**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-44**

20 JANUARY 2015

The Requester, Dotgay LLC,[1] seeks reconsideration of the Community Priority

Evaluation ("CPE") Panel's Report, and ICANN's acceptance of that Report, finding that the

Requester's application for .GAY did not prevail in CPE. The Requester also seeks

reconsideration of ICANN staff's response to the Requester's request, pursuant to ICANN's

Document Information Disclosure Policy ("DIDP"), for documents relating to the CPE Panel's

Report.

I.   Brief Summary.

The Requester submitted a community application for .GAY (the "Application"). Three

other applicants submitted standard (meaning not community-based) applications for .GAY. All

four .GAY applications were placed into a contention set. As the Requester's Application was

community-based, the Requester was invited to and did participate in CPE for .GAY. The

Requester's Application did not prevail in CPE. As a result, the Application remained in

contention with the other applications for .GAY. The contention can be resolved by auction or

some arrangement among the involved applicants.

Following the CPE determination, the Requester filed a request pursuant to ICANN's

DIDP ("DIDP Request"), seeking documents relating to the CPE Panel's Report. In its response

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[1] At many (but not all) points throughout its Reconsideration Request, the Requester refers to itself in the plural, as
"Requesters." Since Section 1 of the Request, seeking "Requester Information," only indicates one Requester
(dotgay LLC), and since the Requester stated it was not "bringing this Reconsideration Request on behalf of
multiple persons or entities" (*see* Request, § 11, Pg. 24), this Determination will deem the Request to have been filed
by a single Requester, dotgay LLC.

to the DIDP Request ("DIDP Response"), ICANN staff identified and provided links to all

publicly available responsive documents, and further noted that many of the requested

documents did not exist or were not in ICANN's possession. With respect to those requested

documents that were in ICANN's possession and not already publicly available, ICANN

explained that those documents would not be produced because they were subject to certain of

the Defined Conditions of Nondisclosure ("Conditions of Nondisclosure") set forth in the DIDP.

The Requester now seeks reconsideration of the CPE determination and ICANN's acceptance of

it, as well as ICANN's DIDP Response. As for CPE, the Requester makes three claims: (i) the

Economic Intelligence Unit ("EIU"), the entity that administers the CPE process, imposed

additional criteria or procedural requirements beyond those set forth in the Applicant Guidebook

("Guidebook"); (ii) the CPE Panel failed to comply with certain established ICANN policies and

procedures in rendering the CPE Panel's Report; and (iii) the CPE Panel's Report is inconsistent

with other CPE panels' reports. The Requester also seeks reconsideration of ICANN's DIDP

Response on the basis that it violates ICANN's transparency principles.

The BGC concludes that, upon investigation of Requester's claims, the CPE Panel

inadvertently failed to verify 54 letters of support for the Application and that this failure

contradicts an established procedure. The BGC further concludes that the CPE Panel's failure to

comply with this established CPE procedure warrants reconsideration. Accordingly, the BGC

determines that the CPE Panel Report shall be set aside, and that the EIU shall identify two

different evaluators to perform a new CPE for the Application.[2] Further, the BGC recommends

that the EIU include new members of the core team that assesses the evaluation results.[3]

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[2] While the new CPE is in process, the resolution of the contention set will be postponed. Therefore, Requester's
request that ICANN stay the processing of the .GAY contention set is rendered moot.
[3] *See* Annex B-3, CPE Panel Process Document, Pg. 4 (summarizing role of core team).

With respect to the Requester's other arguments, the BGC finds that the Requester has not stated a sufficient basis for reconsideration.

II.   Facts.

A.   Background Facts.

The Requester submitted a community application for .GAY.[4]

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.[5] Those applications were placed in a contention set with the Requester's community-based application.

On 23 February 2014, the Requester's Application for .GAY was invited to participate in CPE. CPE is a method of resolving string contention, described in section 4.2 of the 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 .GAY, and its Application was forwarded to the EIU, the CPE provider, for evaluation.[6]

On 6 October 2014, the CPE Panel issued its report on the Requester's Application.[7] The CPE Panel's Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in CPE.[8]

On 22 October 2014, the Requester submitted a reconsideration request, requesting reconsideration of the CPE Panel's Report, and ICANN's acceptance of that Report.[9]

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[4] *See* Application Details, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/444.
[5] *See* Application Details, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/1460; Application Details, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/1115; Application Details, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/1519.
[6] *See* Community Priority Evaluation (CPE), http://newgtlds.icann.org/en/applicants/cpe#status.
[7] *Id.*
[8] *See* CPE Report, *available at* https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf and as Annex A-1.
[9] In this original Request, the Requester contended that the Panel failed to comply with ICANN policies and procedures because it purportedly misapplied two of the criteria an application must meet to prevail in CPE: (1) the

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Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP, seeking documents related to the CPE Panel's Report.

On 31 October 2014, ICANN responded to the DIDP Request.[10] ICANN identified and provided links to all publicly available documents responsive to the DIDP Request, including comments regarding the Application, which were posted on ICANN's website and considered by the CPE Panel.[11] ICANN noted that the documents responsive to the requests were either: (1) already public; (2) not in ICANN's possession; or (3) not appropriate for public disclosure because they were subject to certain Conditions of Nondisclosure and that the public interest in disclosing the information did not outweigh the harm that may be caused by such disclosure.[12]

On 29 November 2014, the Requester submitted a revised reconsideration request ("Request" or "Request 14-44"), which sets forth different arguments than those raised in the 22 October reconsideration request, but still seeks reconsideration of the CPE Panel's Report and ICANN's acceptance of that Report, and also seeks reconsideration of the DIDP Response.[13]

B. Relief Requested.

The Requester asks ICANN to reverse the CPE Panel's decision not to grant the Application community priority status, and requests that ICANN or a newly-appointed third party "perform a new determination" after holding a hearing.[14] In the meantime, the Requester asks ICANN to "suspend the process for string contention resolution in relation to the .GAY

(continued…)

Application's nexus to the community; and (2) the community's endorsement. *See* Annex A-3, Initial Reconsideration Request, § 8.1.1, Pg. 5.
[10] *See* Annex A-4, DIDP Response, Pg. 1.
[11] *See id.*, Pgs. 3-4.
[12] *See generally id.*
[13] ICANN confirmed with the Requester that the Requester is only pursuing the issues raised in the revised Reconsideration Request. Therefore this determination addresses the arguments raised in the revised Request, and not the claims made in the original reconsideration request.
[14] Request, § 9, Pgs. 23-24.

gTLD."[15] The Requester also seeks disclosure of "the information requested" in its DIDP Request.[16] Further, the Requester asks ICANN to reconsider its "position towards Requester's allegations regarding spurious activity."[17]

III. Issues.

In view of the claims set forth in Request 14-44 and ICANN's investigation thereof, the issues are:

A. Whether reconsideration of the CPE Panel's determination that the Requester did not prevail in CPE is warranted because:

(1) The CPE Panel did not adhere to procedures governing the verification of letters in support of the Application;

(2) The EIU imposed additional criteria or procedural requirements;

(3) The EIU did not follow established policies or procedures insofar as:

(a) The CPE Panel declined to ask clarifying questions;

(b) The CPE Panel did not identify the objectors to the Application;

(c) ICANN did not transmit the Requester's evidence of false allegations made against the Application to the EIU;

(d) The CPE Panel purportedly misread the Application;

(e) The CPE Panel awarded the Requester zero points with respect to the nexus element of the CPE criteria; or

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[15] *Id.*, Pg. 23.
[16] *Id.*
[17] *Id.*, § 3, Pg. 2.

(f) The CPE Panel did not consider comments made in the determination

rendered in a separate community objection proceeding regarding the .LGBT

string; or

(4) The CPE Panel's Report is inconsistent with other CPE panel reports in a manner

constituting a policy or procedure violation.

B. Whether ICANN staff violated established policy or procedure by determining that

certain documents sought in the DIDP Request were subject to DIDP Conditions of

Nondisclosure.

IV. The Relevant Standards For Evaluating Reconsideration Requests, Community Priority Evaluations And DIDP Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in

accordance with specified criteria.[18] Dismissal of a request for reconsideration of staff action or

inaction is appropriate if the BGC concludes, and the Board or the NGPC[19] agrees to the extent

that the BGC deems that further consideration by the Board or NGPC is necessary, that the

requesting party does not have standing because the party failed to satisfy the reconsideration

criteria set forth in the Bylaws.

A. Community Priority Evaluation.

The reconsideration process can properly be invoked for challenges to expert

determinations rendered by panels formed by third party service providers, such as the EIU,

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[18] 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.

[19] New gTLD Program Committee.

where it can be demonstrated that a panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.[20]

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 the Requester did not prevail in the CPE. Rather, the BGC's review is limited to whether the CPE Panel violated any established policy or process in making its determination.

ICANN has made public all documents regarding the standards and process governing CPE on the New gTLD microsite. (*See* http://newgtlds.icann.org/en/applicants/cpe.) The specific 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.[21]

CPE will occur only if a community-based applicant selects this option and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.[22] CPE is performed by an independent community priority panel appointed by the EIU to review such applications.[23] A CPE panel's role is to determine whether the community-based application satisfies the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed

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[20] *See* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc, BGC Recommendation on Reconsideration Request 13-5.
[21] The CPE Guidelines may be found here: http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en, and as Annex B-4.
[22] Guidebook, § 4.2.
[23] Guidebook, § 4.2.2.

string and community; (iii) registration policies; and (iv) community endorsement. To prevail in

CPE, an application 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 maximum total of 16 points).

B.   Document Information Disclosure Policy.

ICANN's DIDP is intended to ensure that information contained in documents

concerning ICANN's operational activities, and within ICANN's possession, custody, or control,

that is not already publicly available is made available to the public unless there is a compelling

reason for confidentiality. [24] As part of its commitment to transparency, ICANN makes available

a comprehensive set of materials on its website as a matter of course.[25]

In responding to a request submitted pursuant to ICANN's DIDP, ICANN follows the

guidelines set forth in the "Process For Responding To ICANN's Documentary Information

Disclosure Policy (DIDP) Requests"[26] ("DIDP Response Process"). Specifically, the DIDP

Response Process provides that "[a] review is conducted as to whether any of the documents

identified as responsive to the Request are subject to any of the [Conditions] of Nondisclosure

identified [on ICANN's website]."[27] ICANN reserves the right to withhold documents if they

fall within any of the Conditions of Nondisclosure.[28] In addition, ICANN may refuse

"[i]nformation requests: (i) which are not reasonable; (ii) which are excessive or overly

burdensome; (iii) complying with which is not feasible; or (iv) [which] are made with an abusive

or vexatious purpose or by a vexatious or querulous individual."[29]

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[24] *See* https://www.icann.org/resources/pages/didp-2012-02-25-en.
[25] *See id.*
[26] *See* https://www.icann.org/resources/files/didp-response-process-2013-10-29-en.
[27] *Id.*; *see also* https://www.icann.org/en/about/transparency/didp.
[28] *See* https://www.icann.org/resources/pages/didp-2012-02-25-en.
[29] *See id*.

The DIDP Response Process also provides that "[t]o the extent that any responsive documents fall within any [Conditions of Nondisclosure], a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure."[30] It is within ICANN's sole discretion to determine whether the public interest in the disclosure of responsive documents that fall within one of the Conditions of Nondisclosure outweighs the harm that may be caused by such disclosure.[31] Finally, the DIDP does not require ICANN staff to "create or compile summaries of any documented information," including logs of documents withheld under one of the Conditions of Nondisclosure.[32]

V. Analysis And Rationale.

The Requester first objects to the CPE Panel's Report finding that the Application did not prevail in CPE, asserting three overarching arguments as to why reconsideration is warranted. As discussed below, only one of the Requester's claims identifies conduct that contradicted an established policy or procedure, as required to support reconsideration. Specifically, in the course of evaluating the Requester's claims, ICANN discovered that the EIU failed to verify 54 letters of support for the Application, and on that ground (only), the BGC determines that reconsideration is warranted.

The Requester also objects to ICANN staff's DIDP Response. However, the Requester presents only its substantive disagreement with ICANN staff's application of the DIDP Response Process, which does not support reconsideration.

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[30] *See* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.
[31] *See* https://www.icann.org/resources/pages/didp-2012-02-25-en.
[32] *Id*.

     A.   **Reconsideration Of The CPE Report Is Warranted Because The EIU Did Not Verify All Relevant Letters Of Support, But The Remainder Of The Requester's Claims Do Not Support Reconsideration.**

            1.   **Reconsideration Is Warranted Because The CPE Panel Did Not Adhere To Procedures Governing The Verification Of Support Letters.**

CPE panels "will attempt to validate all letters" submitted in support of or in opposition to an application "to ensure that the individuals who have signed the documents are in fact the sender, have the authority to speak on behalf of their institution, and that the panel clearly understands the intentions of the letter."[33] Only letters that the EIU deems "relevant" to the CPE are forwarded to the CPE evaluators, and it is only those letters that the evaluators must verify.[34] Here, the Requester claims reconsideration is warranted because it contends that the CPE Panel only attempted to verify "less than 20%" of the letters of support received.[35]

Over the course of investigating the claims made in Request 14-44, ICANN learned that the CPE Panel inadvertently did not verify 54 of the letters of support it reviewed. All 54 letters were sent by the Requester in one correspondence bundle, and they are publicly posted on ICANN's correspondence page.[36] The 54 letters were deemed to be relevant by the EIU, but the EIU inadvertently failed to verify them. Given that established policies and procedures require relevant letters to be verified, reconsideration is warranted.

The BGC's acceptance of Request 14-44 should in no way reflect poorly upon the EIU. Rather, this determination is a recognition that, in response to the Requester's claims and ICANN's investigation of the circumstances surrounding the CPE Panel's Report, ICANN

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[33] *See* Annex B-5, FAQ Page, Pg. 6
[34] Annex B-3, CPE Panel Process Document, Pg. 5.
[35] Request, §§ 8.4-8.5, Pgs. 8-10.
[36] *See* https://www.icann.org/en/system/files/correspondence/baxter-to-icann-2-05may14-en.pdf .

discovered that the EIU inadvertently did not adhere to established policies and procedures insofar as it did not verify some of the support letters it considered.

2. The EIU Did Not Improperly Impose Any Additional Criteria Or Procedural Requirements.

The Requester claims that the EIU has promulgated documents that impose requirements that are inconsistent with and supplemental to those set forth in the Guidebook.[37] Specifically, the Requester claims that the following four documents, all finalized after the Guidebook was published, "contain additional criteria, accents and specifications to the criteria laid down in the Applicant Guidebook"[38]: (1) the EIU's "Community Priority Evaluation Panel and Its Processes" document ("CPE Panel Process Document")[39]; (2) the CPE Guidelines[40]; (3) ICANN's CPE Frequently Asked Questions page, dated 10 September 2014 ("FAQ Page")[41]; and (4) an ICANN document summarizing a typical CPE timeline ("CPE Timeline")[42] (collectively, "CPE Materials"). However, the Requester cites no example of any contradiction with established procedures set forth in the Guidebook within the CPE Materials.

First, the CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook's provisions concerning CPE[43] and summarizing those provisions.[44] The CPE Panel Process Document strictly adheres to the Guidebook's criteria and requirements. The Requester has identified no specific aspect of the CPE Panel

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[37] Request, § 8.3, Pg. 6.
[38] *Id*.
[39] Annex B-3.
[40] Annex B-4.
[41] Annex B-5.
[42] Annex B-6.
[43] The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues was selected as the CPE panel firm through ICANN's public Request for Proposals process in a 2009 call for Expressions of Interest. *See* Annex B-3, CPE Panel Process Document; *see also,* ICANN CALL FOR EXPRESSIONS OF INTEREST (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, *available at* https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf.
[44] Annex B-3, CPE Panel Process Document.

Process Document that imposes obligations greater or different than those set forth in the Guidebook. Indeed, none exists.

Second, the CPE Guidelines expressly state that they do "not modify the [Guidebook] framework [or] change the intent or standards laid out in the [Guidebook]."[45] Rather, the Guidelines are "an accompanying document to the [Guidebook] and are meant to provide additional clarity around the scoring principles outlined in the [Guidebook] . . . [and to] increase transparency, fairness, and predictability around the assessment process."[46] Moreover, the CPE Guidelines were published after extensive input from the Internet community, [47] and are "intended to increase transparency, fairness and predictability around the assessment process."[48] Indeed, the final version of the CPE Guidelines "takes into account all feedback from the community."[49] The Requester does not provide any examples of a requirement set forth in the CPE Guidelines that contravenes the Guidebook.

Third, the FAQ Page does not impose any CPE requirements whatsoever. Rather, the FAQ Page summarizes requirements in the Guidebook and accompanying CPE Materials, and provides information such as the estimated duration of a CPE and applicable fees. The FAQ Page makes clear that all CPE procedures must be consistent with the Guidebook: "The CPE guidelines are an accompanying document to the [Guidebook] and are intended to provide additional clarity around process and scoring principles as defined in the [Guidebook]. The CPE

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[45] CPE Guidelines, Pg. 2.
[46] *Id*.
[47] *See* http://newgtlds. icann.org/en/applicants/cpe.
[48] CPE Guidelines, Pg. 2.
[49] *See* newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.

guidelines do not change the [Guidebook] framework or change the intent or standards established in the [Guidebook]."[50]

Fourth, the CPE Timeline does not impose any requirements, but instead summarizes the timeframes typical for the CPE process. The Guidebook does not impose any deadlines upon either CPE participants or the EIU, thus there is no conflict between the CPE Timeline and any applicable policy or procedure.

The Requester claims ICANN should have permitted applicants to amend their applications after the promulgation of the CPE Materials.[51] However, as set forth above, the CPE Materials did not effectuate any amendment to the Guidebook, or render more stringent any requirement set forth therein. Furthermore, the CPE Materials the Requester now challenges were promulgated quite some time ago; the CPE Guidelines, for instance, were made final on 27 September 2013, and the CPE Panel Process Document was published on 7 August 2014.[52] Any challenge to ICANN action or inaction concerning the publication or implementation of these documents would be time-barred in all events.[53]

For these reasons, no reconsideration is warranted on the grounds that any of the CPE Materials improperly impose obligations upon community applicants in a manner inconsistent with the Guidebook.

> **3. The Remainder Of Requester's Claims Regarding Policies And Procedures Applicable to CPE Do Not Support Reconsideration.**
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> **(a) No Policy Or Process Requires The EIU To Ask Clarifying Questions.**

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[50] Annex B-5, FAQ Pg. 4.
[51] Request, § 8.3, Pg. 7.
[52] *See* http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en; http://newgtlds.icann.org/en/announcements-and-media/announcement-07aug14-en.
[53] Bylaws, Art. IV, § 2.5 (setting forth fifteen day deadline for reconsideration requests).

The Requester claims reconsideration is warranted because the EIU "deliberately decided" not to ask the Requester any clarifying questions during the course of CPE.[54] The Requester, however, acknowledges that there is no established policy or procedure *requiring* the CPE panels to pose clarifying questions to applicants and that the decision to ask clarifying questions is optional.[55] Indeed, the CPE Panel Process Document provides: "*If* the core team so decides, the EIU *may* provide a clarifying question (CQ) to be issued via ICANN to the applicant . . . ."[56] Because there is no established policy or procedure requiring any CPE panel to ask clarifying questions, no reconsideration is warranted based on the fact that the CPE Panel here did not.

(b)   No Policy Or Process Requires The CPE Panel To Identify Objectors To The Application.

The fourth CPE criterion, community endorsement, evaluates community support for and/or opposition to an application through the scoring of two elements—4-A, "support" (worth two points), and 4-B, "opposition" (worth two points).[57] Pursuant to the Guidebook, to receive a maximum score for the opposition element, there must be "no opposition of relevance" to the application, and a score of one point is appropriate where there is "[r]elevant opposition from one group of non-negligible size."[58] Here, the CPE Panel awarded the Requester one out of two points, because it:

> determined that there is opposition to the application from a group
> of non-negligible size, coming from an organization within the
> communities explicitly addressed by the application, making it
> relevant. The organization is a chartered 501(c)(3) nonprofit
> organization with fulltime staff members, as well as ongoing
> events and activities with a substantial following. The grounds of
> the objection do not fall under any of those excluded by the

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[54] Request, § 8.4, Pg. 9.
[55] *Id*.
[56] Annex B-3, CPE Panel Process Document, Pg. 3 (emphasis added).
[57] Guidebook, § 4.2.3.
[58] *Id*.

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[Guidebook] (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.[59]

The Requester contends that reconsideration is warranted because the CPE Panel did not identify *which* opponent to the Application the CPE Panel refers to in the above-quoted analysis.[60] While the Requester objects that it is "impossible to verify" whether the opposing entity is relevant and of non-negligible size, the Requester points to no Guidebook or CPE Guideline requiring the CPE Panel to provide the Requester with the name of the opposing entity, and none exists. Notably, the CPE Guidelines explicitly set forth the evaluation process with respect to the "opposition" element, and do not include any disclosure requirements regarding the identity of the opposition.[61] The Requester contends that the Guidebook should have included such a procedural requirement and, on that basis, argues that reconsideration is warranted. However, the Guidebook was extensively vetted by the community over a course of years and included a total of ten versions with multiple notice and public comment periods, and it does not impose such a requirement. No reconsideration is warranted by virtue of the CPE Panel's decision not to identify the opposition.

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(c)   **No Policy Or Procedure Requires ICANN To Directly Transmit The Requester's Evidence Of False Allegations Made Against The Application To The EIU.**

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The Requester claims reconsideration is warranted because the evidence of alleged "spurious activity" that the Requester submitted to ICANN prior to the issuance of the CPE Panel's Report was not provided to the EIU.[62] For example, the Requester brought to ICANN's

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[59] Annex A-1, CPE Report, Pg. 8.
[60] Request, § 8.6, Pg. 11.
[61] CPE Guidelines, Pgs. 19-20.
[62] Request, § 8.7, Pgs 12-13.

attention its views regarding the motivations and financing sources of certain objectors to the

Application, derogatory statements about the Requester made in the press by other applicants for

the .GAY string, and similar allegations of untoward conduct.[63] However, there is no established

policy or procedure requiring ICANN to provide the EIU with supplemental information at an

applicant's request.

Further, there is no suggestion that any of the alleged spurious activities that the

Requester references (such as Requester's allegation that "a community center from Portland,

Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based"

provided false information to ICANN[64]) had any effect upon the CPE Panel's Report. Moreover,

the Requester had the opportunity to refute these negative claims. Specifically, as ICANN

reminded the Requester in a 14 November 2014 letter,[65] the public comment forum provides

applicants with the ability to refute any negative remarks or allegations, and evaluators,

including CPE panels, are instructed to review those comments and responses.[66] In the 14

November letter, ICANN also noted that it had "not identified anything that indicates the

evaluation processes of the New gTLD Program were compromised by the activities cited, and []

determined that all of these processes have been followed in all respects" concerning the

Application.[67] In other words, the Requester had ample opportunity to be heard as to the alleged

"spurious activities" and to bring its concerns to the attention of the CPE Panel.

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[63] Annexes C-2-C-12.
[64] Request, § 8.7, Pg. 12.
[65] *See* Annex C-3, Pgs. 2-3.
[66] *Id.*, citing Guidebook §§ 1.1.2.3, 4.2.3.
[67] Annex C-3, Pg. 5.

In sum, the Requester has identified no policy or procedure requiring ICANN to directly send to the EIU information concerning the alleged "spurious activities," and no reconsideration is warranted based on any decision ICANN may have reached not to do so.

(d)   The Requester's Claim That The CPE Panel Misread The Application Does Not Support Reconsideration.

The Requester claims reconsideration is warranted because the CPE Panel awarded the Requester's Application zero out of four points on the second criterion, which assesses the nexus between the proposed string and the community.[68] 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).[69] The Requester contends that the CPE Panel misinterpreted the Application and therefore erred in awarding no points in the nexus category. Specifically, the CPE Panel's Report construed the Application as providing that membership with an "Authenticating Partner" is a prerequisite for becoming a member of the community the Application defines.[70] The Requester contends that the CPE Panel wrongly interpreted the Application because the Requester intended only that Authenticating Partners would merely screen potential registrants to ensure they match the community definition.[71]

While this interpretation may have been the Requester's intended meaning in drafting the Application, the CPE Panel's interpretation does not evince any policy or procedure violation. The Application states that the Requester is "*requiring* community members to have *registered*

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[68] Guidebook, § 4.2.3; Request, § 8.9.3, Pgs. 16-17.
[69] Guidebook, § 4.2.3.
[70] Annex A-1, CPE Report, Pg. 5.
[71] Request, § 8.9.3B, Pg. 19.

with one of our Authenticating Partners."[72] The CPE Panel applied the Guidebook provisions

and found this assertion signaled a mismatch between the string and the community as defined in

the Application. While the Requester states that "[t]his is, in the Requester's opinion, an obvious

misreading of the Application,"[73] the Requester's substantive disagreement with the CPE Panel's

conclusions does not form a basis for reconsideration.

(e)   The CPE Panel Properly Applied Element 2-A (Nexus).

The Requester contends that the CPE Panel also erred in its analysis of the nexus element

because it did not take into account the specific arguments raised in the Application relating to

the parameters of the gay community.[74] The Requester, however, does not identify any policy or

procedure violation, but instead only offers substantive disagreement with the CPE Panel's

determination that zero points were warranted with respect to the nexus element.[75]

In awarding zero points for element 2-A (nexus), the CPE Panel accurately described and

applied the Guidebook scoring guidelines.[76] 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 short-form or abbreviation of the community name."[77]

The Application describes the gay community as including:

> individuals who identify themselves as male or female homosexuals,
> bisexual, *transgender*, queer, *intersex, ally* and many other terminology -
> in a variety of languages - that has been used at various points to refer
> most simply to those individuals who do not participate in mainstream

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[72] *See* .GAY Application Details, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/444
(". . . dotgay LLC has established a conservative plan with [Authenticating Partners] representing over 1,000
organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay
Community and the minimum pool from which potential registrants will stem.").
[73] Request, § 8.9.3B, Pg. 19.
[74] Request, § 8.9.3, Pgs. 16-17.
[75] The Requester also claims that the CPE Panel's analysis of the nexus element was inconsistent with other CPE
reports (Request, § 8.9.3.A, Pg. 18), which argument is addressed in section V.A.2(b) *infra*.
[76] *See* Annex A-1, CPE Report, Pgs. 5-6.
[77] Guidebook, § 4.2.3.

> cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. . . .
>
> ***The membership criterion to join the Gay Community is the process of "coming out".*** This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, ***dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).***[78]

The CPE Panel determined that the Application did not merit a score on the nexus criteria because the string does not "identify" the community. As the CPE Panel noted, according to the Guidebook, "identify" in this context "means that the applied for string closely describes the community or the community members, *without over-reaching substantially beyond the community*."[79] The CPE Panel provided two independent reasons why "the applied-for string substantially over-reaches beyond the community defined by the application" and therefore does not merit any points in this category.[80]

First, the Application stated that the community will include only those who have registered with one of the Requester's "Authenticating Partners," and the CPE Panel held that this subset of the "gay community" is not commensurate with the "large group of individuals – all gay people worldwide" to which the string corresponds.[81] In fact, the CPE Panel noted that the Application itself estimates the self-identified gay community as 1.2% of the world population, or about 70 million people, whereas "the size of the community it has defined, based on membership with [Authenticating Partners], is 7 million."[82] As discussed in section V.A.2(d), *supra*, while the Requester contends that the CPE Panel misinterpreted the Application in this

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[78] *See* Response to Question 20(a), .GAY Application Details, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/444.
[79] *Id*. § 4.2.3 (emphasis added).
[80] Annex A-1, CPE Report, Pg. 5.
[81] *Id*.
[82] *Id*.

regard, the CPE Panel's reasonable interpretation does not evince any policy or procedure violation.

Second, the CPE Panel found that the Application defines the community as those who have *publicly* "come out" as homosexual, whereas the word "gay" encompasses also "those who are privately aware of their non-heterosexual sexual orientation."[83] The CPE Panel concluded that the string did not match the Application's definition of the community because there are people who are members of the gay community who have not come out, and also, there are "significant subsets of the [Application's] defined community that are not identified by the string .GAY," such as transgender or intersex persons, or allies of what is commonly considered the gay community.[84] In other words, the CPE Panel held that the definition of community proposed in the Application was both over- and under-inclusive in comparison to the string. As to this rationale for the CPE Panel's award of zero points, the Requester claims that the EIU "has not taken into account Requester's specific arguments for including 'allies' in its community definition."[85] Yet the Requester offers no evidence that the CPE Panel improperly excluded any document or information from its consideration in rendering the CPE Panel's Report.

In sum, the Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 2-A, and the Requester's substantive disagreement with the CPE Panel's conclusion does not support reconsideration.

> **(f)** **No Policy Or Procedure Requires The CPE Panel To Consider Determinations Rendered In Community Objection Proceedings.**

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[83] *Id.*
[84] Annex A-1, CPE Report, Pg. 6.
[85] Request, § 8.9.3, Pg. 17.

The Requester claims reconsideration is warranted because the CPE Panel's Report did

not take into account statements made in a determination overruling a community objection to an

application for a different string, namely .LGBT.[86] The New gTLD Program's dispute resolution

processes, such as the community objection process, provide parties with the opportunity to

object to an application and have their concerns considered by an independent panel of experts.

In contrast, CPE is a method of resolving string contention and is intended to resolve cases

where two or more applicants for an identical or confusingly similar string *successfully complete*

all previous stages of the evaluation and dispute resolution processes. The dispute resolution and

string contention procedures were developed independently of each other with their distinct

purposes in mind, as is made clear by the fact that the Guidebook addresses each in separate

provisions. There is no instruction or even suggestion that CPE panels should consider

statements made in objection determinations, especially those made in objection determinations

regarding a different gTLD. Given that no established policy or procedure requires CPE panels

to consider expert determinations issued to resolve community objections, no reconsideration is

warranted on the ground that the CPE Panel here did not do so.

4.   **The CPE Panel's Report Is Not Inconsistent With Other CPE Panels' Reports In A Manner Constituting A Policy Or Procedure Violation.**

(a)   **The CPE Panel's Reference To The Oxford English Dictionary Presents No Ground For Reconsideration.**

The Requester suggests that reconsideration is warranted because the CPE Panel

consulted the Oxford English Dictionary ("OED") in seeking to define the string name, whereas

the Requester claims that other CPE panels, in considering other applied-for strings, did not.[87]

However, the Guidebook expressly authorizes CPE panels to "perform independent research, if

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[86] Request, § 8.8, Pg. 13.
[87] Request, § 8.9.1, Pg. 14.

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deemed necessary to reach informed scoring decisions."[88] The Requester cites no established

policy or procedure (because there is none) requiring every CPE panel to use the same sources of

independent research in their analyses. As such, the fact that the CPE Panel consulted the OED

does not support reconsideration.[89]

> **(b)**   **The CPE Panel's Analysis Of Element 2-A (Nexus) Is Not Inconsistent With Other CPE Panels' Reports In A Manner Constituting A Policy Or Procedure Violation.**

With respect to the nexus element, the Requester contends that the EIU has "used double

standards in preparing the various CPE panel reports, and is discriminating between the various

community-based applicants[.]"[90] Specifically, the Requester notes that the CPE Panel found

that the Application lacked a nexus to the gay community because the Application's community

definition was over-inclusive insofar as it included "allies"—specifically, the CPE Panel

determined that because the proposed community included allies, "there are significant subsets

of the defined community that are not identified by the string '.GAY'."[91]

The Requester cites two CPE panel reports that purportedly show that "the EIU does not

seem to have issues with similar concepts" with respect to other applications.[92] First, it cites the

CPE panel evaluating an application for the string .OSAKA, which awarded full points in the

nexus category even though the community definition included not just those living in Osaka but

also "those who self identify as having a tie to Osaka."[93] Second, the Requester cites the CPE

panel evaluating an application for the string .HOTEL, which awarded partial points in the nexus

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[88] Guidebook, § 4.2.3.
[89] Furthermore, the Requester states that the OED comprised the "sole basis" for evaluating the definition of the community (Request, § 8.9.1, Pg. 14); to the contrary, the Report cites the OED only in a footnote, and includes a detailed discussion of the community definition separate and apart from the OED definition. Annex A-1, Pgs. 5-6.
[90] Request, § 8.9.3.A, Pg. 18.
[91] Annex A-1, CPE Report, Pg. 6.
[92] Request, § 8.9.3A, Pg. 18.
[93] Annex C-13, Pgs. 1, 4.

category even though it noted there was an insubstantial amount of overreach inherent to the

community definition, which includes some entities that are merely "related to hotels."[94]

However, comparing these reports to the CPE Panel's Report here discloses no inconsistency

that could comprise a policy or procedure violation.

Different outcomes by different independent experts related to different gTLD

applications is to be expected, and is hardly evidence of any policy or procedure violation. For

instance, the .OSAKA string has been designated a geographic name string, unlike .GAY.[95] As

such, a host of distinct considerations come into play with respect to each step of the evaluation

and, in addressing the nexus component, the CPE Panel evaluating .OSAKA specifically referred

to the governmental support the applicant had demonstrated.[96] As for .HOTEL, the CPE panel

awarded partial credit to the applicant, finding the "string nexus closely describes the

community," and noted only one potential deficiency, namely the possibility that a "small part of

the community" identified in the application might not match the string name.[97] Here, in

contrast, the CPE Panel's Report found that the proposed community was both over- and under-

inclusive.[98] There is no policy or procedure violation because there is simply no inconsistency:

the .HOTEL report found only mild problems with the proposed community definition and

awarded a partial nexus score, whereas the CPE Panel's Report here identified multiple

mismatches between the proposed community and the string name, and awarded no points for

the nexus element.

In essence, the Requester complains that it lost whereas other applicants prevailed in

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[94] Annex C-14, Pg. 4.
[95] *See* Initial Evaluation for Interlink Co., Ltd.'s Application for .OSAKA, *available at*
http://newgtlds.icann.org/sites/default/files/ier/viun4exoaqie2hl0qojm7uvi/ie-1-901-9391-en.pdf.
[96] Annex C-13, Pg. 4.
[97] Annex C-14, Pg. 4.
[98] Annex A-1, CPE Report, Pgs. 5-6.

scoring nexus points, but no reconsideration is warranted on this ground given that the Requester

has failed to show any policy or procedure violation that led to the award of zero points.

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(c)   **The CPE Panel's Analysis of Element 4-A (Support) Is Not
Inconsistent With Other CPE Panels' Reports In A Manner
Constituting A Policy Or Procedure Violation.**

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The Requester contends that reconsideration is warranted because it claims two other

CPE panels have awarded the applicants the full two points with respect to the support criterion

(element 4-A) even while finding there was no single organization representative of the entire

community, whereas the CPE Panel here awarded the Requester only one point because no such

organization exists.[99] Once again, it is to be expected that different panels will come to different

conclusions with respect to different applications. Moreover, there is no inconsistency in the

first instance.

The CPE Guidelines provide that an Application will be awarded one point for element 4-

A if it demonstrates "[d]ocumented support from at least one group with relevance."[100] The CPE

Panel found that the Application met this one-point standard because at least one relevant group

supported the Application.[101] To warrant an award of *two* points, though, it must be the case that

the "Applicant is, or has documented support from, *the* recognized community

institution(s)/member organization(s), or has otherwise documented authority to represent the

community[.]"[102] Here, the CPE Panel concluded that the Requester was ineligible for a two-

point award given that it is "not the recognized community institution(s)/member organization(s),

nor did it have documented authority to represent the community, or documented support from

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[99] Request, § 8.9.4, Pg. 20.
[100] CPE Guidelines, *available at* http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en,
Pg. 16.
[101] Annex A-1, CPE Report, Pgs. 7-8.
[102] CPE Guidelines, *available at* http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en,
Pg. 16 (emphasis added).

the recognized community institution(s)/member organization(s)" in part because "[t]here is no single such organization recognized by the defined community as representative of the community."[103]

The Requester cites two CPE panel reports where the CPE panel awarded the full two points as to the support element, namely one CPE panel report evaluating an application for .RADIO, and the other for .HOTEL. Nevertheless, there is no inconsistency between those reports and the CPE Panel's Report giving rise to the instant Reconsideration Request: neither of the previous reports *expressly* found that *no* single organization represents the community.[104] The Requester recognizes as much, arguing merely that it "does not appear *to Requester* that there is one single organization recognized by the 'radio' community or the 'hotel' community[.]"[105] In other words, the purported inconsistency between the CPE Panel's Report here and others simply does not exist; the .RADIO and .HOTEL CPE reports did *not* include an express finding that the community is *not* represented by any single organization. Here, in contrast, the CPE Panel explicitly found that no such organization exists with respect to the gay community. The CPE Panel thereafter followed the Guidebook, which does not permit a two-point award in the absence of support from a "recognized" organization, defined as one that is "clearly recognized by the community members as representative of the community."[106]

Far from identifying any procedural irregularity with respect to the "support" prong of the community endorsement element, the Requester appears to fault the CPE Panel for adhering to the applicable rules and policies. As such, no reconsideration is warranted on this ground.

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[103] Annex A-1, CPE Report, Pg. 8.
[104] *See* .RADIO CPE Report, *available at* https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf; .HOTEL CPE Report, *available at* https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf.
[105] Request, § 8.9.4, Pg. 20.
[106] *See* Guidebook § 4.2.3.

B.   **ICANN's DIDP Response Did Not Contravene Any Established Policy Or Procedure.**

1.   **ICANN Staff Adhered To Applicable Policies And Procedures In Responding To The DIDP Request**.

The Requester disagrees with the ICANN staff's determination that certain requested documents were subject to DIDP Conditions of Nondisclosure, as well as ICANN's determination that, on balance, the potential harm from the release of the documents subject to the Conditions of Nondisclosure outweighs the public interest in disclosure.[107] The Requester claims that in declining to produce documents, ICANN's violated its core commitment to transparency.[108] The Requester, however, does not identify any policy or procedure that ICANN staff violated in responding to the DIDP Request. As such, reconsideration is not appropriate.

The DIDP identifies a number of "conditions for the nondisclosure of information," such as documents containing "[c]onfidential business information and/or internal policies and procedures" and/or containing "[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications."[109] It is ICANN's responsibility to determine whether requested documents fall within those Conditions for Nondisclosure. Pursuant to the DIDP process, "a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Conditions for Nondisclosure] identified [on ICANN's website]."[110]

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[107] Request, § 8.10, Pgs. 20-22.
[108] *Id*.
[109] *See* https://www.icann.org/resources/pages/didp-2012-02-25-en.
[110] *See* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf (Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests); *see also*, https://www.icann.org/resources/pages/didp-2012-02-25-en.

The Requester states that it does not find ICANN's position in the DIDP Response "convincing" that three categories of documents are not suitable for public disclosure because they fall into one of the enumerated Conditions of Nondisclosure: (1) agreements between ICANN and the organizations or individuals involved in the CPE; (2) "communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE […]"; and (3) work papers of CPE Panel members.[111] The Requester, however, fails to demonstrate that ICANN contravened the DIDP Response Process in determining that these categories of documents fall under one or more of the Conditions of Nondisclosure.

Indeed, in finding that each of these three categories of requested documents were subject to Conditions of Nondisclosure, ICANN adhered to the DIDP Response Process. First, ICANN has made public all documents regarding the standards and process governing CPE, as well as its instructions to the EIU on how the CPE process should be conducted, on its new gTLD microsite. (*See* http://newgtlds.icann.org/en/applicants/cpe.) In particular, Section 4.2 of the Guidebook, the CPE Panel Process Document, and the CPE Guidelines, set forth the guidelines and criteria by which the CPE panels are to evaluate applications undergoing CPE. These documents also encompass the instructions from ICANN to the EIU on how the CPE process should be conducted. There are no CPE process documents, guidelines, or instructions from ICANN to the EIU on how the CPE process should be conducted that have not been publicly posted. As to the contract between ICANN and the EIU for the coordination of the independent panels to perform CPEs, ICANN analyzed the Requester's request in view of the DIDP Conditions of Nondisclosure. ICANN determined that the contract was subject to several Conditions of Nondisclosure, including those covering "information . . . provided to ICANN pursuant to a

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[111] Request, § 8.10, Pgs. 20-21.

nondisclosure agreement or nondisclosure condition within an agreement" and "confidential

business information and/or internal policies and procedures."[112]

Second, as to ICANN's determination that it will not publicly disclose "communications

with persons from EIU who are not involved in the scoring of a CPE," ICANN analyzed the

Requester's requests in view of the DIDP Conditions of Nondisclosure. ICANN noted that it had

already determined in response to a previous request (No. 20140804-1) that this category of

documents is subject to several Conditions of Nondisclosure.[113] The DIDP response to which

ICANN referred discloses that the requested category of documents falls under Conditions of

Nondisclosure including those covering information that "if disclosed, would or would be likely

to materially prejudice the commercial interests, financial interests, and/or competitive position

of . . . [a third] party[,]" "information exchanged, prepared for, or derived from the deliberative

and decision-making processes," and "confidential business information and/or internal policies

and procedures."

Third, as to the work papers of CPE evaluators or other documents internal to the EIU,

ICANN indicated that it is not involved with the EIU's deliberative process in order to "help

assure independence of the process," and therefore ICANN does not possess any such documents

that might be responsive to this requested category.[114]

As ICANN noted in the DIDP Response, notwithstanding the fact that the Requester's

"analysis in [the DIDP] Request concluded that no Conditions for Nondisclosure should apply,

ICANN must independently undertake the analysis of each Condition as it applies to the

documentation at issue, and make the final determination as to whether any [Conditions of

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[112] Annex A-4, DIDP Response, Pg. 2.
[113] *Id*., Pg. 3 (citing Response to DIDP Request No. 20140804, *available at*
https://www.icann.org/en/system/files/files/response-donuts-et-al-03sep14-en.pdf).
[114] Annex A-4, DIDP Response, Pgs. 2, 4.

Nondisclosure]."[115] In conformance with the publicly posted DIDP process,[116] ICANN

undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response.

ICANN also noted that at least some of these documents were draft documents and explained

that drafts not only fall within a Condition of Nondisclosure but also are "not reliable sources of

information regarding what actually occurred or standards that were actually applied."[117] While

the Requester may not agree with ICANN's determination that certain Conditions of

Nondisclosure apply here, the Requester identified no policy or procedure that ICANN staff

violated in making its determination, and the Requester's substantive disagreement with that

determination is not a basis for reconsideration.

> **2.   ICANN Staff Adhered To The DIDP Response Process In Determining That The Potential Harm Caused By Disclosure Outweighed The Public Interest In Disclosure.**

The DIDP states that if documents have been identified within the Conditions of

Nondisclosure, they "may still be made public if ICANN determines, under the particular

circumstances, that the public interest in disclosing the information outweighs the harm that may

be caused by such disclosure."[118] The Requester's substantive disagreement with the

determination made by ICANN staff in this regard in responding to the DIDP Request does not

serve as a basis for reconsideration.

The Requester argues that ICANN's determination not to make public the documents it

requested through the DIDP "restricts [its] fundamental rights to challenge" the CPE Panel's

evaluation, and "ultimately, to use the transparency and accountability mechanisms embedded

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[115] *Id.*, Pg. 5.
[116] *See* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf.
[117] Annex A-4, DIDP Response, Pg. 5.
[118] *See* https://www.icann.org/resources/pages/didp-2012-02-25-en.

into ICANN's By-laws."[119] Yet, the fact that the Requester believes that in this case the public

interest in disclosing information outweighs any harm that might be caused by such disclosure

does not bind ICANN to accept the Requester's analysis. In accordance with the DIDP

Response Process, ICANN conducted a review of all responsive documents that fell within the

Conditions of Nondisclosure, and determined that the potential harm did outweigh the public

interest in the disclosure of certain documents.[120] The Requester identifies no policy or

procedure that ICANN staff violated in reaching this decision.

Finally, the Requester states that "[i]n Requester's opinion, the EIU . . . is subject to the

same policies—especially those relating to transparency and accountability—as ICANN."[121]

However, as stated in the DIDP Response, "DIDP is limited to requests for information already

in existence *within ICANN* that is not publicly available,"[122] as the DIDP is "intended to ensure

that information contained in documents concerning ICANN's operational activities, *and within

ICANN's possession, custody, or control*, is made available to the public unless there is a

compelling reason for confidentiality."[123] The documents are not within ICANN's possession,

custody or control.[124] Even though the Requester wishes it otherwise, there is no established

policy or procedure that requires ICANN to gather documents from third party service providers

such as the EIU.

In sum, ICANN staff properly followed all policies and procedures with respect to the

Requester's DIDP Request—ICANN staff assessed the request in accordance with the guidelines

set forth in the DIDP and determined, pursuant to those guidelines, that certain categories of

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[119] Request, § 8.10, Pg. 21.
[120] Annex A-4, DIDP Response, Pgs. 2-5.
[121] Request, § 8.10, Pg. 22.
[122] Annex A-4, DIDP Response, Pg. 5 (emphasis added).
[123] *See* https://www.icann.org/resources/pages/didp-2012-02-25-en.
[124] Annex A-4, DIDP Response, Pg. 2.

requested documents were subject to Conditions of Nondisclosure, and that the potential harm from the disclosure of certain documents outweighed the benefits. The Requester's substantive disagreement with that determination is not a basis for reconsideration.

VI. Accepting The Reconsideration Request.

Based on the foregoing, the BGC concludes that reconsideration is warranted. Specifically, ICANN discovered in the course of investigating the claims presented in this Request that the CPE Panel inadvertently neglected to verify some of the letters submitted in support of the Application. This conduct is in contradiction of an established process. Accordingly, the BGC has determined that the CPE Panel's Report will be set aside and that new evaluators will be appointed to conduct a new CPE for the Application. The BGC also recommends that the EIU include new members of the core team to assess the evaluation results.

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 the BGC's determination on such matters is final.[125] As discussed above, Request 14-44 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.

The BGC's decision to accept this reconsideration request and convene a new CPE Panel to evaluate the Requester's Application does not mean that a newly constituted CPE panel necessarily will overturn, reverse, or otherwise alter the decision that ultimately serves as the basis of this Request, namely that the Requester's application for .GAY did not meet the CPE criteria. Accepting the Request merely allows the appointment of new CPE evaluators (and

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[125] Bylaws, Art. IV, § 2.15.

potentially new core team members) to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel's Report.

In terms of the timing of the BGC's Determination, 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 following receipt of the request, unless impractical.[126] To satisfy the thirty-day deadline, the BGC would have to have acted by 29 December 2014. Due to the intervening holidays, it was impractical for the BGC to render a determination on revised Request 14-44 prior to 20 January 2015.

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[126] Bylaws, Article IV, § 2.16.