

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-45**

18 November 2014

The Requester, .music LLC, seeks reconsideration of the Community Priority Evaluation (“CPE”) Panel’s report (the “Report”), and ICANN’s acceptance of that Report, finding that the Requester did not prevail in CPE for .MUSIC. In light of the CPE results, while the Requester’s application will not be given priority over other applications for the same string, it is still in contention to ultimately be, following contention resolution, the prevailing application for .MUSIC.

I. Brief Summary.

The Requester submitted a community-based application for .MUSIC (the “Application”). The Application was placed in a contention set with other applications for .MUSIC. As the Application is community-based, the Requester was invited to, and did, participate in CPE. The Application did not prevail in CPE. As a result, the Application goes back into contention with the other applications for .MUSIC.

The Requester claims that the CPE panel that determined the Application did not prevail in CPE (the “CPE Panel”) failed to comply with established ICANN policies and procedures in rendering its Report. Specifically, the Requester contends that the CPE Panel: (i) improperly applied the CPE criteria; and (ii) failed to ask the Requester clarifying questions and give it an opportunity to respond to letters submitted in opposition to the Application.

The Requester’s claims are unsupported. The Requester has not demonstrated that the CPE Panel acted in contravention of established policy or procedure in rendering the Report.

No policy or procedure requires CPE panels to ask clarifying questions or allow applicants to respond to letters of opposition, and the CPE Panel properly applied the CPE criteria.

Effectively, the Requester simply disagrees with the CPE Panel's determination and challenges the substantive merits of the CPE Panel's Report; however, that is not a basis for reconsideration.

The BGC therefore concludes that Request 14-45 be denied.

II. Facts.

A. Background Facts.

The Requester submitted a community-based application for .MUSIC.¹ The Application was placed in a contention set with other applicants for .MUSIC.²

On 18 June 2014, the Requester was invited to participate in CPE for .MUSIC.³ CPE is a method of resolving string contention, described in section 4.2 of the Applicant Guidebook ("Guidebook"). It will occur only if a community application is in contention and if that applicant elects to pursue CPE.

The Requester elected to participate in CPE for .MUSIC, and its Application was forwarded to the Economist Intelligence Unit ("EIU"), the CPE provider, for evaluation. On 7 October 2014, the CPE Panel issued its Report on the Application. The Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application did not prevail in CPE.⁴

On 22 October 2014, the Requester filed Request 14-45, seeking reconsideration of the Report and ICANN's acceptance of that Report.

¹ See Request, Annex 4.

² See Contention Resolution Status, *available at* <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1497>.

³ See <http://newgtlds.icann.org/en/applicants/cpe#invitations>.

⁴ See Report, *available at* <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-959-51046-en.pdf>.

B. Relief Requested.

The Requester asks the Board to set aside the Report and submit the Application to a new CPE panel for evaluation, “with the Panel directed to [give] regard to the matters raised in the Reconsideration Request, and any further direction from the BGC.”⁵

III. Issues.

In view of the claims set forth in the Request, the issues for reconsideration are whether the CPE Panel in rendering the Report, and ICANN staff in accepting the Report, violated established policy or procedure by:

1. Failing to properly apply the CPE criteria in evaluating the Application;⁶ and/or
2. Failing to ask clarifying questions and give the Requester an opportunity to respond to letters of opposition.⁷

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Priority Evaluation.

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.⁸ Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC⁹ agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the

⁵ Request, § 9, Pg. 25.

⁶ *Id.*, § 8, Pgs. 3-24.

⁷ *Id.*, § 8, Pgs. 23-25.

⁸ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

⁹ New gTLD Program Committee.

requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws. The reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the EIU, where it can be stated that a panel failed to follow established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.¹⁰

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE reports. Accordingly, the BGC does not evaluate the CPE Panel's substantive conclusion that an application did not prevail in CPE. Rather, the BGC's review is limited to whether the CPE Panel violated any established policy or procedure.

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – has published supplementary guidelines (“CPE Guidelines”) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.¹¹

CPE may occur if a community-based applicant selects CPE, and after the applications in the contention set have completed all previous stages of the gTLD evaluation process.¹² CPE is performed by an independent community priority panel appointed by the EIU.¹³ A CPE panel's role is to determine whether the community-based application fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i)

¹⁰ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

¹¹ See CPE Guidelines, *available at* <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>.

¹² Guidebook, § 4.2.

¹³ *Id.*, § 4.2.2.

community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement.¹⁴ To prevail in CPE, an applicant must receive a minimum of 14 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points (for a total of 16 points).¹⁵

V. Analysis and Rationale.

A. The CPE Panel Properly Applied the CPE Criteria.

The Requester objects to the CPE Panel’s decision to award only three of the possible 16 points to the Application. As noted above, in the context of the New gTLD Program, the reconsideration process does not call for the BGC to evaluate the Panel’s substantive conclusion that the Application did not prevail in CPE. Rather, the BGC’s review is limited to whether the Panel (or staff) violated any established policy or procedure. As discussed below, insofar as the Requester claims that the number of points awarded by the CPE Panel for various criteria was “wrong,” the Requester does not claim that the CPE Panel violated established policy or procedure, but instead improperly challenges the CPE Panels’ substantive determination.

1. The CPE Panel Properly Applied the First CPE Criterion.

The Requester claims that the CPE Panel improperly awarded the Application zero out of four points on the first criterion, which assesses the community identified in the Application.¹⁶ Specifically, this criterion evaluates “the community as explicitly identified and defined according to statements in the application” through the scoring of two elements—1-A, “Delineation” (worth two points), and 1-B, “Extension” (worth two points).¹⁷

a. The CPE Panel Properly Applied Element 1-A.

¹⁴ Guidebook, § 4.2.3

¹⁵ *Id.*

¹⁶ *Id.*; *see also* Request, § 8, Pgs. 3-8.

¹⁷ *Id.*

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for element 1-A, “Delineation,” an application must identify a “clearly delineated, organized, and pre-existing community.” The Guidebook defines community as “implying more [] cohesion than a mere commonality of interest,” and requiring “an awareness and recognition of a community among its members.”¹⁸ It also sets forth further guidelines for determining “Delineation.” In awarding zero out of two points for element 1-A, the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines.¹⁹

The CPE Panel found that while the community as defined in the Application “delineate[d] a clear and straightforward membership,” it did not “demonstrate awareness and recognition of a community among its members.”²⁰ The CPE Panel “acknowledge[d] that some of the individuals in the community . . . have a commonality of interest in music,” but determined that the “defined community as a whole, in all its member categories, does not meet the [Guidebook’s] requirement for community awareness and recognition.”²¹ For example, the CPE Panel noted that while amateur musicians are included within the community definition, the organizations that cater to amateur musicians “(a) do not demonstrate cohesion with other organizations for amateur musicians, nor do they (b) demonstrate cohesion with music industry professionals.”²² The CPE Panel also found that the community as defined in the Application had “no entity mainly dedicated to the entire community as defined by the applicant,” and noted that the organizations listed in the Application “represent only segments of the defined

¹⁸ Guidebook, § 4.2.3.

¹⁹ Report, Pgs. 1-4.

²⁰ *Id.*, Pg. 2.

²¹ *Id.*

²² *Id.*, Pgs. 2-3.

community.”²³ Finally, the CPE Panel found that “since [the listed organizations] and their members do not form a cohesive community as defined in the [Guidebook], they cannot be considered to be a community that was active as such prior to 2007.”²⁴

In challenging the Report, the Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 1-A. Instead, the Requester objects to the CPE Panel’s substantive conclusion, suggesting that, in the Requester’s opinion, “[e]ach constituent part of the Music community is aware [of], and often in contractual or statutory relationships with[,] other entities or organizations in the Music community” and that “[t]he Music community is a symbiotic eco-system that could not function without, at the very least, ‘awareness and recognition’ among its members.”²⁵ The Requester also states that there are “many [] instances of collective interest and action by the Music community.”²⁶ Finally, the Requester indicates that the International Music Council, which supports its application, “meets the requirement for a global organization dedicated to the entire community.”²⁷ The Requester’s arguments reflect only substantive disagreement with the CPE Panel’s findings—i.e., a belief that the CPE Panel’s “assessment of [element 1-A] was wrong,”—and are not a proper basis for reconsideration.²⁸

The Requester also argues that the CPE Panel’s conclusions about awareness and recognition within the music community “are not consistent with [] statements in [the CPE reports for] HOTEL, RADIO or ECO”—applications that prevailed in CPE.²⁹ Again, the Requester has identified no policy or procedure that the CPE Panel violated in assessing the community definition in its Application. The CPE Panel, in assessing the Application, applied

²³ *Id.*, Pgs. 3-4.

²⁴ *Id.*, Pg. 4.

²⁵ Request, § 8, Pg. 6.

²⁶ *Id.*

²⁷ *Id.*, § 8, Pg. 6.

²⁸ *Id.*, § 8, Pg. 7.

²⁹ *Id.*, § 8, Pg. 2.

the same criteria and scoring guidelines as the CPE panels assessing the community-based applications for .HOTEL, .RADIO, and .ECO. The fact that the Requester believes that its community definition merited the same score as the community definitions at issue in .HOTEL, .RADIO, and .ECO again simply represents a substantive disagreement with the CPE Panel’s findings. It is not a proper basis for reconsideration.

b. The CPE Panel Properly Applied Element 1-B.

The Requester also objects to the CPE Panel awarding the Application zero out of two points on element 1-B, “Extension.” Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the “Extension” element, the application must identify a “community of considerable size and longevity.”³⁰

In awarding zero out of two points for element 1-B, the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines.³¹ In particular, the CPE Panel found that while the community defined in the Application was “of considerable size,” the community did not have “awareness and recognition of a community among its members,” as required by the Guidebook definition of “community.”³²

The CPE Panel also found that the relevant community as defined in the Application did not demonstrate longevity because “[the] application refers to a proposed community construed to obtain a sought-after generic word as a gTLD,” and the Requester “appear[ed] to be attempting to use the gTLD to organize the various groups noted in the application documentation, as opposed to applying on behalf of an already organized and cohesive

³⁰ Guidebook, § 4.2.3.

³¹ Report, Pgs. 4-5.

³² Report, Pgs. 4-5; *see also* Guidebook, § 4.2.3.

community.”³³ The CPE Panel noted that the Guidebook criteria were specifically designed to avoid “awarding undue priority to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string.”³⁴

In challenging the Report, the Requester claims that the CPE Panel erred in concluding that its Application does not refer to a pre-existing community.³⁵ In the Requester’s view, “[t]he clearly delineated Music community obviously existed prior to the applicant, and in an act of demonstrable cohesion, sought to protect the mutual interests of its members by selecting a [gTLD] applicant that warranted that it would operate according to those interests.”³⁶ Again, this is a disagreement with the substance of the Report—the Requester does not argue that the CPE Panel violated any policy or procedure in scoring element 1-B.

2. The CPE Panel Properly Applied the Second CPE Criterion.

The Requester claims that the CPE Panel improperly awarded the Application zero out of four points on the second criterion, which assesses the nexus between the proposed string and the community.³⁷ This criterion evaluates “the relevance of the string to the specific community that it claims to represent” through the scoring of two elements—2-A, “Nexus” (worth three points), and 2-B, “Uniqueness” (worth one point).³⁸

a. The CPE Panel Properly Applied Element 2-A.

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the “Nexus” element, the applied-for string must “match[] the name of the community or [be] a well-known

³³ Report, Pg. 5.

³⁴ *Id.* (quoting Guidebook, § 4.2.3).

³⁵ Request, § 8, Pgs. 7-8.

³⁶ *Id.*, § 8, Pg. 8. The Requester contends that in 2011 “select members of the Music Community issued an RFI to help choose a .MUSIC applicant that best reflected [the community’s] collective values.” (*Id.*, § 8, Pg. 6.)

³⁷ Guidebook, § 4.2.3; *see also* Request, § 8, Pgs. 11-16.

³⁸ Guidebook, § 4.2.3.

short-form or abbreviation of the community name.”³⁹ In awarding zero out of three points for element 2-A, “Nexus,” the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines.⁴⁰

The CPE Panel found that while the Requester “limits the proposed community to individuals and entities that have a current registration and verifiable membership in a global music community organization[,] [t]he string MUSIC . . . identifies all individuals and entities involved in the creation of music, regardless of whether or not they have verifiable membership in a music-related organization.”⁴¹ The CPE Panel also noted that a rough estimate of the membership of the organizations listed in the Application was four million, while the number of amateur musicians worldwide is unknown but estimated to be about 200 million.⁴² Given the Applicant’s proposed definition, the CPE Panel found that “the applied-for string substantially over-reaches beyond the community defined by the application.”⁴³

In challenging the Report, the Requester argues that the CPE Panel underestimated the size of the community as defined in the Application. Specifically, while the Requester concedes that the Application estimated the size of the community to be around four million individuals, the Requester now claims that this number was “rough,” “conservative,” and included only the membership of organizations listed in the Application.⁴⁴ According to the Requester, the defined community is in fact considerably larger, in part because “any unaffiliated music participant can become a part of [the] community [by] affiliating with any number of eligible organizations and

³⁹ *Id.*, § 4.2.3.

⁴⁰ Report, Pgs. 5-6.

⁴¹ Report, Pg. 5.

⁴² *Id.*

⁴³ *Id.*, Pg. 6.

⁴⁴ Request, § 8, Pgs. 12-13.

agreeing not to infringe others' creative or intellectual property rights.”⁴⁵ The Requester does not, however, identify any policy or procedure that the CPE Panel misapplied in scoring element 2-A. Again, the Requester's substantive disagreement with the CPE Panel's finding is not a proper basis for reconsideration.

b. The CPE Panel Properly Applied Element 2-B.

The Requester next objects to the CPE Panel having awarded its Application zero out of one point on element 2-B, “Uniqueness.” To fulfill the requirements for element 2-B, a string must have “no other significant meaning beyond identifying the community described in the application.”⁴⁶ Section 4.2.3 of the Guidebook further states that in order to be eligible for a score of 1 on the “Uniqueness” element, an application must have “identif[ied] the community,” i.e., have scored 2 or 3 on the “Nexus” element.⁴⁷

Because the CPE Panel awarded the Application zero out of three points for “Nexus,” it also awarded it zero out of one point for “Uniqueness.”⁴⁸ The Requester argues that the score for “Uniqueness” was improper because the score for “Nexus” was improper.⁴⁹ As discussed immediately above, because the Requester's arguments relating to the CPE Panel's evaluation of the “Nexus” element do not support reconsideration, neither do Requester's claims concerning the “Uniqueness” element.

3. The CPE Panel Properly Applied the Third CPE Criterion.

The Requester claims that the CPE Panel improperly awarded the Application one out of

⁴⁵ *Id.*, § 8, Pg. 13. The Requester also argues that the CPE Panel failed to reference letters of support received after its Application was filed. (Request, § 8, Pgs. 11-12.) Not only does the Requester present no evidence that the CPE Panel failed to consider those letters, it does not explain how a consideration of those letters would have impacted the Panel's determination that the Requester's applied-for string substantially over-reaches the community as defined in its Application.

⁴⁶ Guidebook, § 4.2.3.

⁴⁷ *Id.*

⁴⁸ Report, Pg. 6; *see also* Guidebook, § 4.2.3.

⁴⁹ Request, § 8, Pgs. 15-16.

four points on the criterion regarding an applicant’s registration policies.⁵⁰ This criterion evaluates an applicant’s registration policies on four elements, each of which is worth one point—3-A, “Eligibility;” 3-B, “Name Selection;” 3-C, “Content and Use;” and 3-D, “Enforcement.”⁵¹

The Requester specifically challenges the CPE Panel’s evaluation of elements 3-B, 3-C, and 3-D.⁵² Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for element 3-B, “Name Selection,” an applicant’s policies must “include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD.”⁵³ In awarding zero out of one point for element 3-B, the CPE Panel accurately described and applied the Guidebook scoring guidelines and the CPE Guidelines.⁵⁴ The CPE determined that “[t]here was no evidence in the application of restrictions or guidelines for name selection that arose out of the community-based purpose of the application, nor was it articulated what other name selection rules (not related to the community-based purpose) were otherwise sufficient and in accordance with the community-based purpose of the application.”⁵⁵

In challenging the Report, the Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 3-B. Rather, the Requester argues that it “believe[s] that eligibility restrictions and warranties that the Registrant must not infringe the rights of others are sufficient and in alignment with the community-based purpose of the application, given its emphasis on intellectual property safeguards.”⁵⁶ The Requester’s substantive disagreement with the CPE Panel’s finding is not a proper basis for reconsideration.

⁵⁰ Guidebook, § 4.2.3; *see also* Request, § 8, Pgs. 16-21.

⁵¹ Guidebook, § 4.2.3.

⁵² Request, § 8, Pg. 16-21.

⁵³ Guidebook, § 4.2.3.

⁵⁴ Report, Pgs. 6-7.

⁵⁵ *Id.*

⁵⁶ Request, § 8, Pg. 18.

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for element 3-C, “Content and Use,” an application’s policies must “include rules for content and use consistent with the articulated community-based purpose of the applied-for gTLD.”⁵⁷ In awarding zero out of one point for element 3-C, the CPE Panel accurately described and applied the Guidebook scoring guidelines and the CPE Guidelines.⁵⁸ The CPE Panel determined that 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, nor does the application articulate that the other content and use rules (not related to the community-based purpose) were otherwise sufficient and in accordance with the community-based purpose of the application.”⁵⁹

In challenging the Report, the Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 3-C. Rather, the Requester argues that it “has described its content and use rules” and that “further elements of use and content policies to control inappropriate use may well be developed [] in consultation with the registry operator and the community.”⁶⁰ The Requester’s substantive disagreement with the CPE Panel’s determination is not a proper basis for reconsideration.

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for element 3-D, “Enforcement,” an applicant’s policies must “include specific enforcement measures (e.g., investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms.”⁶¹ In awarding zero out of one point for element 3-D, the CPE Panel accurately described and applied the Guidebook scoring guidelines and the CPE

⁵⁷ Guidebook, § 4.2.3.

⁵⁸ Report, Pg. 7.

⁵⁹ *Id.*

⁶⁰ Request, § 8, Pg. 19.

⁶¹ Guidebook, § 4.2.3.

Guidelines.⁶² The CPE Panel found that while the Application “outlined policies that include specific enforcement measures constituting a coherent set” and “m[ade] reference to an appeals process,” it “d[id] not provide a clear description of an appeals process.”⁶³

In challenging the Report, the Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 3-D. Rather, the Requester argues that its Application does in fact adequately describe an appeals process.⁶⁴ Once again, the Requester’s substantive disagreement with the CPE Panel’s finding is not a proper basis for reconsideration.

4. The CPE Panel Properly Applied the Fourth CPE Criterion.

Finally, the Requester claims that the CPE Panel improperly awarded the Application two out of four points on the fourth criterion, which assesses community endorsement of an application.⁶⁵ This criterion evaluates community support for and/or opposition to an application through the scoring of two elements, each worth two points—4-A, “Support,” and 4-B, “Opposition.”⁶⁶

a. The CPE Panel Properly Applied Element 4-A.

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the “Support” element, the applicant must be, or “ha[ve] documented support from, the recognized community institution(s)/member organization(s) or ha[ve] otherwise documented authority to support the community.”⁶⁷ In challenging the Report, the Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 4-A. The Requester simply disagrees with the CPE Panel’s substantive conclusion that “no organization among the

⁶² Report, Pg. 7.

⁶³ *Id.*

⁶⁴ Request, § 8, Pg. 20.

⁶⁵ Guidebook, § 4.2.3; *see also* Request, § 8, Pgs. 21-23.

⁶⁶ Guidebook, § 4.2.3.

⁶⁷ *Id.*

applicant's supporters demonstrates the kind of structure required to be a 'recognized' organization, as per the [Guidebook]."⁶⁸ The Requester's disagreement with the CPE Panel's finding does not support reconsideration.

b. The CPE Panel Properly Applied Element 4-B.

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the "Opposition" element, there must be "no opposition of relevance" to the application.⁶⁹ An application receives a score of one out of two points if it has "relevant opposition from one group of non-negligible size."⁷⁰ In challenging the CPE Panel's awarding its Application only one out of two points on this element, the Requester argues that "opposition from an unnamed group with several full-time employees' that reaches 'thousands' of people . . . could hardly qualify as 'relevant' or of 'non-negligible' size."⁷¹ The Requester's substantive disagreement with the CPE Panel's finding that opposition from a group reaching thousands of people is relevant is not a basis for reconsideration.

B. The CPE Panel is Not Required to Ask Clarifying Questions or Give Applicants An Opportunity to Respond to Letters of Opposition.

The Requester claims that the CPE Panel failed to ask clarifying questions and failed to give the Requester an opportunity to respond to letters submitted in opposition to the Application.⁷² However, the Requester cites no established policy or procedure (because there is none) that requires a CPE panel to ask clarifying questions or allow applicants to respond to letters of opposition.

⁶⁸ Request, § 8, Pg. 21 (quoting Report, Pg. 8).

⁶⁹ Guidebook, § 4.2.3.

⁷⁰ *Id.*

⁷¹ Request, § 8, Pg. 23.

⁷² *Id.*, § 8, Pgs. 23-24.

The Guidebook provides that CPE scoring is based on “information provided in the application plus other relevant information available The panel *may* also perform independent research, if deemed necessary to reach informed scoring decisions.”⁷³ As such, while a panel is permitted to perform independent research, including asking clarifying questions of the applicant, the decision to do so is entirely within its discretion. The CPE Panel’s discretion is made clear in the CPE Panel Process Document: “[i]f the [Panel] so decides, [it] *may* provide a clarifying question [] to be issued via ICANN to the applicant.”⁷⁴

The CPE Panel’s discretion is further emphasized in the CPE Frequently Asked Questions posted on ICANN’s website, which state that the CPE Panel may ask clarifying questions, “if, during the evaluation additional information is needed.”⁷⁵ For example, a CPE Panel may, if it deems it necessary, issue clarifying questions “in order to provide the opportunity [for the applicant to] [a]ddress any letters of opposition.”⁷⁶ Contrary to what the Requester argues, however, nothing in the FAQs *requires* a CPE panel to ask clarifying questions or allow applicants to respond to letters of opposition. In declining to ask the Requester for further response or information, the CPE Panel was acting within its discretion and not contrary to any established policy or process. As such, the CPE Panel’s decision not to issue clarifying questions is not a proper basis for reconsideration.

VI. Determination.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Request 14-45. As there is no indication that either the CPE Panel or ICANN violated any ICANN policy or procedure with respect to the

⁷³ Guidebook § 4.2.3 (emphasis added.)

⁷⁴ CPE Panel Process Document, Pg. 3, *available at* <http://newgtlds.icann.org/en/applicants/cpe> (emphasis added).

⁷⁵ CPE Frequently Asked Questions v. 1.4, Pg. 3, *available at* <http://newgtlds.icann.org/en/applicants/cpe>.

⁷⁶ *Id.*, Pg. 5.

Report, or ICANN's acceptance of the Report, Request 14-45 should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board (or NGPC) consideration is required.⁷⁷ As discussed above, Request 14-45 seeks reconsideration of a staff action or inaction. As such, after consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

⁷⁷ Bylaws, Art. IV, § 2.15.