
61. The non-disclosure by ICANN of requested documents under the Document Disclosure Policy ("DIDP") violates Core Values 7 and 8.
62. ICANN have violated Article 4, §3 (6) by failing to create a Standing Panel as required by their Bylaws.

POSITION OF THE RESPONDENT

63. ICANN disputes each of AGIT's contentions, and asserts that the Board did not violate the Articles of Incorporation, the Bylaws or the Guidebook.
64. ICANN refutes the accusation that secret consultations took place with GAC Objectors, specifically as regards the *Beijing Meeting*: the ICANN Board examined, discussed, evaluated and responded to the GAC's advice from the Beijing meeting. Meetings prior to mid-2013 were held with GAC members only, making the decision to hold the Beijing meeting with members-only routine.
65. Specifically as regards the *Durban Meeting*, neither the Articles of Incorporation, Bylaws nor the Guidebook mandate a full complement of GAC members or Board members to be present during such a meeting.
66. Neither the Articles of Incorporation, Bylaws nor the Guidebook mandate that members of the Board meet with an applicant on the applicant's request.

³⁸ See pg7 AGIT - Supplementary Brief

67. Specifically as regards *OIC correspondence* ICANN staff members' responsibilities include outreach and dialogue with stakeholders in the Middle East, which includes the OIC.
68. There is no evidence that any communications with the OIC influenced the Board's decision to place the applications on hold.
69. The Board not only fulfilled but exceeded its requirements under §3.1 (2) by:
- a. Entering into dialogue with concerned GAC members at the Durban meeting;
 - b. Reviewing correspondence from various Objectors;
 - c. Its use of the 5th February Scorecard; and
 - d. Communicating the rationale behind its decision in a letter to the Claimant, dated 7th February 2014, by informing the Claimant of the conflicts arising, the identities of the objectors, the nature of their objections and what the Claimant must do before the Board would resume consideration of the applications.
70. The Board will resume consideration of the .ISLAM and .HALAL applications once the conflicts noted have been resolved, however ICANN is not required to act as liaison between the Claimant and those who objected to its application.
71. New policy has not been created, rather the Board have followed §5.1 of the Guidebook in exercising their discretion to consider individual applications and whether they are in the best interests of the Internet community.
72. The Board is not mandated under either the Articles of Incorporation, Bylaws or Guidebook to follow expert opinion.
73. No discrimination has occurred with the granting of .KOSHER/.SHIA and .HALAL/.ISLAM. Any difference in treatment of the referenced applications was a result of different circumstances.
74. Scenario 4 contained in §1.1.5 Guidebook is not "any sort of promise by ICANN"³⁹, and instead provides scenarios by which an application may proceed. This provision does not mandate that an application must proceed.⁴⁰

³⁹ Supplementary Response by ICANN pg 22 para 50

75. ICANN staff are tasked with responding to document requests, not the ICANN Board. Board involvement takes place when a reconsideration request, seeking the Board's review of staff action regarding document disclosure, is requested by a Claimant. As a reconsideration request was not filed, no Board action was taken. An IRP is concerned only with Board actions. However, should ICANN's response to the DIDP request be subject to review by the IRP, ICANN submits that staff complied with "standards applicable to DIDP requests."⁴¹
76. The decision not to produce certain documents under the DIDP request but to do so under the IRP conforms to standards and processes in place.

STATEMENT OF REASONS

77. The Panel is of the view that in order to address the party's positions as posed in this IRP, the analysis utilised in the *Merck* declaration is instructive. Applying Article IV, §3.4 Articles of Incorporation and Bylaws, with, where relevant, consideration to the following questions:
- a. Did the Board act without conflict of interest when taking its decision?
 - b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?
 - c. Did the Board members exercise independent judgement in taking the decision, believed to be in the best interests of the company?

BEIJING MEETING:

ACTION: RELIANCE ON LIMITED OUTPUT FROM THE BEIJING MEETING

78. In order for the GAC to properly evaluate gTLD applications, geographic meetings are held in accordance with §3.1 Guidebook.
79. The GAC was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly in matters where there may be an

2. _____

⁴⁰ See telephonic pg. 97 lines 2-10 "These are simply 2 examples of ways in which applications may proceed. This is not intended it be an exhaustive list of possibilities."

⁴¹ Ibid pg 23 para 54

interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

80. The framework and structure for how these meetings are convened, minuted and disseminated are a matter of convention, outside of structured rules. Guidance can be taken from convention, noting from an interview held on 10th May 2014 between Heather Dryden, Head of the GAC with Brad White, ICANN Communications, that, although policy has now changed, previous GAC meetings were held through a 'closed format.'⁴² It is instructive that in May 2013, Heather Dryden confirmed that going forward, GAC meetings would be more open.⁴³

81. The sole output from the Beijing meeting was a Communique of 6 pages.⁴⁴ The only wording relating to the Claimants application consisted of 58 words, detailing concerns on 'religious sensitivity' of the gTLDs.⁴⁵ In addition, the Communique stated that the GAC members concerned were of the view that the applications should not proceed.⁴⁶ No more is said. Core Value 7 calls upon ICANN to employ "open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process". It is the opinion of the Panel that a 58 word output in this manner and language is insufficient to comply with the open and transparent requirements mandated by Core Value 7. Anyone not physically present at that meeting would have little idea, if any, beyond the general contours contained the Communique, as to what actually happened during the meeting nor what was said by any of the participants.

Did the Board act without a conflict of interest?

82. This is not applicable. There is no evidence of a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

⁴² See Annex 21 – Claimant's Supplemental Brief

⁴³ Ibid

⁴⁴ Excluding Annexes.

Full Communique available here: <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

⁴⁵ As quoted in para 23 above

⁴⁶ The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .ISLAM and .HALAL. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.

83. The closed nature and limited record of the regarding the Beijing meeting provides little in the way of ‘facts’ to the Board. Of the 6 page document produced by the GAC to the Board, only 58 words concerned the .HALAL and .ISLAM applications, utilising vague and non-descript terms. For the reasons set out in paragraph 81 above, any reliance on the Beijing Communique by the Board in making their decision would necessarily be to do so without a reasonable amount of facts.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

84. This is not applicable. There is no evidence of a lack of independence with regards the Beijing Communique and the manner in which the Board considered this document.

DURBAN MEETING:

ACTIONS: LIMITED OUTPUT FROM THE MEETING; INSUFFICIENT INVOLVEMENT BY GAC MEMBERS; INSUFFICIENT INVOLVEMENT BY ICANN BOARD; INSUFFICIENT INVOLVEMENT BY CLAIMANT

85. The meetings in Durban were held in July 2013, post the noted policy change⁴⁷ of employing a more open structure to GAC meetings. The Claimant has received a 32-minute audio recording of this meeting, however no Communique was issued.

86. The Guidebook, under §3.1, references the process of the GAC providing advice to the ICANN Board where objections exist to the gTLD application. It would appear eight Board members and ten GAC members were present.

87. The Claimant claims the limited number of GAC attendees at the Durban meeting to discuss the objections renders the advice insufficient to constitute “GAC Advice”. §3.1 does not specifically state what constitutes GAC Advice insofar as whether a full complement, majority, minority or affected parties need be present.

88. The Claimant claims that §3.1 should be interpreted using an *Expressio Unius* model in such that as other sections of the Guidebook and Bylaws use a restricted composition of the GAC, then any other reference automatically applies to the full GAC. For example:

⁴⁷ Para 71

§2.2.1.4 of the Guidebook states, with regard early warnings: “... *GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities.*” and

“... *GAC consensus is not required for a GAC Early Warning to be issued.*”

89. The argument that a full complement of GAC members need to be present in order to constitute GAC advice is flawed. There is no reference to quorum requirements in §3.1 and it is practical that only relevant and concerned members be in attendance.
90. Contrastingly, the Claimant did not reference the statement in Guidebook §3.1 which states the “... *GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors...*” This gives rise to an implication that more than the mere objectors should be present at a GAC advisory meeting.
91. The Claimant uses a number of emails in order to demonstrate disagreement with the manner in which the meeting was carried out. The emails range in date from 1st July 2013 – 12th July 2013, and the Claimant relies specifically on emails sent by Ray Plzak, member of the ICANN Board, between the 1st July 2013 and 10th July 2013, questioning the form in which the meeting was to take place.⁴⁸ These emails indicate that Mr Plzak had a number of questions and queries regarding the format of the meeting. Heather Dryden stated that this was to be “*a meeting available to the subset of Members in the GAC that has a direct interest in these strings.*”⁴⁹ Mr Plzak acknowledges in his 2nd July email “*The fact is that not all GAC members are either interested in all matters or participate in all discussions, or even attend discussions on all matters.*”⁵⁰
92. The Claimant claims that the full Board membership should have been present for the Durban meeting. However, it is the view of this Panel that neither the Bylaws nor the Guidebook mandate full Board attendance.
93. The Claimant claims that a breach of Core Values 7 and 9 occurred through the lack of involvement by the CEO/MD⁵¹ of Claimant during the meeting in Durban. The CEO/MD

⁴⁸ See Annex 22, Claimants Supplementary Annexes

⁴⁹ Annex 22 - Email dated 2nd July 2013

⁵⁰ Ibid

⁵¹ Please note that both titles are present in the 11th July email from Mehdi Abbasnia, and as such, both are used here.

of the Claimant company attempted to meet with ICANN Board members during the Durban meeting (annex 25). The CEO/MD emailed all ICANN Board members on 11th July but was unsuccessful in meeting with any Board members.

Did the Board act without a conflict of interest

94. Claimants claim that the reason for the reduced complement of Board members at the Durban and Beijing meetings was, in the end, to ensure the gTLD string was made available to a 3rd party during the next round of applications.

95. Furthermore, the meetings were deemed to have been organised and structured in a way that was outside of usual GAC and Board meetings. It was accepted that this was not a meeting of the GAC but rather a discussion for the board to understand the concerns of the GAC. The Panel finds on this record the Board did not have a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it

96. The Board is mandated under the Guidebook §3.1 to review advice from the GAC at such meetings in collaboration with additional advice it deems necessary. The Respondent claims that it was unnecessary to include members over and above those with an interest in the gTLD which may have provided more rounded advice.

97. It is the opinion of this Panel that, whilst a meeting with the CEO/MD of the Claimant company may have increased the volume of facts which the Board had in front of it, the lack of available Board members to meet with the Claimant's CEO/MD is not inconsistent with Core Values 7 or 9. The meeting requests were private matters, and therefore at the discretion of each party.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

98. Judgement involving the make-up of the meetings being only those who have an interest is based on the Guidebook, which states:

II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to

understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

99. The ICANN Board met with the GAC members who had an interest in .HALAL and .ISLAM in order to greater understand the concerns. There is no evidence that the reduced number of GAC members in attendance was not following the exercise of independent judgment.

ACTION: CONTINUED CONSULTATIONS WITH THE ORGANISATION OF ISLAMIC STATES (“OIC”)

100. There would appear to be a lack of openness and transparency with regards discussions with the OIC, in particular with regards alleged meetings which occurred via telephone on or around 29th October 2013⁵² and in November 2013 in Buenos Aires.⁵³ ICANN acknowledged through their Supplementary Response that that they are both unclear as to whether the meeting took place and unclear as to what was discussed beyond membership or failed community objections.⁵⁴ Whilst it is acknowledged that the OIC had lodged objections to the Claimant’s applications through the public comment process, it is the opinion of this Panel that such meetings, held with ICANN staff and not ICANN Board members, are not in breach of Core Value 7. ICANN staff do not hold decision making authority, and it is evidenced through Annex 28 that the OIC were advised of their obligations to follow ICANN procedure.⁵⁵ It is further noted that the members of staff which communicated with the OIC at this time were specifically tasked with outreach to the Middle East,⁵⁶ making such communications and meetings an expected element of such outreach.

Did the Board act without a conflict of interest

101. ICANN, in its Response to the Claimant’s request for an IRP, acknowledge that an outreach programme is operating with the Middle East, and with the OIC representing 57

⁵² See Claimant Supplementary Brief pg 5

⁵³ Ibid

⁵⁴ See para 21 ICANN’s Response to Claimant’s Supplementary Brief: “*Likewise, it is not clear that the meeting discussed in Annex 26 ever took place and, if it did, what was discussed beyond the OIC’s GAC membership or the OIC’s failed community objection against the Applications*”

⁵⁵ No. 129, Email from ICANN Senior Advisor – OIC Rep “asked the funny question whether the two strings could be delegated to the OIC. We told him never outside the process”.

⁵⁶ See ICANN Response to AGIT Request for IRP – pg 4.

Muslim states, consultations with the body throughout Claimant's application process were inevitable. ICANN have informed the Panel through their Supplementary Response that ICANN staff do not have decision making authority with respect to applications, and it is ICANN staff who were conducting the outreach. It is therefore the opinion of this Panel that the Board acted without a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

102. The content of the meetings between ICANN staff and the OIC is unclear. However, it is the remit of this IRP to consider Board actions, and it is the opinion of this Panel that the Board have exercised due diligence and care in light of a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

103. This Panel has no evidence of staff members passing on any information from the undocumented meetings discussed above to Board members. In light of the lack of evidence to the contrary, it is the view of this Panel that on this record, independent judgement was made.

ACTION: EXTENT OF INPUT OBTAINED FROM ENTITIES MOST AFFECTED

104. It is the opinion of the Panel that the numerous meetings and subsequent Communiqués demonstrate involvement by entities most affected in the context of the objectors, and therefore ICANN did not breach its obligation under Core Value 9. Core Value 9 mandates "acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected". Input was received by ICANN from objectors on numerous occasions, including and notably during the Durban meeting. Numerous communications have taken place between the GAC and the objectors, through both the Community Objection, subsequent support of the Objection and the public comment process. ICANN stated the following in their 7th February letter to the Claimant:

"... a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM. The Gulf Cooperation Council (25 July 2013: applications not supported by the community, applicants did not

consult the community; believe that sensitive TLDs like these should be managed and operated by the community itself through a neutral body such as the OIC); the Republic of Lebanon (4 September 2013: management and operation of these TLDs must be conducted by a neutral, nongovernmental multistakeholder group); the Organisation of Islamic Cooperation (19 December 2013: foreign ministers of 57 Muslim Member States supported a resolution opposing the strings; resolution was unanimously adopted); and the government of Indonesia (24 December 2013: strongly opposes approval of .islam) all voiced opposition to the AGIT applications... ”⁵⁷

Did the Board act without a conflict of interest?

105. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

106. Based on the lack of information provided by the Board of the ‘religious sensitivities’ or information on how the Governance model offered by the Claimant could be improved, amended or adapted, it is the view of this Panel that, based on this record, the Board did not exercise the appropriate due diligence and care, due to not having a reasonable amount of facts in front of it. Had the Board been in a position to elaborate on the religious sensitivities and subsequent amendments which could be made to ensure the Governance model of the Claimant would be sufficient, the Claimant would have been in an improved position with regards removing itself from the current “On Hold” position in which it finds itself.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

107. The lack of detailed content obtained from the meetings held with concerned GAC members, along with insufficient information on the revisions needed by the Claimant for their Governance model, coupled with the significant reliance placed on the views of the objectors leads this Panel to the view that the Board did not exercise independent judgement with regards the objectors. Independent judgement requires a reasonable

⁵⁷ See Para 37, Pg 16 ICANN’s response to AGIT’s Supplemental Brief

amount of facts to be placed before the decision maker. Without such a reasonable amount of facts, independent judgement cannot be achieved.

ACTION: PLACING THE CLAIMANT'S APPLICATIONS "ON HOLD" WITHOUT DOCUMENTED PROCEDURE FOR SUCH AN OCCURRENCE

108. The Claimants maintain that they were not informed as to which conflicts they were to resolve with the objectors, why they must do so, how they might do so, who will judge whether it has done so, by what criteria or following which schedule.⁵⁸ ICANN maintains that their behaviour and information provision went over and above that necessary when informing the Claimant.
109. It is the opinion of this Panel that the Claimant was expressly informed as to what conflicts they were to resolve through the letter dated 7th February 2014. Through this letter, the Claimant was informed which countries had raised objections through documented, dated letters, detailed over 2 paragraphs.⁵⁹ Although somewhat brief, the conflicts were identified. However, the manner in which the Claimants and objectors were to resolve such conflicts, ascertain whether this had been successfully completed, upon which timescale and adjudged by whom was not and is not clear. Whilst it is clear that the Board required conflicts to be resolved, the Claimant was left with little guidance or structure as to how to resolve the conflicts, and no information as to steps needed to proceed should the conflicts be resolved.
110. The Panel accepts the contention made by ICANN that it is not ICANN's responsibility to act as intermediary, however it is the opinion of this Panel that insufficient guidance is currently available as to the means and methods by which an "On Hold" applicant should proceed and the manner in which these efforts will be assessed. Without such guidance, and lacking detailed criteria, the applicant is left, at no doubt significant expense, to make attempts at resolution without any benchmark or guidance with which to work.
111. During the telephonic hearing, ICANN submitted that by placing the .HALAL and .ISLAM applications in an "On Hold" category, the Claimants were given an opportunity to work with the community and group which they sought to represent.⁶⁰ However, ICANN went on to acknowledge that there is no obligation on the Objectors to speak with

⁵⁸ See, for example, pg 10 AGIT Supplementary Response

⁵⁹ See Ibid

⁶⁰ Telephonic - pg 72 – 73 lines 13-25 and 1 - 7

the Claimant, and ICANN does not have the jurisdiction to require such communication takes place.⁶¹ ICANN stated that should this be the case, and the Claimant is unable to make progress with the Objectors, they should inform ICANN in “some official manner” and inform the Board. This statement, made by Mr Enson on behalf of ICANN, is unacceptably vague, and even at this late stage, fails to provide the Claimant with a structured means of addressing a potential lack of cooperation in resolving the conflicts noted. It is this absence of procedure and documented policy which concerns this Panel with regards the “On Hold” status. In addition, the Claimant has noted that “*there’s been no other applicant put on hold*”⁶² and this statement was not refuted by ICANN.

112. Core Value 8 mandates “making decisions by applying documented policies neutrally and objectively, with integrity and fairness”. There is a distinct lack of documented policy with regards the next steps required by the Claimant, and in particular how and when these steps will be assessed. Rather, it is unclear as to which or how many objectors have authority to even negotiate a resolution to the objections. Even if that were known, the Claimant is left entirely at the mercy of the Objectors, who may not agree to cooperate, may insist that unreasonable conditions be imposed on the Claimant or indeed any number of other potential unknown outcomes. The Guidebook provides for a detailed, clear, comprehensive and structured approach to applications, documenting policies and providing assistance with the application process. This does not mean that every application has an expectation of success, but rather that applicants know the “rules of the game” and exactly what the requirements for success are. However, the situation in which the Claimant finds itself does not feature in the Guidebook. It is the opinion of this Panel that this is a glaring omission, and should be rectified promptly. Without such a documented procedure, it is the view of this Panel that ICANN is acting in a manner which is inconsistent with Core Value 8.
113. The Claimant claims that by placing its application “On Hold”, ICANN has created a new policy, and by doing so without following documented procedure, inconsistency has occurred. The Panel agrees.
114. As discussed above, the Claimant argues that it was not informed as to what conflicts it must resolve with the Objectors, why it must do so, how it might do so, who will judge whether it has done so, and by what criteria or schedule.⁶³

⁶¹ Telephonic – pg 77 lines 16 - 25

⁶² Telephonic – pg 36 lines 19-25

⁶³ See, for example, pg 10 AGIT Supplementary Response

115. There are, therefore, two possible paths to consider with regards the “On Hold” status.
116. First, this is a new concept. A new norm has been created, which ICANN will have the discretion to apply to future applications, which in turn will have new policy creation implications as per the Bylaws.
117. Secondly, this is a one-off. Relevant only to the circumstances surrounding these two applications, in which case, the question of non-discrimination arises.
118. Based on the lack of previous use, and the positive light in which ICANN presented this “On Hold” status during the telephonic hearing (*“Judge Cahill, it’s a good question and I think it demonstrates what ICANN is doing here. And ICANN, rather than just denying the applications based on every Muslim country saying they don’t want this, the ICANN Board gave the Claimant the opportunity to work with the very community (...)”*)⁶⁴, this Panel are minded to consider this a new policy.
119. Placing the applicant on hold is markedly distinct from a ‘yes’ or ‘no’. Where a ‘yes’ is given, the Guidebook offers detailed procedure and policy to follow. When a ‘no’ is given, an application is refused. Both of these options follow clear and concise paths, which are prescribed and available. In contrast, the “On Hold” status is neither clear nor prescribed. One cannot easily predict the way in which such a status will be applied in the same way as they can a ‘yes’ or ‘no’. This is a very specific status, and one which requires greater clarification and explanation. It is for these reasons that the designation of these applications as “On Hold” is considered a new policy, created, without notice or authority, by ICANN.
120. Following the Bylaws, where a new policy is created, a structured procedure must be followed, and ICANN has failed to adhere to this obligation. In addition, with respect to Core Value 7, which calls for the employment of open and transparent policy development mechanisms, it is the opinion of this Panel that such openness and transparency with regards this policy development has not been forthcoming. The first opportunity which the Claimant had to learn of the new policy was when it was imposed upon them through the 7th February letter.

⁶⁴ Telephonic – Pg 72 lines 18 – 24

Did the Board act without a conflict of interest?

121. The Claimant contends that the decision to place the applications “On Hold”, without method or procedure which the Claimant could utilise to move its application forward, was done in order to allow a third party to submit a applications for these two TLDs. However ICANN staff have rebutted this contention, and no applications for .HALAL or .ISLAM have been accepted, some three or more years after the applications were placed on hold. Whilst questions surround the manner in which this policy has been implemented, it is the opinion of this Panel, on this record, that no conflict of interest has occurred.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

122. The decision to place the applications on hold, without foreseeing the need for a formalised mechanism to be in place under which applications placed in this category are to proceed, would indicate that the Board has not acted with sufficient facts in front of it. The Board could not have had a reasonable amount of facts in front of them pertaining to the operation of the on hold status, as such facts do not exist as yet. Had ICANN created a policy under which decisions such as this would operate and formulated a suitable framework, then the Panel could appreciate how the Board may have been acting with a reasonable amount of facts in order to make the decision to place the applications on hold. However, without such a procedure or mechanism in place to accompany the new policy, it is the view of this Panel that the Board has not exercised due diligence with regards this decision as the Board did not have a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

123. By the Respondent failing to foresee the need for or advance a formalised mechanism under which an “On Hold” applications are to proceed, the parties find themselves in front of this IRP in order to resolve the questions which have arisen following the “On Hold” decision. It is the opinion of this Panel that, although independent judgement was exercised by the Board, the decision to place the applications “On Hold” without foreseeing the difficulties that could arise from such a decision was not in the best interests of the internet. Clear, efficient and effective mechanisms are essential in ensuring that the best interests of the internet are suitably considered and served by ICANN.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH EXPERT ADVICE

124. Core Value 7 calls for “well-informed decisions based on expert advice”, but does not mandate that once advice is provided, it must be followed.
125. The Guidebook permits the Board to consult with independent experts under §3.1 *The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.*
126. The Guidebook therefore does not mandate consulting with independent experts, rather the discretion is left to the Board. This is clear through the inclusion of the term “may”. It would therefore be counter-logical if this Panel were to interpret the Guidebook as to allowing the Board discretion to determine *whether* to obtain an expert opinion, but should they decide to, *bind them* to the contents of the opinion.
127. In light of the provisions of both the Guidebook and the Bylaws, it is the opinion of this Panel that the Board is entitled to decide in a manner inconsistent with expert advice.

Did the Board act without a conflict of interest?

128. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

129. Although ultimately deciding to follow a course contrary to expert opinion, ICANN was privy to the opinions of experts when making their decision, including that of the Independent Objector, Dr. Pellet and of Mr. Cremades, the Community Objection Expert. There is no evidence of a lack of due diligence and care in having a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

130. Although deciding contrary to expert opinion, ICANN submitted that it did so in light of all of the facts in front of them. Expert opinion was sought and considered, and those experts were considered to be independent. This fact has not been contested. It is therefore the view of this Panel that the Board did exercise independent judgement in reaching its decision with regards expert opinions.

ACTION: DISTINGUISHING BETWEEN THE GRANTING OF .KOSHER/.SHIA AND “ON HOLD” STATUS OF .HALAL/.ISLAM

131. ICANN informed the Panel through their Response to the Supplemental Brief of the following:

“The applications for .KOSHER and .SHIA were not the subject of any GAC advice or successful Community Objections, and thus were properly delegated pursuant to the procedures set forth in the Guidebook”⁶⁵

132. In reaching its decision, the Panel have considered the .AMAZON case, whereby an allegation arose of disparate treatment by the NGPC against the Claimant.⁶⁶

Amazon argues that the NGPC discriminated against it by denying its application for .amazon, yet an application by a private Brazilian oil company for the string .ipiranga, another famous waterway in Brazil, was approved. Amazon contends that by approving .ipiranga and denying .amazon, the ICANN Board, here the NGPC, engaged in disparate treatment in violation of Article II, Section 3 of the Bylaws.

(...) As pointed out by ICANN’s counsel, in this instance neither the Board nor NGPC, acting on its behalf, considered, much less granted, the application for .ipiranga and, therefore, did not engage in discriminatory action against Amazon. We agree. In the context of this matter, the Bylaws’ proscription against disparate treatment applies to Board action, and this threshold requirement is missing.

⁶⁵ See ICANN’s response to the Supplemental Brief Pg 21, Para 48

⁶⁶ G : Para 120 – 121 AMAZON EU S.A.R.L

Thus, we do not find the NGPC impermissibly treated these applications differently in a manner that violated Article II, Section 3 of the Bylaws regarding disparate treatment.

133. It is the opinion of this Panel that, as with .AMAZON, no Board action took place with regards the .KOSHER application, and therefore the threshold for this requirement is missing. No action inconsistent with Article II, S3 of the Bylaws has occurred.

Did the Board act without a conflict of interest?

134. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

135. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

136. This is not applicable as the Board decision is not being considered due to the distinction made above.

ACTION: IMPACT OF THE GAC FAILING TO REJECT AN APPLICATION

137. This is outside of the remit of this Panel, which is tasked with ascertaining whether or not there have been actions by the Board which are inconsistent with the Bylaws, Articles of Incorporation or the Guidebook. However, as an observation, following the Guidebook, the GAC are not mandated to expressly accept or reject an application, and therefore their decision not to reject is in accordance with the Guidebook.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH GUIDEBOOK SCENARIO

138. Following the overarching aim of the Guidebook, one must assume that the scenarios referenced were included in order to assist candidates with their applications, but with no intention of binding the Board. The following, found under §1.1.5, is deemed instructive of this: *“The following scenarios briefly show a variety of ways in which an application*

may proceed through the evaluation process.” The express inclusion of the term “may” is further indication that §1.1.5 was not intended to be binding on the Board, nor provide applications with a guaranteed route of success.

139. It is the opinion of this Panel that such scenarios act merely to provide examples of how an application may proceed, but do not purport to provide a roadmap to follow to ensure success. Although it is understandable that a certain level of reliance may be placed on such scenarios by applicants, one would expect in the majority of cases for there to be distinguishing factors. As such, the scenarios cannot be considered binding on the Respondent, and no inconsistent act occurs should ICANN deviate from the scenarios.

Did the Board act without a conflict of interest?

140. The Board were not mandated to follow the scenarios laid down in the Guidebook, as it is found by this Panel that the scenarios were merely instructive. There is no evidence that the Board were conflicted in making this decision, rather they were exercising their judgement in order to distinguish the Claimant’s application from the scenario listed.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

141. The decision to act in a manner contrary to the Guidebook scenario was made following an assessment of the objections, independent expert opinions and the applications, whereupon ICANN made the decision to distinguish the scenario from the applications. The status of the scenarios being advisory rather than mandatory confirms the notion that the Board acted with due diligence in choosing to distinguish the applications and act in a manner contrary to the scenario listed.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

142. Independent judgement is evidenced by the Board choosing to distinguish the applications from the scenarios. It is submitted that it is in the best interests of the internet for consideration to be given to each case in turn, rather than mandate through prescribed scenarios the way in which a case must proceed. The Board have utilised their right of independent judgement in taking the decision, and it is submitted that this path is in the best interests of the internet.

ACTION: CLASSIFICATION OF A NUMBER OF DOCUMENTS AS CONFIDENTIAL

143. ICANN has a published Documentary Information Disclosure Policy (DIDP) which states:

“ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”

144. The Claimant claims a request was made under this policy for documents related to the parties' dispute, which was subsequently declined by ICANN, thereby acting in breach of Recommendation No. 1, Core Value 7 and Core Value 8. ICANN claims that the Claimant did not file a reconsideration request seeking the Board's review of ICANN staff's DIDP response. As no reconsideration request was filed, the DIDP response involved no Board action.⁶⁷

145. The remit of this Panel is restricted to the analysis of Board actions or inactions. The Claimant has not produced any evidence to indicate that a reconsideration request was filed, and it is therefore outside the purview of this IRP to consider the actions of ICANN staff members.

ACTION: FAILING TO ESTABLISH A STANDING PANEL

146. §4 (6) of the Articles of Incorporation and Bylaws requires a 'Standing Panel' be established, and this Panel recommends, along with previous IRP panel recommendations⁶⁸, that one is created. However, for clarity, this is not to be taken as or in any way inferred as a binding order (as the Panel has no such authority). Also, whether or not there is a standing panel seems to have no direct relationship with the facts of this IRP.

CONCLUSION

147. For the reasons stated above, the Panel concludes that ICANN has acted in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws. Specifically:

⁶⁷ See ICANN's Supplementary Response para 4 and <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

⁶⁸ See *.AFRICA (DotConnectAfrica Trust v ICANN – Case #50 2013 001083)*

148. Core Value 7 – Articles of Incorporation and Bylaws

It is the opinion of the Panel that the volume and quality of information disseminated following the meeting of the GAC in Beijing constituted an act which was inconsistent with Core Value 7; to be consistent with Core Value 7 requires ICANN to act in an open and transparent manner.

149. Core Value 8 - Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent acted inconsistently with Core Value 8; to be consistent with Core Value 8 requires the Respondent to make, rather than defer (for practical purposes, indefinitely), a decision ("making decisions by applying documented policies neutrally and objectively, with integrity and fairness") as to the outcome of the Claimant's applications. The Respondent, in order to act in a manner consistent with its Articles of Incorporation and Bylaws, needs to promptly make a decision on the application (one way or the other) with integrity and fairness. However, nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for the Respondent.

150. Article III (S3 (b)) Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent created a new policy. In light of this, the Respondent failed to follow the procedure detailed in Article III (S3 (b)), which is required when new policy is developed.

151. We further conclude that Claimant is the prevailing party in this IRP. We hold this view consistent with the finding that the designation of "On Hold" is a new policy. ICANN failed to implement procedures pursuant to which applications placed in an "On Hold" status are to proceed. As a result, the Board has not acted with due diligence in this regard.

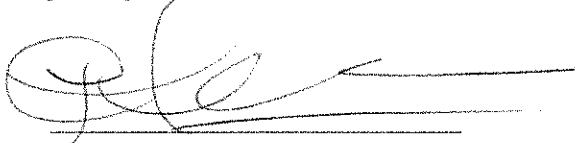
152. The failure to determine how Claimant should proceed under the new "On Hold" policy has largely resulted in the Claimant's costs in this IRP. Accordingly, pursuant to Article IV, Section 4.3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 34 of the ICDR Rules, ICANN shall bear the costs of this IRP, the cost of the Reporter, as well as the cost of the IRP provider.

153. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totalling US \$6,279.84 shall be borne by ICANN.

154. The compensation and expenses of the Panelists totalling US \$175,807.82 shall be borne by ICANN.
155. The fees and expenses of the Reporter, Ms. Bommarito, shall be borne by ICANN. ICANN has already settled Ms. Bommarito's invoices.
156. Therefore, ICANN shall reimburse AGIT the sum of US \$93,918.83, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Respondent.
157. Each party shall bear its own expenses and attorneys' fees.
158. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

The Panel would like to take this opportunity to congratulate the Parties' legal representatives for their hard work, civility and responsiveness during the proceedings. The Panel was pleased with the quality of the written submissions, in addition to the oral advocacy skills displayed throughout the proceedings.

Respectfully submitted:



Calvin A. Hamilton FCI Arb., Chair

November 28, 2017

Date

Honourable William Cahill (Ret.)

Date

Klaus Reichert SC

Date

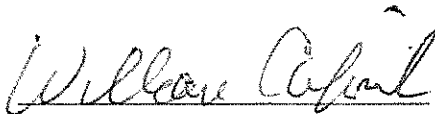
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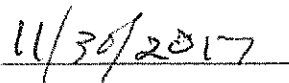
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