

Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-5

Requestor¹ submits this rebuttal to the BAMC’s Recommendation on Request 18-5 (the “**Recommendation**”).² The Recommendation affirmed the Resolutions and raised issues that Requestor will address in this rebuttal—specifically Requestor’s position regarding the BAMC’s invitation and the ICANN Board’s violations of the ICANN’s Bylaws.

1. Requestor’s Position Regarding the BAMC’s Invitation

The Recommendation misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-5. It states, without further clarification, that Requestor rejected the BAMC’s invitation.³ This description oversimplifies Requestor’s response to the BAMC’s invitation, which imposed significant constraints on its ability to fully address Reconsideration Request 16-5 in light of the CPE Process Review Reports. For instance, the invitation limited the written submission to ten pages and the BAMC presentation to a telephonic presentation.⁴ In response, Requestor repeatedly asked for a meaningful opportunity to make additional submissions to ICANN regarding the CPE Process Review Reports.⁵ Nearly three months have passed since Requestor first submitted its requests regarding the BAMC’s invitation; neither ICANN nor the BAMC have responded to Requestor.

2. The ICANN Board Failed to Comply with the ICANN Bylaws

As explained in Reconsideration Request 18-5 (“**Request 18-5**”), the ICANN Board failed violated its obligations under the ICANN Bylaws by adopting the Resolutions.⁶ Pursuant to the

¹ This rebuttal adopts the same exhibits and terms as in DotMusic’s Reconsideration Request 18-5. *See* Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).

² *See* Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018).

³ *Id.* at p. 7.

⁴ *See* Exhibit 34, Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process that Were Placed On Hold Pending Completion of the CPE Process Review (15 Feb. 2018); Exhibit 35, Email from R.M. Wong to ICANN Board (5 Apr. 2018).

⁵ *Id.*; Exhibit 36, Letter from A. Ali to C. Chalaby and C. Disspain (23 Mar. 2018), pp. 4-5 (making several requests in response to the BAMC’s invitation).

⁶ *See generally* Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).

ICANN Bylaws, the ICANN Board must (1) “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act”⁷ and “promote well-informed decisions based on expert advice;”⁸ (2) “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment;”⁹ and (3) operate “with efficiency and excellence.”¹⁰ The Bylaws further require that ICANN carry “out its activities in conformity with relevant principles of international law and international conventions.”¹¹ The ICANN Board failed to adhere to these requirements when it adopted the Resolutions. Yet, the Recommendation supports the ICANN Board’s clear violations of these obligations and, in doing so, makes several misstatements that Requestor corrects below.¹²

A. Requestor Presented Significant Evidence that the ICANN Board Violated Its Bylaws by Adopting the Resolutions

Request 18-5 provides sufficient evidence to show that the ICANN Board failed to comply with the ICANN Bylaws. The Recommendation contends that “Requestor provides no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s ... commitments.”¹³ Yet, even within Request 18-5, Requestor provided ICANN with significant evidence supporting its claims, such as the Expert

⁷ Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Section 1.2(a)(iv).

⁸ *Id.*

⁹ *Id.* at Article 1, Section, 1.2(a)(v).

¹⁰ *Id.* at Article 1, Section 1.2(a)(iv).

¹¹ *Id.* at Article 1, Section 1.2(a). The Recommendation contends that ICANN “did not violate any relevant international law or convention” and that “Requestor does not have the ‘right’ to due process or other ‘constitutional’ rights with respect to the DIDP.” Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), pp. 17-18. Requestor has made its position clear in its Rebuttal to the BAMC’s Determination on Reconsideration Request 18-1, and incorporates its argument herein. *See* Exhibit 37, Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-1 (20 June 2018), pp. 3-4.

¹² Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), pp. 8-20.

¹³ *Id.* at p. 9.

Opinion of Personal Data Redacted and the Council of Europe’s report.¹⁴ These documents constitute evidence that support Requestor’s concerns about the CPE Process Review.¹⁵

ICANN has also prevented Requestor from obtaining additional evidence by refusing to disclose any documents related to the independent review in violation of its commitment to transparency. ICANN is required to operate “through open and transparent processes.”¹⁶ Although the Recommendation denies that ICANN violated this obligation,¹⁷ ICANN has continually refused to disclose relevant documents that would likely provide additional evidence in support of Requestor’s concerns.¹⁸ Requestor has already shown that ICANN has failed to comply with its commitment to act with transparency in its prior submissions to ICANN, and incorporates these submissions herein.¹⁹

B. FTI Produced Methodologically Flawed CPE Process Review Reports

The Recommendation misconstrues Requestor’s concerns about the ICANN Board’s actions. It states that “Requestor has identified no policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Review.”²⁰ Requestor has not argued that the ICANN Board breached its obligations because FTI failed to comply with a non-existent ICANN policy or procedure or because ICANN failed “to develop a

¹⁴ See, e.g., Exhibit 5, Letter from Personal Data Redacted to the BAMC (1 Feb. 2018); Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICAN Board, attaching the Second Expert Opinion of Personal Data Redacted (31 Jan. 2018); Exhibit 12, Expert Legal Opinion by Honorary Professor in International Copyright Personal Data Redacted (18 June 2016); Exhibit 13, Even Salomon and Kinanya Pijl, “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017).

¹⁵ See Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 19 (describing Requestor’s submissions as “Evidence”).

¹⁶ Exhibit 14, ICANN Bylaws (22 July 2017), Article 1, Sections 1.2(a), 1.2(b)(ii) (ICANN must “seek[] and support[] broad, informed participation . . . to ensure that the bottom-up multistakeholder policy development process is used to ascertain the global public interest and that those processes are countable and transparent.”).

¹⁷ See Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 9.

¹⁸ See, e.g., Exhibit 18, Request No. 20180110-1 (10 Jan. 2018); Exhibit 25, Request No. 20170505-1 (5 May 2017); Exhibit 28, Request No. 2017-0610-1 (19 June 2017).

¹⁹ See Exhibit 38, Reconsideration Request 18-1 (10 Mar. 2018); Exhibit 39, Reconsideration Request 17-4 (25 July 2017); Exhibit 40, Reconsideration Request 17-2 (18 June 2017).

²⁰ Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), pp. 10-11.

particular methodology for the CPE Process Review.”²¹ Rather, as described in Request 18-5, Requestor has argued that the ICANN Board’s actions violate the ICANN Bylaws because FTI did not adhere to a proper methodology in the CPE Process Review Reports.²² This resulted in a methodologically flawed set of reports on the CPE process. The ICANN Board violated its Bylaws by failing to make a well-informed decision and failing to fairly apply its documented policies when it adopted these flawed reports.

Although FTI adopted a review standard for its independent review of the CPE process, it failed to adhere to this standard—resulting in methodologically flawed CPE Process Review Reports.²³ According to the Recommendation, the ICANN Board “relied on FTI to develop an appropriate methodology” for the review.²⁴ FTI adopted the “international investigative methodology” from the Association of Certified Fraud Examiners’ (“ACFE”) for the CPE Process Review.²⁵ As FTI explained in the CPE Process Review Reports, pursuant to the ACFE’s methodology, FTI was required to (1) formulate an investigative plan that identifies sources of relevant materials; (2) collect and review “*all* potentially relevant materials and documentation;” (3) interview relevant individuals deemed to have knowledge pertinent to the subject being investigated; (4) compare that documents with the interview information, which frequently results in follow-up interviews; and (5) re-analyze the documentation to prepare for writing the investigation report.²⁶ FTI failed to adhere to both this methodology and the ACFE’s guiding standards for such investigations.

²¹ *Id.* at p. 10.

²² *See* Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).

²³ Requestor reserves the right to contest FTI’s choice of investigative methodology for the CPE Process Review, which is not at issue in Request 18-5.

²⁴ Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 10.

²⁵ *Id.* at p. 13.

²⁶ Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 4 (emphasis added).

First, FTI failed to obtain and review “all potentially relevant materials and documentation”²⁷ as part of its independent review. The ACFE’s Code of Professional Standards requires that FTI “*obtain evidence and information that is **complete, reliable and relevant.***”²⁸ However, FTI based its independent review of the CPE Reports on information solely obtained from ICANN and the CPE Provider—the two organizations being reviewed—even though FTI could have obtained a significant amount of additional relevant information from the community applicants.²⁹ This information was not even complete. In response to FTI’s information requests, the CPE Provider refused to send FTI relevant documents, such as internal emails “relating to the CPE process and evaluations” among the CPE “evaluators.”³⁰ FTI did nothing in response to this refusal, and simply proceeded with its review without accounting for this missing information.

Second, FTI failed to interview all of the relevant individuals with “knowledge pertinent to the begin investigation.”³¹ FTI had the capability to review the community applicants affected by the CPE Provider’s CPEs, but refused to talk with any of the applicants. FTI’s chosen excuse for refusing to obtain additional evidence from the community applicants, that “it would not be necessary or appropriate to interview the applicants in the court of the CPE Process Review” because “the CPE Provider evaluated the applications on the written record,”³² is inexcusable. FTI was tasked with reviewing the CPEs to determine whether the “CPE criteria were applied consistently throughout each CPE report.”³³ It was not restrained by either the New gTLD Program Applicant Guidebook or the CPE Guidelines.

²⁷ *Id.*

²⁸ Exhibit 41, CFE Code of Professional Standards Interpretation and Guidance, p. 8 (emphasis added).

²⁹ See Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

³⁰ *Id.* at pp. 7-8.

³¹ *Id.* at p. 4.

³² Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 12.

³³ Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 1.

Since FTI refused to interview the community applicants, the CPE Process Review Reports only relied on interviews with ICANN and CPE Provider staff.³⁴ FTI’s blanket acceptance of declarations made by ICANN and the CPE Provider is a significant problem with the FTI Reports as it does not consider “*the possibility of conjecture, unsubstantiated opinion and bias of witnesses and others*” in accordance with ACFE standards.³⁵ As explained above, FTI simply accepted that the documents and interview statements were accurate and free of bias—despite being from the organizations under review. Instead of critically examining this evidence, FTI (1) did not question the information from ICANN and the CPE Providers; (2) refused to address the significant amount of contrary findings from third parties; and (3) excluded evidence that provided a contrary viewpoint to ICANN and the CPE Provider by deliberately choosing not to interview applicants.³⁶ FTI thus based the CPE Process Review Reports on a purely one-sided representation of the CPE process in clear violation of the ACFE standards.

Third, FTI further did not exercise due professional care in conducting the CPE Process Review. In accordance with ACFE standards, FTI was required to discharge its professional responsibilities with “*diligence, critical analysis and professional skepticism.*”³⁷ FTI failed to achieve this objective because FTI simply accepted statements and information without further investigation or critical analysis. This is clearly exemplified in the third part of the CPE Process Review Reports, where FTI simply compiled the reference materials relied upon by the CPE Provider for the CPE Reports to conduct a cite-checking exercise.³⁸ FTI was *only* concerned with

³⁴ Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 3-9.

³⁵ Exhibit 41, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

³⁶ Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

³⁷ Exhibit 41, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

³⁸ See generally Exhibit 42, FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017).

determining whether the “reference[s] to the CPE Panel’s research” were reflected in the actual cited materials, *and not whether the underlying referenced research was true or accurate*.³⁹

FTI clearly failed to critically analyze the information that it received and rather simply accepted the information as true without exercising any professional skepticism. This is evident in its interviews of the CPE Provider’s personnel as well. FTI interviewed only two CPE Provider personnel from the “core team.”⁴⁰ The independent evaluators examined a community application and applied the CPE criteria.⁴¹ The core team simply met to discuss the evaluators’ completed work and helped resolve and different conclusions between the evaluators.⁴² Despite the limited influence the two interviewees had in scoring the community applications, FTI accepted their broad statements as universally true for the entire evaluation process. For instance, the Recommendation explains that FTI’s interviews with the CPE Provider’s personnel confirmed that ICANN did not affect the CPE Provider’s CPEs and that the CPE Provider “never changed the scoring or the results based on ICANN organization’s comments.”⁴³ This conclusion on the actions of the independent evaluators for the CPE is based off of two interviews with CPE Provider personnel that *were not CPE evaluators*. Clearly, FTI’s generalizations are unreliable as they are based on claims made by two CPE core team members on the evaluation process under the purview of the independent evaluators. FTI’s actions have further rendered the entire CPE Process Reports significantly unreliable.

³⁹ See *id.* at pp. 14-57.

⁴⁰ Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 8 (distinguishing between the core team and the independent evaluators); see also Exhibit 43, Economist Intelligence Unit, “Community Priority Evaluation Panel and its Processes” (7 Aug. 2104), <https://newgtlds.icann.org/en/applicants/cpe/panel-process-07aug14-en.pdf> (“The Community Priority Evaluation panel comprises a core team, in addition to several independent1 evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-today management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”).

⁴¹ Exhibit 02, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 8.

⁴² *Id.* at pp. 8-9.

⁴³ Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 15.

FTI clearly failed to adhere to the methodology that it *chose to adopt* for the CPE Process Review Reports. By ignoring these failures in order to adopt the CPE Process Review Reports and attempt to justify the CPE Provider’s clearly discriminatory application of the CPE criteria in the CPE Reports, the ICANN Board violated its Bylaws-imposed obligations.

C. The CPE Process Review Reports Are Substantively Flawed

The Recommendation further misconstrues Requestor’s concerns about the Resolutions. It argues that “FTI was Not Required to Agree with Others’ Substantive Conclusions and Did Not Fail to Engage in ‘Substantive Analysis.’”⁴⁴ Contrary to the Recommendation, Requestor has not contended that the “reconsideration is warranted because FTI’s conclusions differed from other opinions claiming that the CPE process is inconsistent.”⁴⁵

Rather, the CPE Process Review Reports are substantively flawed because FTI did not *address* any of the independent evaluations. FTI states that it “carefully considered the *claims* raised in Reconsideration Requests and Independent Review Process ... proceedings” and the “*claim* that certain of the CPE criteria were applied inconsistently across the various CPEs.”⁴⁶ These simple declarations do not address the independent authority directly contradicting FTI’s conclusions. FTI must have examined the full scope of relevant evidence and then confirmed or rebutted the authorities with adequate analysis. FTI, though, instead chose to ignore their existence rather than directly rebut their conclusions. By failing to consider divergent views on the CPE Process, FTI produced a series of substantially flawed reports.

The CPE Process Reports are further flawed because FTI failed to substantively analyze the CPE Reports as part of its CPE Process Review. As described in **Section 2.B** above, FTI

⁴⁴ *Id.* at p. 12.

⁴⁵ *Id.* at p. 13. Requestor reserves the right to contest the CPE Process Review Reports’ substantive conclusions, which are not at issue in this proceeding.

⁴⁶ Exhibit 07, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 3 (emphasis added).

simply accepted statements and information without further investigation or critical analysis. FTI's immediate acceptance that both the research performed by the CPE Provider and the information it received from ICANN and the CPE Provider were fully true and accurate further emphasizes the lack of any substantive evaluation in its CPE Process Review. Avri Doria's statements regarding the CPE Process Review Reports are especially telling on this issue; they reveal that the ICANN Board was aware of the problems with "the rigor of the [CPE Process Review Reports] and some of its conclusions,"⁴⁷ but purposefully turned a blind eye to these issues in favor of rubber-stamping the CPE Process Review Reports and their conclusions.

The ICANN Board could therefore not have approved the Resolutions, which adopted the CPE Process Review Reports, without violating its obligation to act for the public benefit, make well-informed decisions based on expert advice, and apply documented policies consistently, neutrally, objectively, and fairly.

3. Conclusion

Therefore, it is clear that ICANN failed to comply with its Bylaws in passing the Resolutions. The BAMC further perpetuated this violation by recommending that the Board deny Request 18-5.⁴⁸ In addition to the reasons stated in the Request 18-5,⁴⁹ the Board should grant Request 18-5 and reject the CPE Process Review Reports.



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29 June 2018

Date

⁴⁷ Exhibit 03, Avri Doria, ICANN Board Meeting Transcript (15 Mar. 2018), pp. 12-13.

⁴⁸ In its Recommendation, the BAMC noted that it "will consider the CPE Process Review Reports in the course of its evaluation of Request 16-5 ... but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-5." Exhibit 33, Recommendation of the BAMC Reconsideration Request 18-5 (14 June 2018), p. 19. Requestor appreciates this assurance from the BAMC.

⁴⁹ See generally Exhibit 32, Reconsideration Request 18-5 (14 Apr. 2018).