

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 16-12
14 DECEMBER 2018**

The Requestor, Merck KGaA, seeks reconsideration of the Community Priority Evaluation (CPE) report (CPE Report) of its community-based application for the .MERCK generic top-level domain (gTLD), and ICANN organization's acceptance of that Report.¹ Specifically, the Requestor claims that the independent provider that conducted the CPE (CPE Provider) violated established CPE procedures by misapplying CPE Criterion 2 (Nexus between Proposed String and Community) in its evaluation of the Requestor's application.

I. Brief Summary.

The Requestor submitted a community-based application for .MERCK (Application), which was placed in a contention set with two other .MERCK applications.² The Requestor participated in CPE but did not prevail. The Requestor submitted Request 16-12 on 25 August 2016, challenging the CPE Provider's evaluation of its Application and ICANN org's acceptance of the CPE Report.³

While Request 16-12 was pending, the ICANN Board and Board Governance Committee (BGC) directed ICANN org to undertake a review of certain aspects of the CPE process (CPE Process Review). The CPE Process Review: (i) evaluated the process by which ICANN org interacted with the CPE Provider; (ii) evaluated whether the CPE criteria were applied consistently throughout and across each CPE report; and (iii) compiled the research relied upon

¹ Request 16-12, § 3, at Pg. 2; *id.* § 8, at Pg. 6 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-request-redacted-25aug16-en.pdf>).

² <https://gtldresult.icann.org/applicationstatus/applicationdetails/1631>.

³ Request 16-12, § 3, at Pg. 2; *id.* § 8, at Pg. 6.

by the CPE Provider for the evaluations which are the subject of pending Reconsideration Requests.⁴ The BGC determined that the pending Reconsideration Requests regarding CPEs, including Request 16-12, would be placed on hold until the CPE Process Review was completed.⁵

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).⁶

On 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11 (2018 Resolutions), which accepted the findings in the CPE Process Review Reports; declared the CPE Process Review complete; concluded that there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.⁷

Subsequently, the BAMC invited the Requestor to provide a telephonic presentation to the BAMC in support of Request 16-12. The BAMC also invited the Requestor to submit additional written materials in response to the CPE Process Review Reports.⁸ The Requestor submitted supplemental materials in support of its Request on 12 April 2018⁹ and conducted a

⁴ <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>;
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

⁵ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. 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>). Since 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with initial review of reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en#article4>).

⁶ See <https://www.icann.org/news/announcement-2017-12-13-en>.

⁷ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁸ See Attachment 1 to BAMC Recommendation.

⁹ Supplemental Submission by Requestor in support of Request 16-12 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-supp-submission-12apr18-en.pdf>).

telephonic presentation to the BAMC on 4 September 2018.¹⁰ The Requestor also submitted a written summary of its telephonic presentation to the BAMC.¹¹

The BAMC then evaluated the Requestor's claims, taking into consideration all relevant materials. Based on its extensive review of all relevant materials, the BAMC finds that reconsideration is not warranted because the CPE Provider did not violate any established policies or procedure in its evaluation of Criterion 2 and that ICANN org's acceptance of the CPE Provider's Report complied with established policies. Accordingly, the BAMC recommends that the Board deny Request 16-12.

II. Facts.

A. The CPE Provider's Evaluation of the Requestor's Application.

1. The CPE Report.

The Requestor submitted a community-based application for .MERCK. One other applicant, Merck Registry Holdings, Inc. (MRH), a subsidiary of Merck & Co., Inc., submitted both a community application (Merck & Co. Application) and a standard (meaning, not community-based) application for .MERCK. All three .MERCK applications were placed into a contention set.¹²

As a community-based applicant, the Requestor participated in CPE. CPE is a method of resolving string contention,¹³ described in Module 4, section 4.2 of the gTLD Applicant Guidebook (Guidebook). To prevail in CPE, an applicant must receive at least 14 out of 16

¹⁰ Minutes, 4 September 2018 BAMC Meeting (<https://www.icann.org/resources/board-material/minutes-bamc-2018-09-04-en>).

¹¹ <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf>.

¹² <https://gtldresult.icann.org/applicationstatus/applicationdetails/1631>.

¹³ "String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings." Guidebook Module 1, § 1.1.2.10.

points. The Requestor’s Application received 11 points, and therefore did not prevail in CPE.¹⁴ As discussed in further detail below, the Requestor earned the maximum four points for Criterion 1: Community Establishment, zero points on Criterion 2: Nexus between Proposed String and Community, four points for Criterion 3: Registration Policies, and three points for Criterion 4: Community Endorsement.

2. Request 16-12.

The Requestor submitted Request 16-12 on 25 August 2016.¹⁵ The Requestor claimed that the CPE provider incorrectly required a showing of “absolute world-wide exclusivity” over the applied-for string to receive points under sub-criterion 2-A-Nexus,¹⁶ which considers, among other things, whether the string closely describes the community defined in the application without over-reaching substantially beyond the community.¹⁷ The CPE Provider concluded that the applied-for string, .MERCK, ““over-reach[ed] substantially beyond the community”” because the string matched the name of both the Requestor and of Merck & Co., Inc., another substantial entity.¹⁸ The Requestor also argued that ICANN org “failed to take reasonable care in evaluating the Request[o]r’s evidence and misapplied standards and policies developed by ICANN in the...Guidebook, resulting in a denial of due process to the Request[o]r.”¹⁹

The Requestor sought an opportunity to make a presentation to the BGC²⁰ regarding Request 16-12. In response, the BGC invited the Requestor to make a presentation at the 29

¹⁴ *Id.*

¹⁵ Request 16-12 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-a-request-redacted-25aug16-en.pdf>).

¹⁶ Request 16-12, § 8, Pg. 7.

¹⁷ Guidebook, Module 4, § 4.2.3, at Pg. 4-13.

¹⁸ CPE Report, at Pg. 4 (quoting Guidebook, Module 4, § 4.2.3, at Pg. 4-13).

¹⁹ *Id.*, § 8, Pg. 6.

²⁰ 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

March 2017 BGC meeting.²¹ The Requestor did so (2017 Presentation), and submitted a written summary of the points raised in its 2017 Presentation.²² The Requestor also made a presentation to the BAMC in September 2018,²³ after the Board passed the 2018 Resolutions.

B. The CPE Process Review.

On 17 September 2016, the Board directed ICANN org to undertake a review of the “process by which ICANN [org] interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the Board’s oversight of the New gTLD Program (Scope 1).²⁴ 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.

The BGC later determined that the review should 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 research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).²⁵ Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the pending Requests relating to CPEs, including Request

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>).

²¹ See <https://www.icann.org/resources/board-material/agenda-bgc-2017-03-29-en>.

²² See <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf>.

²³ Minutes, 4 September 2018 BAMC Meeting (<https://www.icann.org/resources/board-material/minutes-bamc-2018-09-04-en>).

²⁴ ICANN Board Rationale for Resolution 2016.09.17.01 (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>).

²⁵ <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

16-12, would be on hold until the CPE Process Review was completed.²⁶

FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. On 13 December 2017, ICANN org published FTI's reports issued in connection with the CPE Process Review (the CPE Process Review Reports).²⁷

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN org[] 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.²⁸

FTI also concluded that "ICANN org[] had no role in the evaluation process and no role in writing the initial draft CPE report," and reported that the "CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN org[]'s comments."²⁹

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."³⁰

For Scope 3, FTI compiled the research relied upon by the CPE Provider for the evaluations which are the subject of the pending Reconsideration Requests relating to CPE.³¹ In the specific instance of the Requestor's CPE, FTI observed that the CPE Provider included a

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

²⁷ See <https://www.icann.org/news/announcement-2017-12-13-en>.

²⁸ Scope 1 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

²⁹ *Id.*, at Pg. 9, 15.

³⁰ Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

³¹ Scope 3 Report, at Pg. 3-4 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

citation in the CPE Report for each reference to research.³² Relevant here, FTI observed that the CPE Report did not reflect any references to research or reference material in its application of Criterion 2: Nexus between Proposed String and Community, but the working papers contained four citations to research or reference material for sub-criterion 2-A-Nexus and four citations to research or reference material for sub-criterion 2-B-Uniqueness.³³ Additional detailed results of Scope 3 of the CPE Process Review are set forth in the CPE Process Review Reports.³⁴

On 15 March 2018, the Board passed the 2018 Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Reviews.³⁵

In adopting the 2018 Resolutions, the Board noted that Merck KGaA and the other requestors with pending reconsideration requests relating to CPEs

each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.³⁶

³² *Id.* at Pg. 55-57.

³³ *Id.* at Pg. 56. FTI provided those references, which included the Wikipedia pages for “Merck Group” and for Merck & Co., Inc., <http://www.merckgroup.com/en/index.html>, and <http://www.bloomberg.com/news/articles/2014-02-10/a-tale-of-two-mercks-as-prottesterstakeonwrong-company>.

³⁴ *See generally id.*

³⁵ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

³⁶ 2018 Resolutions.

Accordingly, the Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),³⁷ and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).³⁸ As part of the Transition Process, the BAMC invited the Requestor to “submit additional information relating to Request 16-12, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the Requestor to “make a telephonic oral presentation to the BAMC in support of” Request 16-12. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-12 and that is not already covered by the written materials.”³⁹ The BAMC asked the Requestor to confirm its interest in proceeding with a telephonic presentation by 23 March 2018.⁴⁰

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

On 24 October 2017, the Requestor submitted a letter to ICANN org “not[ing] that it has requested access to the documents that the CPE [Provider] relied upon in making its determination with respect to [the Application] and, in particular, to the independent research that the [CPE Provider] conducted and to the information on the process by which ICANN interacted with the [CPE] Provider.”⁴¹ The Requestor asked ICANN org to confirm

that ICANN will disclose FTI’s final report and in particular, the documents that the CPE [Provider] used to make its determination,

³⁷ <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

³⁸ 2018 Resolutions. *See also* Roadmap (<https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>).

³⁹ Attachment 1 to BAMC Recommendation.

⁴⁰ *Id.*

⁴¹ 24 October 2017 letter from Bettinger to ICANN (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-bettinger-to-icann-board-24oct17-en.pdf>).

the independent research that the [CPE Provider] conducted and the information on the process with which ICANN interacted with the CPE Provider related to [the CPE Report] immediately after FTI completes its review and that our client will have the opportunity to respond and comment on FTI's findings before ICANN renders a determination regarding [the Requestor's] Request for Reconsideration.⁴²

On 12 April 2018, pursuant to the BAMC's invitation to submit additional materials,⁴³ the Requestor submitted a ten-page letter to the BAMC challenging the scope of FTI's investigation and asserting the information in the Scope 3 Report relating to Request 16-12 supported the Requestor's arguments concerning the Nexus criterion.⁴⁴ On 4 September 2018, the Requestor made its telephonic presentation to the BAMC, reiterating its arguments that the CPE Provider misapplied the nexus requirement (Criterion 2) and ignored material information in its consideration of the Application, and that the BAMC should disregard the CPE Process Review Reports in its consideration of Request 16-12,⁴⁵ and additionally asserting that the BAMC has "authority to evaluate whether the CPE results are correct," even if it concludes that the CPE adhered to applicable policies and procedures.⁴⁶

D. Relief Requested.

The Requestor asks the BAMC to:

1. Set aside the CPE Report;
2. "Closely review" all evidence the Requestor submitted in support of its

⁴² *Id.* at Pg. 2.

⁴³ The Requestor sought and was granted a ten-day extension of the 2 April 2018 deadline for submitting supplemental materials. *See* Attachment 1 to BAMC Recommendation.

⁴⁴ 12 April 2018 letter from Bettinger to ICANN (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-supp-submission-12apr18-en.pdf>).

⁴⁵ Requestor's Written Submission in support of Oral Presentation to BAMC on 4 September 2018 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf>).

⁴⁶ *Id.* at Pg. 1.

Application, including its Public Interest Commitment and a contract between the Requestor and Merck & Co., Inc.;⁴⁷

3. Ask new evaluators “to perform a *de novo* evaluation of [the Application], with instructions and guidance to ensure that all policies are fairly and correctly applied;”⁴⁸ and
4. “[D]isclose[] all documentary information and communications between the ICANN organization and the CPE Provider relating to the Community Priority Evaluation of Merck KGaA’s application for [.MERCK].”⁴⁹

III. Issues Presented.

The issues are as follows:

1. Whether the CPE Provider adhered to the Guidebook in its application of Criterion 2, Nexus between Proposed String and Community, in the CPE Report;
2. Whether ICANN org complied with applicable policies and procedures when it accepted the CPE Report;
3. Whether ICANN org must disclose documentary information and communications between ICANN org and the CPE Provider relating to the Application; and
4. Whether the Board complied with applicable Commitments, Core Values, and policies when it acknowledged and accepted the findings set forth in the CPE Process Review Reports.

IV. The Relevant Standards for Reconsideration Requests and CPE.

⁴⁷ *Id.* at Pg. 7.

⁴⁸ 12 April 2018 letter from Bettinger to ICANN, at Pg. 9-10; Requestor’s Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 8.

⁴⁹ 12 April 2018 letter from Bettinger to ICANN, at Pg. 9-10. *See also* Request 16-12, at § 9, Pg. 12 (requests 1 and 2 only).

A. Reconsideration Requests.

Article IV, Section 2.1 and 2.2 of ICANN's Bylaws⁵⁰ provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) One or more Staff actions or inactions that contradict established ICANN policy(ies);
- (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.⁵¹

Where, as here, the reconsideration request seeks reconsideration of ICANN Staff and Board action, the operative version of the Bylaws direct the BAMC⁵² to review the request and provide a recommendation to the Board.⁵³ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁵⁴

On 26 April 2017, the BGC placed Request 16-12 on hold, and it remained on hold until the Board directed the BAMC to proceed with its evaluation of Request 16-12. Accordingly, the BAMC has reviewed Request 16-12 and all relevant materials, and issues this Recommendation.

⁵⁰ The BAMC has considered Request 16-12 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestor submitted Request 16-12). Although the Bylaws have since changed (*see* the Bylaws archive, <https://www.icann.org/resources/pages/governance/bylaws-archive-en>, and 22 July 2017 Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en>), the operative version of the Bylaws is the one in effect when Request 16-12 was submitted.

⁵¹ ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

⁵² As noted above, *supra* n.35, the BAMC is currently 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>).

⁵³ *See* ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

⁵⁴ *Id.*

B. The CPE Criteria and Procedures.

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.⁵⁵ The standards and CPE process are defined in Module 4, Section 4.2 of the Guidebook. Community-based applications that elect to participate in CPE are evaluated by the following criteria: Criterion 1: Community Establishment; Criterion 2: Nexus Between the Proposed String and Community; Criterion 3: Registration Policies; and Criterion 3: Community Endorsement.⁵⁶ Pursuant to the Guidebook, the sequence of the criteria reflects the order in which they will be assessed by the CPE Provider. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points. An application that prevails in CPE “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”⁵⁷

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.⁵⁸ CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.⁵⁹ A CPE Provider’s role is to determine whether the community-based application fulfills the four community priority criteria set forth in Module 4.2.3 of the Guidebook.⁶⁰

⁵⁵ See Guidebook, Module 4, § 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>.

⁵⁶ *Id.* at Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁵⁷ *Id.* at Module 4, § 4.2.3, Pg. 4-9.

⁵⁸ Guidebook, Module 4, § 4.2.

⁵⁹ *Id.* Module 4, § 4.2.2.

⁶⁰ *Id.* at Module 4, §§ 4.2.2 and 4.2.3. at Pgs. 4-8 and 4-9 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

In addition to the Guidebook, the CPE Provider’s supplementary guidelines (CPE Guidelines) provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.⁶¹ The CPE Guidelines accompany the Guidebook and do not alter the CPE criteria established by the Guidebook.⁶² Rather, the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process by explaining the methodology that the CPE Provider undertook to evaluate each criterion.⁶³ The CPE Provider also published the CPE Panel Process Document explaining the CPE evaluation process as described in the Guidebook and discussed in the CPE Guidelines.⁶⁴

V. Analysis and Rationale.

A. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Criterion 2.

The Requestor received zero points for Criterion 2. Criterion 2 evaluates “the relevance of the string to the specific community that it claims to represent.”⁶⁵ It is measured by two sub-criterion: sub-criterion 2-A-Nexus; and sub-criterion 2-B-Uniqueness.⁶⁶ Sub-criterion 2-A is worth a maximum of three points and sub-criterion 2-B is worth a maximum of one point, for a total of four points.

To obtain three points for sub-criterion 2-A, the applied-for string must “match the name of the community or be a well-known short-form or abbreviation of the community.”⁶⁷ For a score of two, the applied-for string should “closely describe the community or the community

⁶¹ See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

⁶² *Id.* at Pg. 2.

⁶³ See *id.*

⁶⁴ See CPE Panel Process Document, at Pg. 2 (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

⁶⁵ See Guidebook, Module 4, § 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

⁶⁶ *Id.* at Pgs. 4-12-4-13.

⁶⁷ *Id.*

members, without over-reaching substantially beyond the community.”⁶⁸ The Guidebook explains the scoring rubric for sub-criterion 2-A as follows:

As an example, a string could qualify for a score of two 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 qualify for two points.⁶⁹ Zero points are awarded if the string “does not fulfill the requirements for a of 2.”⁷⁰

It is not possible to obtain a score of one for this sub-criterion.

To obtain one point for sub-criterion 2-B, the applied-for string must have no other significant meaning beyond identifying the community described in the application.⁷¹ An application that does not qualify for two or three points for sub-criterion 2-A will not qualify for a score of one for sub-criterion 2-B.⁷²

The Requestor challenges the CPE Provider’s application of sub-criterion 2-A-Nexus, and sub-criterion 2-B-Uniqueness. For the reasons set forth below, the Requestor’s arguments do not support reconsideration.

1. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-A-Nexus.

The Requestor’s Application received zero points for sub-criterion 2-A. The CPE Provider determined that the Requestor’s Application did not satisfy the three point test because the applied-for string does not “match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.”⁷³ The CPE Provider also

⁶⁸ *Id.* at Pg. 4-12.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at Pg. 4-13.

⁷² *Id.* at Pg. 4-14.

⁷³ CPE Report, at Pg. 3.

found that the Requestor’s Application did not satisfy the two point test because the applied-for string does not “identify...the community as defined in the application.”⁷⁴

The community as defined by the Requestor’s Application consists of

the collection of corporate entities, their affiliates and subsidiaries which together comprise the Merck Community. Membership in the Merck Community is clearly defined in the following manner. Members of the Merck Community are the companies which are part of the Merck Group...To be recognized as a member of the Merck Community, a registrant must meet the Eligibility Requirements, which are as follows: - the registrant is Merck KGaA or a company which is a fully owned subsidiary of Merck KGaA, - the registrant uses “Merck” as the sole element or as a component of its company name, and - the registrant uses as its umbrella brand the German figurative trademark No. 30130670, “MERCK”.⁷⁵

The Application further states

The applied-for “.MERCK” string is identical to the Merck Community’s distinctive corporate name and globally famous trademark. The individual companies which comprise the Merck Community actively self-identify as members of the Merck Community, and utilize the Merck name within their own corporate titles. Members of the public recognize the name Merck as corresponding to the Merck Community and its constituent members.⁷⁶

The CPE Provider noted that, pursuant to the Guidebook, “identify means that the applied[-]for string closely describes the community or the community members, without over-reaching substantially beyond the community” and the applied-for string must at least identify the community for full or partial credit for sub-criterion 2-A.⁷⁷ The CPE Provider concluded that

although the string “Merck” matches the name of the community defined in the Application, it also matches the name of another

⁷⁴ *Id.*

⁷⁵ Written Summary of Requestor’s 29 March 2017 Presentation to the BGC, Pg, 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf>).

⁷⁶ CPE Report at Pgs. 3-4.

⁷⁷ *Id.* at Pg. 4.

corporate entity known as “Merck” within the US and Canada. This US-based company, Merck & Co., Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US\$39.5 billion in 2015. It is therefore a substantial entity also known by the name “Merck”.⁷⁸

The CPE Provider therefore determined that the string is “‘over-reaching substantially beyond the community’ ...it defines because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant.”⁷⁹

The Requestor disagrees with the CPE Provider’s conclusion that the applied-for string, .MERCK, over-reached the community defined in the Application, and on that basis argues that reconsideration is warranted. However, the Requestor has not identified any policy or procedure that the CPE Provider violated in its determination.⁸⁰ Nor has the Requestor provided any evidence that the CPE Provider violated any established policy or procedure. The Requestor’s substantive disagreement with the CPE Provider’s conclusion is not grounds for reconsideration. Additionally, as reported in the CPE Process Review Scope 2 Report, the CPE Provider acted consistent with the Guidebook in its analysis under sub-criterion 2-A for all the CPEs that were conducted.⁸¹

The BAMC notes that the Requestor does not deny that the U.S.-based entity is connected to the Requestor’s community as defined in the Application; to the contrary, the majority of Request 16-12 is devoted to summarizing the decades-old, contentious legal dispute

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ The Requestor asserts that the BAMC should re-evaluate the Application in the course of making a recommendation on Request 16-12. See Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf>). ICANN’s Bylaws direct the BAMC to consider only whether the challenged action violates established ICANN policies or procedures and do not authorize the BAMC to perform a *de novo* review of the Application. See ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

⁸¹ CPE Process Review Scope 2 Report, at pgs. 36-37 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

between the Requestor and the U.S.-based Merck & Co., Inc. (a former subsidiary of the Requestor) over which company may use the name “MERCK” outside the United States.⁸² Instead of denying this relationship, the Requestor claims the CPE Provider erred “by equating ‘over-reaching substantially beyond the community’ with anything less than absolute world-wide exclusivity.”⁸³ However, the Requestor’s portrayal of the CPE Provider’s analysis is inaccurate. Far from determining that the existence of *any* entity called “Merck” would necessarily prevent the Application from scoring points in the nexus element, the CPE Provider emphasized the U.S.-based entity’s substantial revenues, and the significant operations the U.S.-based entity maintains “in the pharmaceutical, vaccines and animal health industry[.]”⁸⁴ As such, the Requestor is incorrect to surmise that the CPE Provider would have awarded zero points for nexus if there existed an entity called Merck of negligible size and importance that was not included in the Requestor’s community definition.⁸⁵ As a result, there is no support for the Requestor’s claim that the CPE Provider required “absolute world-wide exclusivity” for a finding of nexus.

Consideration of the CPE Provider’s treatment of the Merck & Co. Application confirms the inaccuracy of the Requestor’s portrayal of the CPE Report. On 10 August 2016, the CPE Provider issued its report on the Merck & Co. Application (Merck & Co. CPE Report).⁸⁶ There, the CPE Provider considered whether the existence of *the Requestor* should prevent *the Merck & Co. Application* from receiving any points on the nexus element.⁸⁷ The CPE Provider applied

⁸² See Request 16-12, § 8, Pgs. 7-10.

⁸³ Request 16-12, § 8, Pg. 7.

⁸⁴ CPE Report, Pg. 4.

⁸⁵ See Request 16-12, § 8, Pgs. 7, 9, 11.

⁸⁶ Merck & Co., Inc. CPE Report, at Pg. 1 (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>). The Merck & Co., Inc. Application earned nine out of 16 possible points on the CPE criteria, and therefore did not qualify for community priority.

⁸⁷ Merck & Co., Inc. CPE Report, Pg. 4.

the same reasoning to the Merck & Co. Application as the reasoning included in the Requestor's CPE Report: it found that the Merck & Co., Inc.'s applied-for string (.MERCK) substantially over-reaches beyond the community because *the Requestor* is "a substantial entity also known by the name 'Merck'" and is not included in the *Merck & Co. Application's* community definition in its application for .MERCK.⁸⁸ For that reason, the CPE Provider awarded the Merck & Co. Application zero points on sub-criterion 2-A, just as the CPE Provider did with respect to the Requestor's Application.⁸⁹

The Requestor next argues that its own community is larger than the community associated with Merck & Co., Inc. and therefore "the string clearly identifies the Requestor."⁹⁰ It argues that it has the "exclusive rights to use MERCK in 191 out of 193 UN countries," and that its community "covers 99% of the world's jurisdictions, home to 95% of the world's population."⁹¹ These assertions do not show that the CPE Provider failed to adhere to any established policy or procedure in its evaluation of sub-criterion 2-A. The Requestor does not dispute the fact that Merck & Co., Inc. is: (i) not included in the Application's community definition; (ii) known as "Merck," and (iii) of substantial size. As such, the Requestor has failed to identify any policy or procedure that the CPE Provider violated in concluding that the string .MERCK over-reaches substantially beyond the community definition in the Application. Nor has the Requestor shown that the CPE Provider failed to adhere to any policy or procedure in awarding zero points on the nexus element, and in fact, the Guidebook specifically instructs that zero points must be awarded if the string substantially over-reaches beyond the community in the Application.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Request, § 8, Pg. 9.

⁹¹ *Id.*

The Requestor also asserts that it should have been awarded more points for sub-criterion 2-A because it “will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights” and claims that Merck & Co., Inc. has not made any such reciprocal commitments.⁹² But the Requestor does not point to any policy or procedure indicating that the CPE Provider must (or even should) take geo-targeting considerations into account under sub-criterion 2-A, because none exist. As such, no reconsideration is warranted because the CPE Provider did not take the Requestor’s geo-targeting plans into account when scoring sub-criterion 2-A.

The Requestor argues that the only reason its community overlaps with Merck & Co., Inc.’s community is because of Merck & Co., Inc.’s “unlawful intrusion” into its territories and its “illegal use” of the word MERCK.⁹³ It contends that “the [CPE Provider] cannot contribute or consolidate such an illegal use.”⁹⁴ The CPE Provider explained in the CPE Report its rationale for concluding that the string over-reached,⁹⁵ which is discussed in detail above. That rationale did not depend exclusively on Merck & Co., Inc.’s presence outside the United States and Canada.⁹⁶ The CPE Provider was not required to weigh in on the decades long legal dispute between the Requestor and Merck & Co., Inc.,⁹⁷ as part of its application of any of the CPE criteria under the Guidebook.⁹⁸ Accordingly, the CPE Provider did not violate any established policy or procedure in omitting this consideration, and this argument does not warrant reconsideration.

⁹² Request, § 8, Pg. 9.

⁹³ *Id.*, § 8, Pg. 10.

⁹⁴ *Id.*

⁹⁵ CPE Report, at Pg. 3-4.

⁹⁶ *Id.* (discussing Merck & Co., Inc.’s U.S. presence).

⁹⁷ *See* Request 16-12, § 8, at Pg. 7-10.

⁹⁸ *See*, Guidebook, Module 4, § 4.2.3.

Additionally, the Requestor argues that ICANN org should have, but failed to, provide the following information, which would have affected the CPE Provider's determination under sub-criterion 2-A.

- Merck & Co., Inc. “exercises its right to use the name ‘Merck’ under a reciprocal use agreement, which has been in force since the 1970s.”⁹⁹
- “Merck & Co., Inc.’s rights to use the trademark and tradename ‘Merck’ in isolated form are territorially limited to two countries within North America, whereas Request[o]r retains those rights throughout the rest of the world.”¹⁰⁰
- The Requestor “explicitly stated in its application and in a Public Interest Commitment that it will take all necessary measures, including geo-targeting, to avoid internet access by users in the two countries, the US and Canada, in which the other corporate entity has trademark rights.”¹⁰¹
- “Merck & Co has indicated in its applications not only that it intends to use the <.merck> space internationally (where it has no rights in the MERCK trademark whatsoever), but also that it intends to sell and license domain names to affiliates and other entities throughout the world, including territories where Request[o]r has exclusive rights.”¹⁰²
- “Various court proceedings are currently pending in the UK, Switzerland, Germany, [and] France on the grounds of Merck & Co.’s trademark infringement and breach of [contract with Merck KGaA].”¹⁰³
- “Any ‘over-reaching’ beyond the community is due to the current and proposed unlawful intrusion by Merck & Co. into the Request[o]r’s territories. As a result of this unlawful intrusion, namely Merck & Co’s global use of the name MERCK on the Internet, it is not surprising that the [CPE Provider] has been misled when undertaking the internet search to be utilized according to the CPE guidelines to help understand whether the string identifies the community.”¹⁰⁴

⁹⁹ 2017 Presentation, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf>).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at Pg. 4.

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 5 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-oral-presentation-bamc-20sep18-en.pdf>).

There is no requirement under the Guidebook that required ICANN org to provide such information to the CPE Provider. In its email notice to the CPE Provider to begin the CPE evaluation of the Requestor’s Application, ICANN org stated that the following are in scope: “Application questions 1-30a, [a]pplication comments (that have been loaded into an external share drive for [the CPE Provider’s] retrieval and attached to this email, [c]orrespondence, [o]bjection outcomes, [o]utside research (as necessary).”¹⁰⁵ The CPE Provider acknowledged—and therefore *was* aware—of several of these issues, including that Merck & Co., Inc. is only known as “Merck” in the United States and Canada.¹⁰⁶ Further, as explained above, none of these facts are determinative as to the analysis of sub-criterion 2-A. Nevertheless, because there is no requirement under Module 4, Section 4.2.3 of the Guidebook that ICANN org provide the above information to the CPE Provider, no policy or procedure was violated by ICANN org.

2. The Application of Sub-Criterion 2-A is Consistent with Other CPE Reports.

The Requestor asserts that the CPE Provider’s analysis of sub-criterion 2-A in the CPE Report is inconsistent with its analysis of the same sub-criterion for the applications for .ECO, .RADIO, .SPA, and .ART, claiming that in each of those cases, the “applicant was awarded three points under the nexus requirement although there were other entities using the same name.”¹⁰⁷ The Requestor provides no support or additional argument concerning this assertion, and further, the argument is misplaced. In each of these cases, the CPE Provider determined that the applied-for string did *not* match the name of the community, but it identified the community without

¹⁰⁵ Attachment 2 to BAMC Recommendation.

¹⁰⁶ CPE Report at Pg. 4, n.2.

¹⁰⁷ 2017 Presentation Summary at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf>).

over-reaching substantially beyond the community.¹⁰⁸ By contrast, the CPE Provider concluded that .MERCK *did* match the name of the community, but it *also* matched the name of another community, that of US-based Merck & Co., Inc.¹⁰⁹

Concerning .ART, the CPE Provider concluded that the community defined in the application “is broad and encompasses all areas that are typically considered as art. However, given the subjective nature and meaning of what constitutes art, the general public may not necessarily associate all of the members of the defined community with the string.”¹¹⁰ Therefore, the CPE Provider concluded that although the string did not match the defined community, it identified the community.¹¹¹ The Requestor here does not argue that the general public might subjectively disagree as to the meaning of “Merck.” Instead, the Requestor acknowledges Merck & Co., Inc., but disagrees with the CPE Provider’s determination that Merck & Co., Inc. constituted a community that matched the name of the string .MERCK. Accordingly, the CPE Provider’s determination concerning the .ART application is not inconsistent with its determination concerning the Application.

In the .ECO CPE, the CPE Provider determined that there was a “common association of the prefix ‘eco’ with various phrases closely associated with environmental protection,” and therefore determined that “.ECO” identified the community.¹¹² Similarly, the CPE Provider concluded that the community of spa associations and establishments were “commonly known

¹⁰⁸ .ART CPE Report at Pg. 5 (<https://newgtlds.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); .SPA CPE Report at Pg. 4 (<https://newgtlds.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); .ECO CPE Report at Pg. 5-6 (<https://newgtlds.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); .RADIO CPE Report at Pg. 4-5 (<https://newgtlds.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

¹⁰⁹ CPE Report at Pg. 3-4.

¹¹⁰ .ART CPE Report at Pg. 5.

¹¹¹ *Id.*

¹¹² .ECO CPE Report at Pg. 4-5.

by others” by the applied-for string .SPA,¹¹³ and that the “public will generally associate the [.RADIO] string with the community as defined by the [.RADIO] applicant.”¹¹⁴ On that basis, the CPE Provider concluded that the strings identified the communities. There was no separate, competing community associated with .ECO, .SPA, or .RADIO as there is in the Requestor’s case.

3. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-B-Uniqueness.

The Requestor argues that the CPE Provider should have awarded the Application one point on the uniqueness element because of the Requestor’s longstanding and sole use of its community name MERCK in “99% of global jurisdictions The name MERCK has no other meaning than the name of the family owning the majority of Requestor’s community.”¹¹⁵

As discussed above, to fulfill the requirements for element sub-criterion 2-B, the applied-for string must have “no other significant meaning beyond identifying the community described in the application and it must also score a 2 or 3 on [sub-criterion 2-A] Nexus.”¹¹⁶ Accordingly, to be eligible for a point on the uniqueness element, an application must have “identif[ied] the community,” *i.e.*, scored 2 or 3 on the nexus element. Here, the CPE Provider awarded zero points under sub-criterion 2-B because the applied-for string did not receive a score of two or three on sub-criterion 2-A for the reasons discussed above.¹¹⁷

¹¹³ .SPA CPE Report at Pg. 4.

¹¹⁴ .RADIO CPE Report at Pg. 5. The CPE Provider noted that “the community, as defined in the [.RADIO] application, also includes some entities that are only tangentially related to radio,” but concluded that those entities “comprise only a small part of the community.” *Id.*

¹¹⁵ Request, § 8, Pg. 11.

¹¹⁶ CPE Report at Pg. 4.

¹¹⁷ CPE Report at Pg. 5; *see also* Guidebook, Module 4, § 4.2.3, Pg. 4-14 (“The phrasing ‘. . . 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.’”).

Similar to its arguments in sub-criterion 2-A, the Requestor’s challenge of the CPE Provider’s scoring on sub-criterion is based on a substantive disagreement with the CPE Provider’s conclusions. The Requestor has not provided any evidence demonstrating that the CPE Provider failed to comply with established policy or procedure. On the contrary, the CPE Report clearly demonstrates that the CPE Provider applied the standards set forth in the Guidebook in evaluating sub-criterion 2-B. Indeed, the Guidebook advises

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.¹¹⁸

The Application makes clear that .MERCCK *does* carry a significant meaning other than the Application’s defined community, as the Application references “trademark-related concerns within North America.”¹¹⁹ The CPE Provider therefore adhered to the Guidebook in finding that the Application merits zero points for sub-criterion 2-B.

In sum, the Requestor has failed to show any policy or procedure violation in connection with the CPE Provider’s finding that the Application should receive a score of zero points for Criterion 2, and accordingly, reconsideration is not warranted.

4. The CPE Report did not Implicate Due Process Rights.

The Requestor argues that the CPE Provider “failed to take reasonable care” in drafting the CPE Report, “and misapplied standards and policies developed by ICANN in the [Guidebook], resulting in a denial of due process to the Request[o]r.”¹²⁰ This argument does not warrant reconsideration. For the reasons discussed above, the Requestor has not demonstrated

¹¹⁸ Guidebook, Module 4, § 4.2.3.

¹¹⁹ Application ¶ 20(c) (emphasis added) (<https://gtldresult.icann.org/applicationstatus/applicationdetails/1631>).

¹²⁰ Request 16-12, § 8, Pg. 6.

any failure by the CPE Provider to follow the established policy and procedures for CPE as set forth in the Guidebook.

Relatedly, the Requestor asserts that

the BGC has regularly disregarded blatant misapplication of an evaluation standard by third party service providers, such as the [CPE Provider], stating that the Reconsideration process does not permit evaluation of a third party service provider's substantive conclusion. . . . Many parties [including] the Requestor have been left out in the rain with blatantly wrong decisions by third [party] providers such as Legal Rights Objection Panel, String Confusion Panels and also the [CPE Provider].¹²¹

The Requestor is suggesting that there should have been a formal appeal process for decisions by ICANN org's third-party service providers, including the CPE Provider, Legal Rights Objection Panel, and String Confusion Panels. The methods for challenging determinations in the course of the gTLD contention resolution process are set forth in the Guidebook, which was developed after more than 18 months of extensive discussions with a wide variety of stakeholder groups, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community, culminating in the Board's June 2008 decision to adopt the community-developed New gTLD policy.¹²² Drafts of the Guidebook itself were released for public comment, and revised in light of meaningful community input.¹²³ The time for challenging the Guidebook has long passed.¹²⁴

¹²¹ 2017 Presentation, at Pg. 3.

¹²² Guidebook, Preamble.

¹²³ *Id.*

¹²⁴ See <https://newgtlds.icann.org/en/applicants/agb>, indicating current version of guidebook is dated 4 June 2012. Under the Guidelines in effect in June 2012, Reconsideration Requests were due within thirty days after publication of Board actions or within thirty days after a Requestor became aware of or should reasonably have become aware of challenged Staff action. ICANN Bylaws, 16 March 2012, Art. IV, § 2.5 (<https://www.icann.org/resources/pages/bylaws-2012-12-21-en#IV>).

Moreover, the Guidebook provides a path for challenging the results of the CPE process: Module 6 of the Guidebook states that applicants, including the Requestor, “may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application.”¹²⁵ The Requestor has exercised this right by invoking the Reconsideration process with Request 16-12.¹²⁶

Because the CPE Provider’s application of Criterion 2 to the Application was consistent with the Guidebook, ICANN org’s acceptance of the CPE Report was also consistent with applicable policies and procedures, and did not implicate any “due process” violation. Nor does the fact that there was no option to appeal the substance of evaluation results implicate any due process violation.

B. The CPE Process Review Supports the Results of the Merck KGaA Application.

Request 16-12 was placed on hold pending completion of the CPE Process Review, which was conducted to evaluate claims, like the Requestor’s, that the CPE Provider inconsistently applied the CPE criteria. FTI considered those issues, and concluded, among other things, that there was “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.”¹²⁷ For this additional reason,

¹²⁵ Guidebook, Module 6, § 6, at Pg. 6-4.

¹²⁶ The Requestor also exercised this right when it filed an IRP proceeding concerning objections that the Requestor and Merck & Co., Inc. filed against each other in the course of their competing applications for the .MERCK gTLD. See <https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf>.

¹²⁷ Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>). The Requestor believes that the Scope 2 Report “has no significance with respect to Merck KGaA’s Request for Reconsideration.” (12 April 2018 Letter from Bettinger to ICANN, at Pg. 8.) However, the Scope 2 Report’s findings are directly relevant to the Requestor’s claim that the CPE Provider’s determination concerning sub-criterion 2-A-Nexus, was inconsistent with the CPE Provider’s determinations under the same sub-criterion for .SPA, .RADIO, .ART, and .ECO.

the Requestor’s argument that the CPE Provider incorrectly applied Criterion 2 does not support reconsideration.

The Requestor argues that the CPE Process Review Scope 2 and 3 Reports are excessively narrow in scope, because they “do not address any of the[] issues that were raised in [Request 16-12], nor do they reevaluate [the CPE Provider’s] application of the Nexus criteria or assess the propriety or reasonableness of the research undertaken by the CPE [P]rovider.”¹²⁸

Similarly, the Requestor complains that the CPE Process Review “is not a ‘compliance investigation’ as FTI claims to have done, but a mere description of [CPE report] outcomes.”¹²⁹

The Requestor also lists other entities, including the Council of Europe, ICANN Ombudsman Chris LaHatte, and Professor William N. Eskridge, Jr., who have criticized the CPE Process Review Reports.¹³⁰ The Requestor’s claims do not support reconsideration.

The BGC, not FTI, determined the parameters of the Scope 2 investigation.¹³¹ The Board (including the BGC) was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. “[T]he fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the

¹²⁸ 12 April 2018 Letter from Bettinger to ICANN, at Pg. 6 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-supp-submission-12apr18-en.pdf>). See also Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 7 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf>).

¹²⁹ 12 April 2018 Letter from Bettinger to ICANN, at Pg. 6 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-supp-submission-12apr18-en.pdf>).

¹³⁰ See Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf>). Professor Eskridge discussed the CPE Process Review Reports in a submission in support of the Requestor in Reconsideration Request 16-3. See 31 January 2018 Letter from A. Ali to ICANN Board attaching Second Eskridge Opinion (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>).

¹³¹ See 2 June 2017 Update on Review of the CPE Process Review (<https://www.icann.org/news/announcement-4-2017-06-02-en>).

Requestor.¹³² Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone set a particularly wide or narrow scope for it. Further, the Requestor has not identified any policy or procedure violated by the Board’s discretionary decision not to include in the CPE Process Review a substantive and wholesale reevaluation of CPE applications or analysis of the “reasonableness” of the CPE Provider’s research.¹³³

The Requestor also asserts that FTI’s Scope 2 conclusion that the CPE Provider’s evaluation process and reports were consistent with the Guidebook “is not based on any interpretative [*sic*] analysis of the nexus criterion nor on an investigation of whether the EIU ignored important facts that supported a full credit [score] under the Nexus Criterion,” and “showed no interest in or knowledge of” the Requestor’s historical relationship with Merck & Co., Inc., or Merck KGaA’s promise to limit access to the .MERCK string by users in areas where Merck & Co., Inc. holds rights to the name.¹³⁴ These matters are similarly beyond the scope of the CPE Process Review and do not support reconsideration.

The Requestor asserts that the Scope 3 Report “reveals that [the CPE Provider was] completely ignorant of the contractual obligations between Merck KGaA and Merck & Co., Inc. and Merck KGaA’s Public Interest Commitment,” and that the CPE Provider “consulted only three Wikipedia websites and one Bloomberg article to evaluate” the Nexus sub-criterion.¹³⁵ According to the Requestor, this demonstrates that the CPE Provider’s research and diligence were “grossly inadequate.”¹³⁶

¹³² *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138 (<https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>).

¹³³ 12 April 2018 Letter from Bettinger to ICANN, at Pg. 6.

¹³⁴ *Id.* at Pg. 7. *See also* Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 7 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-oral-presentation-bamc-20sep18-en.pdf>).

¹³⁵ 12 April 2018 Letter from Bettinger to ICANN, at Pg. 8.

¹³⁶ *Id.*

The CPE Report makes clear that the CPE Provider *was* cognizant of the contractual relationship between the Requestor and Merck & Co., Inc., and of the contentious legal history. For example, the CPE Report notes that Merck & Co., Inc. “is known as MSD outside of the US and Canada,” i.e., where the Requestor has exclusive rights to the “Merck” mark.¹³⁷ Additionally, the CPE Provider referenced and cited Merck & Co., Inc.’s Legal Rights Objection (LRO) to the Application.¹³⁸ The LRO, which the BAMC assumes the CPE Provider reviewed, having cited it, sets forth the same facts as to the legal disputes between the Requestor and Merck & Co., Inc. that the Requestor argues the CPE Provider was “ignorant of.”¹³⁹ The Requestor’s assertion is inaccurate and does not support reconsideration.

Additionally, concerning the CPE Provider’s independent research, no policy or procedure required the CPE Provider to rely on any minimum number or particular type of resources. The Guidebook *permits* the CPE Provider to “perform independent research,” but only “if deemed necessary.”¹⁴⁰ The Requestor has not put forth any arguments demonstrating that the CPE Provider should have determined that additional research was necessary. Accordingly, reconsideration on this ground is not warranted.

For all of the reasons discussed above, reconsideration is not warranted.

C. The Requestor’s Request for the Disclosure of Documentary Information is Not Grounds for Reconsideration.

The Requestor has requested that “the Board disclose[] all documentary information and communications between the ICANN org and the CPE provider relating to” the Application and CPE Report.¹⁴¹

¹³⁷ CPE Report, at Pg. 4.

¹³⁸ *Id.* at Pg. 7 & Pg. 7 n.7.

¹³⁹ LRO at Pg. 3-4 (<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-980-7217-en.pdf>).

¹⁴⁰ Guidebook, Module 4, § 4.2.3, at Pg. 4-9.

¹⁴¹ 12 April 2018 Letter from Bettinger to ICANN, at Pg. 10.

This request does not set forth grounds for reconsideration, nor is it properly made in the context of a reconsideration request, as the Requestor is not asking ICANN org to reconsider Board or staff action or inaction. To the extent the Requestor wishes to make a request under ICANN org's Documentary Information Disclosure Policy (DIDP), the Requestor may do so separately, consistent with the DIDP.¹⁴² However, the BAMC notes that the documentary information that the Requestor seeks was the subject of multiple DIDP Requests and subsequent Requests for Reconsideration, which the Requestor may consider consulting before submitting an additional substantially identical request.¹⁴³

VI. Recommendation

The BAMC has considered the merits of Request 16-12 and, based on the foregoing, concludes that ICANN org (and the CPE Provider) acted consistent with the Guidebook and did not violate applicable policies or procedures when the CPE Provider determined that the Application did not satisfy the requirements for Community Priority and ICANN org accepted the CPE Report. Accordingly, the BAMC recommends that the Board deny Request 16-12.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 14 August 2016. However, Request 16-12 was placed on hold pending completion of the CPE Process Review. The Requestor was then provided an opportunity to supplement its arguments in light of the CPE Process Review results, and to make

¹⁴² See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

¹⁴³ See, e.g., DIDP Request 20180115-1 and response thereto (<https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>) (Request for Reconsideration Denied on 18 July 2018 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.c>)); DIDP Request 20180110-1 and response thereto (<https://www.icann.org/resources/pages/didp-20180110-1-ali-request-2018-02-12-en>) (Request for Reconsideration Denied on 18 July 2018, (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.b>)).

a telephonic presentation to the BAMC prior to its recommendation. The Requestor accepted both invitations and made its presentation to the BAMC on 4 September 2018. Accordingly, the first opportunity that the BAMC has to make a recommendation on Request 16-12 is 14 December 2018.