

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 16-5
25 JANUARY 2019**

The Requestors¹ seek reconsideration of the Community Priority Evaluation (CPE) report (CPE Report), of DotMusic Limited's (DotMusic) community-based application for the .MUSIC generic top-level domain (gTLD), and ICANN organization's acceptance of that Report.² The Requestors claim that the independent provider that conducted the CPE (CPE Provider) violated established CPE procedures in its evaluation of DotMusic's application (Application), and that the Board should have either conducted an investigation of the CPE process as a whole or revised the CPE Report in response to certain Independent Review Process (IRP) findings.

The issues relevant to the BAMC's Recommendation concerning Request 16-5 are numerous and lengthy. The Requestors submitted 41 exhibits to Request 16-5, and they have made at least 11 additional submissions in support of Request 16-5 since it was submitted. Additionally, in that time ICANN org undertook a review of certain aspects of the CPE process (CPE Process Review), during which Request 16-5 was placed on hold, and the Requestors submitted several additional Reconsideration and document requests relating to the CPE and the CPE Process Review. The BAMC has considered all the arguments and materials submitted to date relating to Request 16-5 and Attachment 1 to this Recommendation sets forth the BAMC's comprehensive evaluation of each of the arguments raised in the many submissions to date. To assist with the BAMC's discussions and deliberations, this document addresses, at a high level,

¹ dotMusic Limited (DotMusic), the International Federation of Musicians, the International Federation of Arts Councils and Culture Agencies, the Worldwide Independent Network, the Merlin Network, the Independent Music Companies Association, the American Association of Independent Music, the Association of Independent Music, the Content Creators Coalition, the Nashville Songwriters Association International, and ReverbNation (collectively, Requestors).

² Request 16-5, <https://www.icann.org/en/system/files/files/reconsideration-16-5-dotmusic-request-redacted-24feb16-en.pdf>.

the relevant issues and findings, but leaves the detailed rationale to Attachment 1, which is incorporated herein by reference.

I. Brief Factual Background.

DotMusic submitted a community-based application for .MUSIC (Application), which was placed in a contention set with seven other .MUSIC applications.³ DotMusic participated in CPE, but did not prevail. The Requestors then submitted Request 16-5, challenging the CPE Provider's Report, and ICANN org's acceptance of that Report, and arguing that the Board should have intervened in or overturned the CPE Report in light of the IRP Panel Declaration (Despegar IRP Declaration) in the *Little Birch LLC et al. v. ICANN* and *Despegar Online SRL et al. v. ICANN* (Despegar IRP).⁴

While Request 16-5 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 by the CPE Provider for the evaluations which are the subject of pending Reconsideration Requests.⁵ The BGC determined that the pending Reconsideration Requests relating to CPEs, including Request 16-5, would be placed on hold until the CPE Process Review was completed.⁶

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

³ See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1392>.

⁴ Request 16-5.

⁵ <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>.

⁶ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

published FTI's reports issued in connection with the CPE Process Review (CPE Process Review Reports).⁷ With respect to Scope 1, FTI concluded that "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."⁸

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."⁹

For Scope 3, FTI observed that all eight of the relevant CPE reports (which are the ones at issue in the Reconsideration Requests placed on hold) referenced research conducted by the CPE Provider.¹⁰ In one case¹¹ (for which two CPE reports were completed), FTI did not find citations to each reference to research in the working papers underlying the Second CPE Report. FTI concluded that it is possible that the research referenced without citation in the Second CPE was research cited in the working papers associated with the First CPE.¹²

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

⁷ See <https://www.icann.org/news/announcement-2017-12-13-en>.

⁸ 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>).

⁹ 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>).

¹⁰ 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>).

¹¹ That case did not involve the Application. See *id.* at Pg. 36.

¹² *Id.* at Pg. 36.

forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.¹³

Subsequently, the BAMC invited the Requestors to provide a telephonic presentation to the BAMC in support of Request 16-5 and to submit additional written materials in response to the CPE Process Review Reports.¹⁴ DotMusic rejected both invitations from the BAMC.¹⁵

In issuing this recommendation, the BAMC carefully evaluated the claims raised in Request 16-5, in the Requestors' 17 September 2016 presentation to the BGC, in the materials that the Requestors submitted to the Board between 14 February 2016 and 5 April 2018, and the findings in the CPE Process Review Reports. Based on its extensive review of all relevant materials, the BAMC finds that ICANN org complied with established policies, Bylaws, and Articles of Incorporation when it accepted the CPE Report, because the CPE Provider did not violate any established policies or procedure in conducting the CPE. The BAMC further finds that the Requestors do not identify any misapplication of policy or procedure by the CPE Provider that materially or adversely affected the Requestors. Accordingly, the BAMC recommends that the Board deny Request 16-5.

¹³ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

¹⁴ Attachment 1 to BAMC Recommendation on Request 18-5 (<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-1-14jun18-en.pdf>).

¹⁵ Attachment 2 to BAMC Recommendation on Request 18-5 (<https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-2-14jun18-en.pdf>); 23 March 2018 letter from A. Ali to ICANN Board (<https://www.icann.org/en/system/files/files/reconsideration-16-3-et-al-dotgay-dechert-to-icann-board-bamc-redacted-23mar18-en.pdf>).

II. Relief Requested.

As set out in full in Attachment 1 and incorporated herein by reference, the Requestors ask the Board to determine that the Application satisfies the requirements for Community Priority.¹⁶

¹⁶ Request 16-5, § 9, Pg. 21.

III. The Relevant Standards for Reconsideration Requests and CPE.

A. The Relevant Reconsideration Request Standards.

Article IV, Section 2.1 and 2.2 of ICANN's Bylaws¹⁷ 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.¹⁸

Where, as here, the reconsideration request challenges both Board and staff action or inaction, the operative version of the Bylaws direct the BAMC to review the request and provide a recommendation to the Board.¹⁹ Denial of a reconsideration request 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.²⁰

B. The CPE Criteria and Procedures.

As discussed in further detail in Attachment 1 to this Recommendation, CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.²¹ The standards and CPE process are defined in Module 4, § 4.2 of the

¹⁷ The BAMC has considered Request 16-5 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestors submitted Request 16-5).

¹⁸ ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

¹⁹ See ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

²⁰ *Id.*

²¹ 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>.

Guidebook. Community-based applications that undergo 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 4: Community Endorsement.²² 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.”²³

The CPE process does not determine the existence, adequacy, or validity of a community. It merely evaluates whether a community-based application satisfies the CPE criteria for community priority. As the Guidebook notes, “a finding by the [CPE Provider] that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid.”²⁴

IV. Analysis and Rationale.

A. Request 16-5 Does Not Comply With The Applicable Bylaws.

As a preliminary matter, the BAMC notes Request 16-5 exceeds the Bylaws’ length restrictions and uses smaller font than is required for Reconsideration Requests.²⁵ Despite this procedural violation, the BAMC has considered the merits of Request 16-5 and all other relevant materials and finds, for the reasons discussed below and in Attachment 1, that reconsideration is not warranted.

B. The Despegar IRP Declaration Does Not Support Reconsideration.

²² *Id.* at Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

²³ *Id.* at Module 4, § 4.2.3, Pg. 4-9.

²⁴ Guidebook, Module 4, § 4.2.3, at Pg. 4-9.

²⁵ See Section VI.A of Attachment 1, incorporated herein by reference.

The Requestors claim that reconsideration is appropriate because the CPE process is purportedly fundamentally flawed. In support, the Requestors rely on the Despegar IRP Declaration.²⁶ The Requestors seem to assert that the Despegar IRP Declaration requires the Board to either conduct a review of the CPE Process as a whole—which the Board did in the CPE Process Review—or to reject the CPE Report here based on the purported flaws²⁷—but for the reasons set forth in Section VI.B of Attachment 1 and incorporated herein by reference, nothing in the Despegar IRP Declaration or ICANN’s acceptance of it mandates the Requestors’ suggested result. Specifically, nothing about the Despegar IRP Declaration or the Board’s acceptance of the Despegar IRP Declaration requires the BAMC to take any action in response to Request 16-5 beyond determining whether ICANN staff and the CPE Provider followed established policy and procedure with respect to the CPE Report, which is what the BAMC and the Board are doing in their consideration of Request 16-5 and what the Board has done in initiating the CPE Process Review.

C. The Board’s Acceptance of Advice from ICANN’s Governmental Advice Committee Advice Has No Bearing on DotMusic’s Claim to Community Priority.

ICANN’s Governmental Advisory Committee (GAC) provided advice to ICANN regarding certain proposed gTLD strings, including .MUSIC. The GAC’s advice included, among other things, that .MUSIC should be subject to additional safeguards,²⁸ and that it should not be operated as an exclusive access registry unless doing so would “serve a public interest goal.”²⁹ The Board, via the New gTLD Program Committee (NGPC), accepted the GAC’s

²⁶ Request 16-5, § 6, Pg. 19; *Despegar IRP Final Declaration ¶¶ 66-67, available at* <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

²⁷ Request 16-5, § 6, Pg. 19.

²⁸ See Beijing Communiqué, Annex I, Pg. 9 <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>; see also <https://newgtlds.icann.org/en/applicants/gac-advice/cat2-safeguards>.

²⁹ See *id.*, Pg. 11.

advice, and directed ICANN org to defer contracting with applicants for certain of the stings, including .MUSIC “pending a dialogue with the GAC” regarding an appropriate definition of “public interest goal.”³⁰ The NGPC subsequently approved revisions to the New gTLD Registry Agreement in furtherance of the GAC’s advice.³¹

As discussed in Section VI.C of Attachment 1 and incorporated herein by reference, nothing in the NGPC’s acceptance of and response to the GAC’s advice required ICANN to give “preferential treatment” to community applicants for .MUSIC. The advice did not even discuss community versus standard applications, and, contrary to the Requestors’ assertion, nothing about the GAC’s advice implied that .MUSIC involved a community with “cohesion.”³²

D. Nothing in the GNSO’s Recommendations Required that Claims of Community Priority be “Taken on Trust.”

The Requestors claim that CPE should not have been required at all because, according to the Requestors, ICANN’s Generic Names Supporting Organization (GNSO) recommended that an application’s assertions of community representation should be “taken on trust.”³³ As explained in Section VI.D of Attachment 1 and incorporated herein by reference, the Requestors misread the language of the GNSO’s recommendations, which in fact clearly required CPE. In accordance with the GNSO’s recommendation, the Guidebook provides that “[e]valuation of an applicant’s designation as community-based will occur only in the event of a contention situation

³⁰ See <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>. See <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>; see also ICANN NGPC Paper No. 2013-06-25-2b: GAC Advice in Beijing Communiqué regarding Safeguard Advice Applicable to Category 2 Strings, Briefing Materials 1, Pgs. 25-31 (<http://www.icann.org/en/groups/board/documents/briefing-materials-1-25jun13-en.pdf>).

³¹ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d>; see also <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-item-1d-02jul13-en.pdf>, Annex I, New gTLD Agreement.)

³² Request 16-5, § 8, Pg. 10; see also Blomqvist Opinion, ¶ 52, at pg. 41.

³³ *Id.*, § 6, Pg. 3, 6.

that results in a community priority evaluation.”³⁴ Because the Requestors have not demonstrated that ICANN violated any established policy or procedure in declining to take DotMusic’s claim of community priority “on trust,” the Requestors’ argument does not support reconsideration.

E. The Requestors Have Not Demonstrated Any Conflict of Interest on the Part of the CPE Provider.

The Requestors contend that the CPE Provider had a conflict of interest with respect to the Application because Eric Schmidt, the executive Chairman of Google from 2001 to 2017, was a member of the Board of Directors of the Economist Group, the CPE Provider’s parent company, from November 2013 through December 2015,³⁵ and Vint Cerf, Vice President of Google since 2003, “chaired an ICANN strategy Panel in 2013 (when applications were being evaluated),” and Google also submitted an application for the .MUSIC string.³⁶

Pursuant to the Guidebook, the CPE Panel Process Document and the CPE Guidelines, the CPE Provider was required to confirm that none of the evaluation panelists or core team members had any conflicts with respect to the community-based applications.³⁷ The Requestors present no evidence that the CPE Provider failed to do so. The Requestors do not allege that Eric Schmidt—a high level executive—was an evaluation panelist or member of the CPE Provider’s core team (he was not), or that he had any influence over, or knowledge of, the CPE Report (or even had any involvement whatsoever with the CPE Provider, which is a single division within

³⁴ Guidebook Module § 1.2.3.2, at Pg. 1-27.

³⁵ Request 16-5, § 6, Pg. 20. *See also* DotMusic CPE Process Review Letter, at ¶¶ 26(c), 67b, at Pg. 28, 47 (also arguing that Sir Robin Jacob, a Panelist selected by the ICC in the Community Objection proceedings for .MUSIC and .BAND, represented Samsung, “one of Google’s multi-billion dollar partners,” in a legal case (for additional detail, see Reconsideration Request 16-7, § 8, at Pg. 18 (marked 17) n.68, <https://www.icann.org/en/system/files/files/reconsideration-16-7-dotmusic-request-redacted-30may16-en.pdf>).

³⁶ DotMusic CPE Process Review Letter, at ¶ 26(c), at Pg. 28.

³⁷ Guidebook § 2.4.3.1, at Pg. 2-33; CPE Panel Process Document at Pg. 2, <https://newgtlds.icann.org/en/applicants/cpe>; CPE Guidelines at Pg. 22, <https://newgtlds.icann.org/en/applicants/cpe>.

the Economist Group). In fact, the CPE Report was issued *after* Mr. Schmidt ceased to be a board member.³⁸ Likewise, DotMusic has not explained how Vint Cerf’s position on an ICANN Strategy Panel concerning the Internet Governance Ecosystem³⁹ in 2013, *three years before* the CPE Report was issued, had any effect on the CPE of the Application. For these reasons and the additional reasons discussed in Section VI.E of Attachment 1 and incorporated herein by reference, the Requestors’ argument does not support reconsideration.

F. ICANN Org Is Not Involved in Scoring CPE Criteria.

The Requestors argue that certain communications between ICANN org and the CPE Provider that were disclosed as part of the *Dot Registry v. ICANN* independent review proceedings (CPE Communications) demonstrate that ICANN “materially” revised the CPE Report in violation of established policy and procedure.⁴⁰ Contrary to the Requestors’ assertions, nothing in the CPE Communications supports the Requestors’ view that ICANN org revised the CPE Provider’s *scoring* on the Application. As discussed in Section VI.F of Attachment 1 and incorporated herein by reference, the CPE Process Review’s Scope 1 Report confirms that “there is no evidence that ICANN org had any undue influence on the CPE Provider . . . or engaged in any impropriety in the CPE process,” including with respect to the Application.⁴¹ FTI observed that “ICANN organization did not suggest that the CPE Provider make changes in the final scoring or adjust the rationale set forth in the CPE report[s].”⁴² For this and the other reasons

³⁸ Mr. Schmidt stepped down in about December 2015 (<https://www.theguardian.com/media/2015/dec/10/economist-appoints-tessa-jowell-to-board-as-googles-eric-schmidt-departs>). The CPE Report was issued on 10 February 2016. (<https://newgtlds.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf>.)

³⁹ See Strategy Panel: ICANN’s Role in the Internet Governance Ecosystem, *available at* <https://www.icann.org/en/system/files/files/report-23feb14-en.pdf>.

⁴⁰ Request 16-5, § 6, Pg. 18.

⁴¹ FTI Scope 1 Report at Pg. 3, *available at* <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

⁴² *Id.* at Pg. 12.

discussed in Section VI.F of Attachment 1 and incorporated herein by reference, this argument does not support reconsideration.

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

The Requestors assert that the CPE Provider and ICANN org failed to “follow due process” in the DotMusic CPE Report.⁴³ This argument does not warrant reconsideration. For the reasons discussed in Section VI.G of Attachment 1 and incorporated herein by reference, the Requestors have not demonstrated any failure by the CPE Provider to follow the established policy and procedures for CPE as set forth in the Guidebook.

H. DotMusic’s Argument Concerning Revenues from Auctions Does Not Support Reconsideration.

DotMusic asserts that ICANN org’s acceptance of the CPE Report was motivated by some sort of financial incentive.⁴⁴ For the reasons discussed in Section VI.H of Attachment 1 and incorporated herein by reference, DotMusic has not shown that the CPE Provider or any ICANN staff or Board member acted with improper motive with respect to the Application, nor that any applicable ICANN policy or procedure was violated. This argument does not support reconsideration.

I. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of the CPE Criteria.

The Requestors object to the CPE Provider’s decision to award only 10 of the possible 16 points to the Application. For the reasons set forth in Section VI.I of Attachment 1, which is incorporated herein by reference, the Requestors do not demonstrate that the CPE Provider violated any established policy or procedure in scoring the Application.

⁴³ Request 16-5, § 8, at Pg. 16 (marked 15).

⁴⁴ 15 December 2016 letter from Ali to ICANN, at Pg. 6.

1. The CPE Provider’s Application of Criterion 1 was Consistent with Applicable Policies and Procedures.

The Application received zero points for Criterion 1. Criterion 1 evaluates “the community as explicitly identified and defined according to statements in the application.”⁴⁵ It is measured by two sub-criterion: Sub-criterion 1-A-Delineation; and Sub-criterion 1-B-Extension.⁴⁶ Sub-criterion 1-A-Delineation; and Sub-criterion 1-B-Extension are each worth a maximum of two points, for a total of four points. The Requestors challenge the CPE Provider’s analysis of both sub-criteria.

(a) The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 1-A-Delineation.

The Guidebook explains that “community” implies “more of cohesion than a mere commonality of interest,” and requires, among other things, “an awareness and recognition of a community of its members.”⁴⁷ In order for the CPE Provider to award points for sub-criterion 1-A, it must conclude, among other things, that there is at least one entity mainly dedicated to the community.⁴⁸ The Guidebook directs that “a community can consist of . . . a logical alliance of communities,” but the applicant must demonstrate “the requisite awareness and recognition of the community . . . among the members.”⁴⁹ “Otherwise the application would be seen as not relating to a real community and score 0 on both ‘Delineation’ and ‘Extension.’”⁵⁰

As discussed in Section VI.I.1.a of Attachment 1 and incorporated herein by reference, the CPE Provider determined that the community described in the Application lacked awareness and recognition of a community among its members.”⁵¹ The CPE Provider also found

⁴⁵ Guidebook, Module 4, § 4.2.3, at Pg. 4-10, 4-11.

⁴⁶ *Id.* at Pg. 4-11.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, at Pg. 4-12

⁵⁰ *Id.*

⁵¹ CPE Report, at Pg. 2.

that there was “no entity mainly dedicated to the entire community as defined by the applicant in all its geographic reach and range of categories.”⁵²

The Requestors argue that the CPE Provider erred in finding that the community defined in the Application did not demonstrate the requisite cohesion.⁵³ Ultimately, the Requestors’ arguments amount to disagreement with the CPE Provider’s determination that a community including individuals and entities as varied as musicians, libraries, lawyers, public relations agencies, accountants, and those who consume music⁵⁴ does not demonstrate the requisite cohesion, even if all participate in music-related activities or have some connection to the music industry. For the reasons set forth in Section VI.I.1.a of Attachment 1 and incorporated herein by reference, this substantive disagreement is not a basis for reconsideration.

The Requestors also argue that the CPE Provider relied on the incorrect community definition—i.e., not the community definition DotMusic provided in response to Question 20A of the Application.⁵⁵ As set forth more fully in Section VI.I.1.a of Attachment 1 and incorporated herein by reference, the CPE Provider expressly relied on DotMusic’s response to Question 20A,⁵⁶ and this argument does not support reconsideration.

DotMusic asserts that because it used “similar . . . language” in its definition of the community to the language in the Guidebook, the CPE Provider should have determined that the Application satisfied Criterion 1.⁵⁷ This argument does not support reconsideration because: (1) the Guidebook notes that “a logical alliance of communities” is only “viable” as a community if “*the requisite awareness and recognition of the community is at hand among the members,*”⁵⁸

⁵² *Id.*, Pg. 3.

⁵³ Request 16-5, § 6, Pgs. 10-11 (.OSAKA, .ECO, .SPA); DotMusic CPE Process Review Letter, ¶ 52, at Pg. 41-42.

⁵⁴ CPE Report, Pg. 2 (quoting community definition provided by the Requestors in response to Question 20A).

⁵⁵ Request 16-5, § 6, Pg. 13; DotMusic CPE Process Review Letter, ¶ 42, Pg. 38.

⁵⁶ *See* CPE Report, Pg. 2.

⁵⁷ DotMusic CPE Process Review Letter, ¶ 44, at Pg. 39.

⁵⁸ Guidebook, Module 4, § 4.2.3, at Pg. 4-12 (emphasis added).

which was not the case here; and (2) it rests on the assumption that the CPE Provider should have awarded full points on Criterion 1 because the Application stated that it satisfied the requirements for Criterion 1, which is incorrect. Accordingly, for the reasons set forth above and more fully in Section VI.I.1.a of Attachment 1 and incorporated herein by reference, these arguments do not support reconsideration.

The Requestors compare DotMusic's CPE Report to the CPE reports for other applications, arguing that because the CPE Provider found that the communities as defined in those applications did have the requisite cohesion, a similar result should have been reached with respect to the Application.⁵⁹ As explained more fully in Section VI.I.1.a of Attachment 1 and incorporated herein by reference, the CPE results for other applications do not demonstrate that the CPE Provider failed to properly establish the first CPE criterion with respect to the community as defined in the Application,⁶⁰ and the CPE Provider applied the same, correct, standard for analyzing awareness and recognition to the Application and the other referenced applications.

DotMusic's additional arguments concerning sub-criterion 1-A, which are set forth and discussed in detail in Section VI.I.1.a of Attachment 1 and incorporated herein by reference, do not support reconsideration for the reasons provided in Attachment 1.

- (b) The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 1-B: Extension.

DotMusic asserts that the CPE Provider should have awarded two points for sub-criterion

⁵⁹ *Id.*, § 6, Pgs. 10-12.

⁶⁰ The Requestors also refer the BGC to "expert" letters DotMusic submitted to the CPE Provider, which purport to explain why the Application meets the requirements for community priority. Request, § 3, Pg. 1; *see also id.*, Ex. 40. However, these letters simply demonstrate the views of those individuals regarding the scoring of the Application. They do not constitute evidence that the CPE Provider failed to adhere to established policy and procedure in scoring the Application.

1-B, Extension.⁶¹ To obtain two points for Extension, the community must be of considerable size and longevity. For a score of 1, the community must *either* be of considerable size *or* have longevity, but not both.⁶² The Guidebook notes that Extension “relates to the dimensions of the community,” and that if the community lacks the requisite awareness and recognition, “the application would be seen as not relating to a real community and score 0 on both “Delineation” and “Extension.”⁶³

The CPE Provider determined that the Application did not satisfy the one- or two-points test for sub-criterion 1-B because, while the community defined in the Application was “of considerable size,” it, again, did not “show evidence of ‘cohesion’ among its members.”⁶⁴ The CPE Provider also found that the relevant community as defined in the Application did not demonstrate longevity because the proposed community was “construed to obtain a sought-after generic word as a gTLD.”⁶⁵

DotMusic asserts that the CPE Provider should have concluded that the community defined in the Application met the size and longevity requirements because the community includes “millions of constituents” and certain organizations dedicated to musicians and the recording industry were founded well before 2007.⁶⁶ The Guidebook, however, states that an application should receive 0 points on “Extension” if the community defined in the application lacks “the requisite awareness and recognition of the community . . . among the members.”⁶⁷ As noted above and in Section VI.I.1.b of Attachment 1 and incorporated by reference here, because the CPE Provider concluded that the community defined in the application lacked awareness and

⁶¹ DotMusic CPE Process Review Letter, ¶ 50, at Pg. 40-41.

⁶² Guidebook, Module 4, § 4.2.3, at Pg. 4-10.

⁶³ *Id.*

⁶⁴ CPE Report, Pg. 4.

⁶⁵ *Id.*

⁶⁶ DotMusic CPE Process Review Letter, ¶ 50, at Pg. 40-41.

⁶⁷ Guidebook, Module 4, § 4.2.3, at Pg. 4-12.

recognition among the identified members, it was required to award zero points for sub-criterion 1-B, Extension. Accordingly, the CPE Provider acted consistent with the Guidebook and the Requestors' argument does not support reconsideration.

(c) The CPE Process Does Not Double-Count and Has Not Substantively Changed Since the Publication of the Guidebook

DotMusic argues that the CPE Provider “appears to double count awareness and recognition of the community amongst its members twice.”⁶⁸ The CPE Provider counts awareness and recognition once in sub-criterion 1-A “Delineation,” and once in sub-criterion 1-B, “Extension.”⁶⁹ This practice is consistent with the Guidebook, which states that in developing the CPE criteria, the “utmost care has been taken to avoid any ‘double-counting’ – any negative aspect found in assessing an application for one *criterion* should only be counted there and should not affect the assessment for other *criteria*.”⁷⁰ Accordingly, as set forth in Section VI.I.1.c of Attachment 1 and incorporated herein by reference, double counting did not occur here.

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

The Application received three points for Criterion 2. Criterion 2 evaluates “the relevance of the string to the specific community that it claims to represent,” and is measured by two sub-criterion: 2-A-Nexus; and 2-B-Uniqueness.⁷¹ 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

⁶⁸ 15 December 2016 letter from Ali to ICANN at Pg. 2-3, available at <https://www.icann.org/en/system/files/files/reconsideration-16-5-dechert-to-icann-bgc-15dec16-en.pdf>.

⁶⁹ CoE Report, at Pg. 49.

⁷⁰ Guidebook, Module 4, § 4.2.3, at Pgs. 4-9, 4-10 (emphasis added).

⁷¹ Guidebook, Module 4, § 4.2.3, at Pg. 4-12, 4-13.

of the community or be a well-known short form or abbreviation of the community.”⁷² For a score of two, the applied-for string should closely describe the community or the community members, without overreaching substantially beyond the community.⁷³ Zero points are awarded if the string “does not fulfill the requirements for a score of 2.”⁷⁴

The Requestors challenge the CPE Provider’s analysis of sub-criterion 2-A-Nexus, for which DotMusic received two of three possible points.⁷⁵ As discussed in more detail in Section VI.I.2 of Attachment 1, and incorporated herein by reference, the Requestors have provided no evidence demonstrating that the CPE Provider failed to comply with the applicable CPE procedures when it evaluated sub-criterion 2-A.

The Requestors disagree with the CPE Provider’s determination that there is no “established name” for the community identified in the Application.⁷⁶ However, as discussed in Section VI.I.2 of Attachment 1 and incorporated herein by reference, this reflects a substantive disagreement with the determination of the CPE Provider, and is not evidence that the CPE Provider misapplied the second CPE criterion. As such, it is not a basis for reconsideration.

DotMusic also argues that the CPE Provider’s application of sub-criterion 2-A in the CPE Report is inconsistent with its application of the same sub-criterion in the .SPA CPE.⁷⁷ For the reasons explained in Section VI.I.2 of Attachment 1 and incorporated herein by reference, DotMusic has not identified any inconsistency in the CPE Provider’s application of sub-criterion 2-A. Further, the Scope 2 Report confirmed that the CPE Provider applied sub-criterion 2-A

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Request 16-5.

⁷⁶ Request 16-5, § 6, Pg. 15. *See also* Blomqvist Opinion, ¶¶ 65-68 at Pg. 46-47; Burgess Opinion, ¶¶ 26-29, at Pg. 24-26.

⁷⁷ DotMusic CPE Process Review Letter, ¶¶ 56-57, at Pg. 43-44.

consistently in all CPEs, including the DotMusic and the .SPA CPEs.⁷⁸ Accordingly, reconsideration is not warranted.

3. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 4-A-Support.

The Application received three points for Criterion 4. Criterion 4 evaluates support for and/or opposition to an application.⁷⁹ It is measured by two sub-criterion: sub-criterion 4-A-Support; and sub-criterion 4-B-Opposition.⁸⁰ Sub-criterion 4-A and sub-criterion 4-B are each worth a maximum of two points, for a total of four points.⁸¹

To obtain two points for sub-criterion 4-A-Support, an applicant must be the recognized community institution/member organization or have documented support from the recognized community institution(s)/member organization(s), or have otherwise documented authority to represent the community.⁸² “Recognized” community institutions are those institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of the community.⁸³ Consideration of support is not based merely on the number of comments or expressions of support received.⁸⁴

The Requestors challenge the CPE Provider’s application of sub-criterion 4-A-Support.⁸⁵ The CPE Provider determined that DotMusic did not satisfy the two points test for sub-criterion 4-A because it was “not the recognized community institution(s)/ member organization(s), nor did it have documented authority to represent the community.”⁸⁶ Additionally, the CPE Provider

⁷⁸ Scope 2 Report, Pg. 36-41 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

⁷⁹ Guidebook, § 4.2.3; *see also* Request, § 6, Pgs. 14-15.

⁸⁰ Guidebook, Module 4, § 4.2.3, at Pg. 4-17.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at Pgs. 4-17-4-18.

⁸⁴ *Id.*

⁸⁵ Request 16-5.

⁸⁶ CPE Report, at Pg. 8.

concluded that, although DotMusic had “documented support from many groups with relevance,” none were the “recognized community institution” because the CPE Provider had “not found evidence that such organization exists.”⁸⁷

As discussed in detail in Section VI.I.3 of Attachment 1, which is incorporated herein by reference, ultimately, the Requestors disagree with the CPE Provider’s determination that the institutions supporting the Application, while relevant, were not the “recognized community institutions” under sub-criterion 4-A because none represented the whole of the community as defined by DotMusic. These arguments represent a substantive disagreement with the CPE Provider and do not support reconsideration.

For this and the additional reasons set forth in Section VI.I.3 of Attachment 1, which is incorporated herein by reference, the Requestors’ arguments concerning sub-criterion 4-A do not support reconsideration.

J. The Board’s Conclusion of the CPE Process Review was Consistent with Applicable Policies and Procedures.

The Requestors’ criticisms of the conclusion of the CPE Process Review focus on the transparency, methodology, and scope of the CPE Process Review. None support reconsideration. The BAMC notes that it addressed many of the Requestors’ concerns in its Recommendation on Request 18-5,⁸⁸ which the Board adopted on 18 July 2018.⁸⁹ The rationales set forth by the BAMC, and the Board in its determination on Request 18-5, are incorporated herein by reference.

K. DotMusic’s Procedural Demands are Outside the Scope of Request 16-5.

⁸⁷ *Id.*

⁸⁸ Recommendation on Request 18-5, <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-14jun18-en.pdf>.

⁸⁹ Board action on request 18-5, <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.f>.

DotMusic's demand that ICANN org disclose all documents related to the CPE Process Review is not required by the 2018 Resolutions or otherwise,⁹⁰ and the Board addressed DotMusic's demand for the same documents when it denied DotMusic's reconsideration request challenging ICANN org's response to DIDP Request 20180110-1.⁹¹ Nor is ICANN org obligated to provide DotMusic with a list of specific concerns about Request 16-5 following DotMusic's supplemental submission and to schedule an in person presentation to address them (once the above-described conditions are met).⁹² The additional reasoning in Section VI.K of Attachment 1 is incorporated herein by reference.

With respect to DotMusic's extraordinary demand that ICANN org bear DotMusic's costs and expenses for reviewing any documents ICANN produces and preparing supplemental submissions to the BAMC concerning those documents, the BAMC rejects this demand, as discussed in Section VI.K of Attachment 1 and incorporated herein by reference.

V. Recommendation.

The BAMC has considered the merits of Request 16-5 and, based on the foregoing, concludes that ICANN org acted consistent with the Guidebook and did not violate ICANN's Mission, Commitments and Core Values when it accepted the CPE Report, and the Board's response to the Despegar IRP Determination does not warrant reconsideration. Accordingly, for the reasons set forth in Attachment 1 and incorporated herein by reference, the BAMC recommends that the Board deny Request 16-5.

⁹⁰ Transition Process (<https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>).

⁹¹ Board Action on Request 18-1 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.b>).

⁹² <https://www.icann.org/en/system/files/files/reconsideration-18-5-dotmusic-bamc-recommendation-attachment-2-14jun18-en.pdf>.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws applicable to Request 16-5 provides that the BAMC 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 BAMC would have to have acted by 26 March 2016. However, Request 16-5 was placed on hold pending completion of the CPE Process Review. The Requestors were then provided an opportunity to supplement their arguments in light of the CPE Process Review results, and to make a telephonic presentation to the BAMC prior to its recommendation. The Requestors rejected both invitations. Accordingly, the first opportunity that the BAMC has to consider Request 16-5 is 25 January 2019.