

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-6  
14 JUNE 2018**

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The Requestors, Travel Reservations SRL, Fegistry LLC, Minds + Machines Group Limited, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) seek reconsideration of ICANN Board Resolutions 2018.03.15.08 through 2018.03.15.11 (collectively, the 2018 Resolutions) which concluded the Community Priority Evaluation (CPE) Process Review.<sup>1</sup>

**I. Brief Summary**

The Requestors each submitted standard applications for the .HOTEL generic top-level domain (gTLD). Another applicant, Hotel Top-Level Domain S.a.r.l (HTLD), submitted a community-based application for .HOTEL (HTLD Application). HTLD participated and prevailed in CPE. As a result, HTLD was awarded priority for the .HOTEL string thereby eliminating all other applicants for the .HOTEL string, including the Requestors' applications.

Following the CPE of HTLD Application, some of the Requestors challenged the HTLD CPE Report through the Reconsideration process (Reconsideration Requests 14-34<sup>2</sup> and 14-39<sup>3</sup>) and the independent review process (IRP) (Despegar IRP).<sup>4</sup> On 12 February 2016, the Despegar IRP Panel declared ICANN to be the prevailing party in the Despegar IRP.<sup>5</sup>

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<sup>1</sup> Request 18-4, § 3, at Pg. 1.

<sup>2</sup> See Reconsideration Request 14-34, available at <https://www.icann.org/resources/pages/14-34-2014-07-01-en>.

<sup>3</sup> See Reconsideration Request 14-39, available at

<sup>4</sup> See Despegar IRP Panel Declaration, available at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>. Travel Reservations SRL (one of the Requestors) was formerly known as Despegar Online SRL. Request 16-11, § 1, at Pg. 2, available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

<sup>5</sup> See Despegar IRP Panel Declaration, available at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

The Board accepted the findings of the Despegar IRP Panel,<sup>6</sup> and directed that the HTLD Application move forward to the next stage of the New gTLD Program (the 2016 Resolutions).<sup>7</sup> Thereafter, a group of standard applicants for the .HOTEL gTLD, including the Requestors, submitted Reconsideration Request 16-11 (Request 16-11), seeking reconsideration of the 2016 Resolutions.<sup>8</sup>

While Request 16-11 was pending, the ICANN Board directed ICANN org to undertake the CPE Process Review to evaluate the process by which ICANN org interacted with the CPE Provider.<sup>9</sup> The BGC thereafter determined that the CPE Process Review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report; and (ii) compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations which are the subject of certain pending Reconsideration Requests relating to the CPE process.<sup>10</sup> The BGC determined that the pending Reconsideration Requests regarding the CPE process, including Request 16-11, would be placed on hold until the CPE Process Review was completed.<sup>11</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>12</sup>

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<sup>6</sup> ICANN Board Resolutions 2016.03.10.10 – 2016.03.10.11, available at <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>.

<sup>7</sup> *Id.*

<sup>8</sup> Request 16-11.

<sup>9</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

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

<sup>11</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, see <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, see <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, see <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

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

On 15 March 2018, the Board passed the 2018 Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>13</sup>

On 14 April 2018, the Requestors submitted Request 18-6, challenging the 2018 Resolutions.<sup>14</sup> The Requestors claim that the 2018 Resolutions are contrary to ICANN org's commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>15</sup>

The BAMC has considered Request 18-6 and all relevant materials and recommends that the Board deny Request 18-6 because the Board considered all material information when it adopted the 2018 Resolutions, which are consistent with ICANN's Mission, Commitments, Core Values, and established ICANN policy(ies). Specifically, as noted in the Resolutions, the Board has considered the CPE Process Review Reports.<sup>16</sup> The CPE Process Review Reports identify the materials considered by FTI.<sup>17</sup> Additionally, as noted in the rationale of the Resolutions, the Board acknowledged receipt of, and took into consideration, the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions.<sup>18</sup>

## **II. Facts.**

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

<sup>14</sup> Request 18-6, § 2, at Pg. 3, available at <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf>.

<sup>15</sup> *Id.* § 7, at Pg. 6-7.

<sup>16</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>17</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>18</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

**A. The CPE Provider’s Evaluation of the HTLD Application.**

HTLD submitted a community-based application for .HOTEL.<sup>19</sup> The Requestors each submitted standard (meaning, not community-based) applications for .HOTEL, and all of the .HOTEL applications were placed into a contention set. HTLD was invited to, and did, participate in CPE for .HOTEL.<sup>20</sup>

On 11 June 2014, the CPE Provider issued a CPE report, concluding that the HTLD Application prevailed in CPE.<sup>21</sup>

The Requestors have challenged the CPE Provider’s determination that the HTLD Application satisfied the requirements for community priority, and the Board’s decision not to cancel the HTLD Application, via numerous DIDP Requests, Reconsideration Requests, and the Despegar IRP. All of those challenges have been resolved, with the exception of Request 16-11, which is pending.

The Requestors submitted Request 16-11 on 25 August 2016, asserting that the 2016 Resolutions are inconsistent with ICANN’s Articles of Incorporation and Bylaws.<sup>22</sup>

**B. The CPE Process Review.**

While Request 16-11 was still pending, ICANN’s Board, as part of the Board’s oversight of the New gTLD Program, directed ICANN org to undertake a review of the process by which ICANN org interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider as part of the New gTLD Program.<sup>23</sup> The Board’s

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<sup>19</sup> See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1562>.

<sup>20</sup> CPE is a method of resolving string contention, described in section 4.2 of the New gTLD Applicant Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. See Community Priority Evaluation (CPE), <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>21</sup> See CPE Report at Pg. 1, available at <https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

<sup>22</sup> Request 16-11, § 6, at Pg. 6 available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>.

<sup>23</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>.

action was part of the ongoing discussions regarding various aspects of the CPE process as well as issues that were identified in the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC (Dot Registry IRP).<sup>24</sup>

Subsequently, the BGC discussed potential next steps regarding the review of pending reconsideration requests relating to the CPE process.<sup>25</sup> The BGC determined that, in addition to reviewing the process by which ICANN organization interacted with the CPE Provider related to the CPE reports issued by the CPE Provider (Scope 1), the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout and across each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for evaluations that are the subject of pending reconsideration requests (Scope 3).<sup>26</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. The BGC determined that the then eight pending Reconsideration Requests relating to the CPE process, including Request 16-11, would be on hold until the CPE Process Review was completed.<sup>27</sup>

On 13 December 2017, ICANN organization published CPE Process Review Reports.<sup>28</sup>

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN organization 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.<sup>29</sup>

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<sup>24</sup> *Id.*

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

<sup>26</sup> *Id.*

<sup>27</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>28</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>29</sup> Scope 1 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

FTI also concluded that “ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN organization’s comments.”<sup>30</sup>

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.”<sup>31</sup>

For Scope 3, “FTI identified and compiled all reference material cited in each final report, as well as any additional reference material cited in the CPE Provider’s working papers to the extent that such material was not otherwise cited in the final CPE report.”<sup>32</sup> 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. Two of the eight relevant CPE reports included citations for each reference to research. Of the remaining six relevant CPE reports, while the reports did not include citations to each reference to research, in five of the six instances, FTI found citations to, or the materials that corresponded with, the research in the working papers underlying the reports. In the other instance (for which two CPE reports were done on the same application) FTI did not find citations to each reference to research in the working papers underlying the Second CPE Report. However, FTI did find citations to the research referenced in the Second CPE Report in the working papers underlying the First CPE Report.<sup>33</sup>

Accordingly, based on FTI’s observations, it is possible that the research being referenced in the

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<sup>30</sup> *Id.*, at Pg. 9, 15.

<sup>31</sup> Scope 2 Report, at Pg. 2, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>32</sup> Scope 3 Report, at Pg. 3-4, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

<sup>33</sup> *Id.* at Pg. 4.

relevant CPE report was the research for which citations were found in the working papers underlying the first CPE on that particular application.<sup>34</sup>

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

The Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),<sup>36</sup> and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).<sup>37</sup> The Roadmap provides, in relevant part, that

Following the completion of the oral presentations and additional written submissions, if any, the BAMC will consider the merits of the pending requests in one or two meetings as soon as practicable. The BAMC's review will take into consideration any additional written submissions . . . , materials presented in the oral presentations . . . , any materials previously submitted in support of the reconsideration request including any additional materials that were submitted in connection with the CPE Process Review, if any, and the findings set forth in the CPE Process Review Reports.<sup>38</sup>

The Board noted that the requestors with pending reconsideration requests each will have an opportunity to submit supplemental materials

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<sup>34</sup> *Id.* at Pg. 34.

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

<sup>36</sup> Available at <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

<sup>37</sup> 2018 Resolutions. See also Roadmap, available at <https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>.

<sup>38</sup> Roadmap, at Pg. 2.

and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.<sup>39</sup>

### **C. The Requestors' Response to the CPE Process Review.**

On 16 January 2018, the Request 16-11 Requestors submitted a letter to the BAMC concerning the CPE Process Review Reports.<sup>40</sup> They stated that “a first cursory review of the report[s] already shows that Requestors’ concerns about the lack of transparency remain unaddressed.”<sup>41</sup> The Request 16-11 Requestors were “concerned about the methodology used by [FTI], and about due process and policy violations, disparate treatment and inconsistencies that have not been considered.”<sup>42</sup> The Requestors stated that they “trust[ed] that . . . ICANN shall hear Request[o]rs before proceeding further in this matter.”<sup>43</sup>

On 1 February 2018, the Request 16-11 Requestors submitted a second letter to the BAMC expressing concerns about the CPE Process Review’s transparency, methodology, and scope. The Request 16-11 Requestors asked the BAMC to “address these inconsistencies—in the event that you do not simply decide to cancel HTLD’s application . . . and to ensure a meaningful review of the CPE regarding .hotel.”<sup>44</sup>

On 19 March 2018, consistent with the Roadmap, the BAMC invited the Request 16-11 Requestors to “submit additional information relating to Request 16-11, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2

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<sup>39</sup> *Id.*

<sup>40</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>.

<sup>41</sup> *Id.* at Pg. 1.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at Pg. 2.

<sup>44</sup> *Id.* at Pg. 4.



April 2018. The BAMC also invited the Request 16-11 Requestors to “make a telephonic oral presentation to the BAMC in support of” Request 16-11. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-11 and that is not already covered by the written materials.”<sup>45</sup> On 22 March 2018, the Request 16-11 Requestors accepted the BAMC’s invitation to make a telephonic presentation and asked for an extension on its deadline to 9 April 2018 submit additional materials in support of Request 16-11,<sup>46</sup> which the BAMC granted.<sup>47</sup>

On 9 April 2018, the Request 16-11 Requestors submitted a letter to the Board concerning the 2018 Resolutions, asserting that the Board passed the 2018 Resolutions “without considering Request[o]rs’ arguments against accepting the findings set forth in the CPE Process Review Reports,” and “[i]nstead . . . considered that Request[o]rs will have the opportunity to address their arguments in support of . . . Request 16-11.”<sup>48</sup> The Request 16-11 Requestors claimed that the 2018 Resolutions “make[] a meaningful review of [the] main arguments expressed by Request[o]rs impossible” and that “upholding [the 2018 Resolutions] would preclude the ICANN Board from granting the remedies requested by Request[o]rs in the framework of . . . Request 16-11.”<sup>49</sup> The Request 16-11 Requestors concluded that the 2018 Resolutions were “either careless and incompetent or prejudiced.”<sup>50</sup>

#### **D. Request 18-6.**

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<sup>45</sup> Attachment 1, 19 March 2018 Email from ICANN to the Requestor.

<sup>46</sup> Attachment 2, 22 March 2018 Email from the Requestor to ICANN.

<sup>47</sup> Attachment 3, 23 March 2018 Email from ICANN to the Requestor.

<sup>48</sup> 9 April 2018 letter from Petillion to Board at Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-09apr18-en.pdf>.

<sup>49</sup> *Id.* at Pg. 1-2.

<sup>50</sup> *Id.* at Pg. 2.

On 14 April 2018, the Requestors submitted Request 18-6, challenging the 2018 Resolutions.<sup>51</sup> As they did in the above-referenced correspondence concerning Request 16-11, the Requestors asserted that the 2018 Resolutions “would preclude the ICANN Board from granting the remedies requested by Request[o]rs in the framework of Reconsideration Request 16-11, and unjustly deprive Request[o]rs from a meaningful review.”<sup>52</sup> The Requestors incorporated the concerns they raised “in the framework of Reconsideration Request 16-11” and reiterated their concerns about the CPE Process Review’s transparency, methodology, and scope.<sup>53</sup> The Requestors claimed that the 2018 Resolutions are contrary to ICANN organization’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>54</sup> The Requestors also requested that Request 18-6 and Request 16-11 be heard together.<sup>55</sup>

#### **E. Relief Requested**

The Requestors ask the BAMC to:

1. “[R]everse” the 2018 Resolutions;
2. Grant Requestors a hearing;
3. “[P]rovide[] full transparency regarding all communications between (i) ICANN, the ICANN Board, ICANN’s counsel and (ii) the CPE Process Reviewer”; and
4. “[P]rovide full transparency on its consideration of the CPE Process and the CPE Process Review and to list and give access to all material the BAMC and the ICANN Board considered during its meetings on the CPE Process and the CPE Process

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<sup>51</sup> Request 18-6, § 2, at Pg. 3.

<sup>52</sup> *Id.* § 5, at Pg. 4.

<sup>53</sup> *Id.* § 7, at Pg. 5-7.

<sup>54</sup> *Id.* § 7, at Pg. 6-7.

<sup>55</sup> *Id.* § 8, at Pg. 8.

Review.”<sup>56</sup>

### **III. Issue Presented.**

The issue is whether the Board’s adoption of the 2018 Resolutions contradicted ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies). The BAMC will not consider Request 16-11 in conjunction with Request 18-6 because the Requests were filed under different Bylaws with different standards for Reconsideration and involve different subject matters. Further, while Article 4, Section 4.2(j) of the Bylaws allow different Reconsideration Requests to be heard as the same time, as long as “(i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction,”<sup>57</sup> here, the two Requests involve different actions. Accordingly, the sole issue here is, as referenced above, whether the Board’s adoption of the 2018 Resolutions contracted ICANN’s Missions, Commitments, Core Values and/or established ICANN policy(ies).

### **IV. The Relevant Standards for Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws 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:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.<sup>58</sup>

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<sup>56</sup> Request 18-6, § 8, at Pg. 8.

<sup>57</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(j).

<sup>58</sup> ICANN Bylaws, 22 July 2017, Art. 4, §§ 4.2(a), (c).

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Request is sufficiently stated, the Request is sent to the Ombudsman for review and consideration.<sup>59</sup> Pursuant to the Bylaws, where the Ombudsman has recused himself from the consideration of a reconsideration request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>60</sup> Denial of a request for reconsideration of ICANN organization action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>61</sup>

On 19 May 2018, the BAMC determined that Request 18-6 is sufficiently stated and sent Request 18-6 to the Ombudsman for review and consideration.<sup>62</sup> The Ombudsman thereafter recused himself from this matter.<sup>63</sup> Accordingly, the BAMC has reviewed Request 18-6 and issues this Recommendation.

## **V. Analysis and Rationale.**

### **A. The 2018 Resolutions Are Consistent With ICANN’s Mission, Commitments, Core Values and Established ICANN Policy(ies).**

The Requestors’ criticisms of the Resolutions focus on the transparency, methodology, and scope of the CPE Process Review. But, the Requestors provide no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s commitments to transparency, multistakeholder policy development, promoting well-informed decisions based on expert advice, applying documented policies consistently, neutrally, objectively, and fairly without discrimination, and operating with

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<sup>59</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l).

<sup>60</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(l)(iii).

<sup>61</sup> ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>62</sup> Ombudsman Action Regarding Request 18-6, Pg. 2, <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-ombudsman-action-23may18-en.pdf>.

<sup>63</sup> Ombudsman Action Regarding Request 18-6, Pg. 1.

efficiency and excellence. Rather, it appears that the Requestors simply do not agree with findings of the CPE Process Review Reports and the Board’s acceptance of those findings. As demonstrated below, these are not sufficient bases for reconsideration.

1. The CPE Process Review Satisfied Applicable Transparency Obligations.

The Requestors argue that the CPE Process Review—and therefore the 2018 Resolutions—are contrary to ICANN’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>64</sup> Specifically, the Requestors believe that the CPE Process Review lacked transparency concerning: (1) “the selection process for the CPE process reviewer ([FTI]), and the names and curricula vitae of the FTI individuals involved in the review”; (2) the “instructions FTI received from ICANN [organization]”; (3) the “criteria and standards that FTI used to perform the CPE process review”; (4) the “documents or the recordings of the interviews on which [FTI’s] findings are based”; and (5) the “questions that were asked during [FTI’s] interviews.”<sup>65</sup>

As an initial matter, ICANN org provided details concerning the selection process for the CPE process reviewer almost one year ago, in furtherance of its effort to operate to the maximum extent feasible in an open and transparent manner.<sup>66</sup> In the same document, ICANN org provided information concerning the scope of FTI’s investigation.<sup>67</sup> Similarly, the CPE Process Review Reports themselves provide extensive detail concerning FTI’s “criteria and standards”

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<sup>64</sup> Request 18-6, § 7, at Pg. 6-7.

<sup>65</sup> 1 February 2018 letter from Petition to BAMC at Pg. 1-2, available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petition-to-icann-bamc-redacted-01feb18-en.pdf>.

<sup>66</sup> See CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>67</sup> See *id.*

for conducting the CPE Process Review.<sup>68</sup> Accordingly, none of these arguments support reconsideration.

Concerning FTI's documents, recordings, and interview questions, as noted in the CPE Process Review Reports, many of the materials that FTI reviewed are publicly available documents, and are equally available to the Requestors.<sup>69</sup> Additionally, FTI requested, received, and reviewed (1) emails from ICANN organization (internal to ICANN personnel as well external emails exchanged with the CPE Provider) and (2) the CPE Provider's working papers, including draft reports, notes, and spreadsheets.<sup>70</sup> While the Requestors did not file a request for documentary information pursuant to the Documentary Information Disclosure Policy (DIDP), these materials are the subject of two DIDP Requests, which were submitted by parties in January 2018. ICANN organization considered the request and concluded that ICANN organization explained that those documents would not be made publicly available because they were subject to certain Nondisclosure Conditions.<sup>71</sup> These same Nondisclosure Conditions apply to the Requestors' claim. Moreover, the reasoning set forth in the BAMC's Recommendations on Reconsideration Requests 18-1 and 18-2, denying reconsideration on those DIDP Responses are applicable here and are therefore incorporated herein by reference.<sup>72</sup> The Requestors here provide no evidence that ICANN org's decision not to disclose these materials contravened any

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<sup>68</sup> See, e.g., 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>.

<sup>69</sup> Scope 1 Report at Pgs. 3-6.

<sup>70</sup> *Id.* at Pg. 6.

<sup>71</sup> See ICANN organization Response to DIDP Request 20180115-1, at Pg. 21-22, available at <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>.

<sup>72</sup> See BAMC Recommendation on Request 18-1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>; see also BAMC Recommendation on Request 18-2, available at <https://www.icann.org/en/system/files/files/reconsideration-18-2-dotgay-bamc-recommendation-request-05jun18-en.pdf>.

applicable policies, or ICANN’s Mission, Commitments, or Core Values. Accordingly, this argument does not support reconsideration.

2. The Requestors’ Challenges to FTI’s Methodology Do Not Warrant Reconsideration.

The Requestors assert that the Board should not have acknowledged or accepted the CPE Process Review Reports because FTI’s methodology was flawed.<sup>73</sup> Specifically, the Requestors complain that FTI: (1) did not explain why the CPE Provider refused to produce email correspondence; and (2) did not try to contact former employees of the CPE Provider.<sup>74</sup>

As a preliminary matter, FTI, not the Board or ICANN organization, defined the methodology for the CPE Process Review Reports.<sup>75</sup> The Board selected FTI because it has “the requisite skills and expertise to undertake” the CPE Process Review, and relied on FTI to develop an appropriate methodology.<sup>76</sup> The Requestors have not identified a policy or procedure (because there is none) requiring the Board or ICANN org to develop a particular methodology for the CPE Process Review.

With respect to the first concern, the CPE Provider *did* produce to FTI, and FTI *did* review, the CPE Provider’s working papers, draft reports, notes, and spreadsheets for all CPE Reports.<sup>77</sup> FTI also received and reviewed emails (and attachments) produced by ICANN organization between relevant CPE Provider personnel and relevant ICANN organization personnel related to the CPE process and evaluations.<sup>78</sup> The Requestors are correct that FTI

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<sup>73</sup> 1 February 2018 letter from Petillion to BAMC at Pg. 2., available at <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>. See also Request 18-6, § 7, at Pg. 7.

<sup>74</sup> 1 February 2018 letter from Petillion to BAMC, at Pg. 2.

<sup>75</sup> See, e.g., Scope 2 Report at Pg. 3-9, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

<sup>76</sup> See CPE Process Review Update, 2 June 2017, available at <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>77</sup> See Scope 2 Report at Pg. 7-8.

<sup>78</sup> See Scope 2 Report at Pg. 7-8.

requested additional materials from the CPE Provider such as the internal correspondence between the CPE Provider’s personnel and evaluators, but the CPE Provider refused to produce certain categories of documents, claiming that pursuant to its contract with ICANN org, it was only required to produce CPE working papers, and internal and external emails were not “working papers.”<sup>79</sup> No policy or procedure exists that would require ICANN organization to reject the CPE Process Review Reports because the CPE Provider did not produce internal emails. This argument does not support reconsideration.

Similarly, with respect to the second concern, FTI interviewed the “only two remaining [CPE Provider] personnel,” who were both “part of the core team for all 26 evaluations” in the CPE Process review.<sup>80</sup> Other team members were no longer employed by the CPE Provider when FTI conducted its investigation, and were therefore not available for FTI to interview.<sup>81</sup> Neither FTI nor the Board were required to search out every former CPE Provider employee who had any role in any CPE evaluation, particularly when FTI already had access to two individuals who were core members of *every* CPE evaluation team and the working papers of the CPE reports that the entire core team worked on. The Requestor has not identified a policy or procedure requiring FTI to do more (including to explain why it did not seek out former employees) because none exists. Reconsideration is not warranted on this ground.

The Requestors also claim that FTI’s methodology was flawed because FTI did not identify that the CPE Provider determined that the HTLD Application “provided for an appeal system,” when in fact the application “d[id] not provide for an appeal system” as required under

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<sup>79</sup> See *id.* See also EIU Consulting Agreement Statement of Work #2 – Application Evaluation Services\_12Mar2012, at Pg. 8, available at <https://newgtlds.icann.org/en/applicants/cpe#process-review>.

<sup>80</sup> EIU Consulting Agreement Statement of Work #2 at Pg. 9.

<sup>81</sup> Scope 1 Report, at Pg. 14, available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.



Criterion 3, Registration Policies.<sup>82</sup> The Requestors claim that “[t]he Despegar et al. IRP Panel considered [this] inconsistenc[y] to have merit,” and the “existence of said inconsistencies has never been contested.”<sup>83</sup> This assertion as to the Despegar IRP Panel Declaration is an overstatement. The Despegar IRP Panel stated that: (1) ICANN org had confirmed that the CPE Provider did not have a “process for comparing the outcome of one CPE evaluation with another in order to ensure consistency,” nor did ICANN organization have a process for doing so; and that (2) “[m]uch was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations, . . . some of which, *on the basis solely of the arguments provided by [the Requestors]*, have some merit.”<sup>84</sup> The Despegar IRP Panel did not make a determination concerning these arguments, nor was it asked to. Accordingly, the IRP Panel’s side note concerning the Requestors’ allegations of inconsistencies does not support reconsideration.

3. The Requestors’ Challenge to the Scope of the CPE Process Review Does Not Warrant Reconsideration.

The Requestors’ remaining complaints about the CPE Process Review Reports all relate to the scope of FTI’s investigation.<sup>85</sup> The Requestors believe that FTI “sum[med] up” but did not “analyze” “the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria,” that it did not analyze “the inconsistencies invoked by applicants in [reconsideration requests], IRPs or other processes,” and that FTI “did not examine the gTLD applications underlying the CPE [evaluations].”<sup>86</sup> Essentially, the Requestors wanted

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<sup>82</sup> 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing Despegar IRP Panel Declaration, ¶ 146.

<sup>83</sup> *Id.* at Pg. 4

<sup>84</sup> Despegar IRP Panel Declaration, ¶ 146 (emphasis added).

<sup>85</sup> See 1 February 2018 letter from Petillion to BAMC, *available at* <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>. See also Request 18-6, § 7, at Pg. 7.

<sup>86</sup> *Id.*

FTI to substantively re-evaluate the CPE applications, which was beyond the scope of the CPE Process Review. Therefore, the Requestor’s arguments concerning the scope of the CPE Process Review do not support reconsideration of the HTLD CPE Report.

4. The 2018 Resolutions Are Consistent with ICANN’s Mission, Commitments, Core Values, and Established Policy(ies).

Finally, the Requestors assert that the Board should reconsider the 2018 Resolutions because they are contrary to ICANN’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner,<sup>87</sup> and they will prevent Requestors from obtaining “a meaningful review of their complaints regarding HTLD’s application for .hotel, the CPE process and the CPE Review Process.”<sup>88</sup> Relatedly, the Requestors make a passing reference to a concern about “due process . . . violations.”<sup>89</sup>

As an initial matter, the BAMC notes that when the Board acknowledged and accepted the CPE Process Review Reports, it directed the BAMC to consider the Reports along with all of the materials submitted in support of the relevant reconsideration requests.<sup>90</sup> The BAMC will consider the CPE Process Review Reports in the course of its evaluation of Request 16-11 (just as the BAMC will consider all of the materials submitted by the Requestors in connection with Request 16-11), but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-11.

The BAMC will carefully review and consider all of the materials that the Requestors submitted in support of Request 16-11. The BAMC notes that it provided the Requestors an

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<sup>87</sup> Request 18-6, § 7, at Pg. 6-7.

<sup>88</sup> *Id.* § 5, at Pg. 3.

<sup>89</sup> 16 January 2018 letter from Petillion to BAMC, at Pg. 1, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>.

<sup>90</sup> See ICANN Board Rationale for Resolutions 2018.03.15.08-2018.03.05.11, available at <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

opportunity to make a telephone presentation concerning the effect of the CPE Process Review on Request 16-11, which the Requestors accepted. The BAMC will consider all of the Requestors' arguments, and consider the CPE Process Review Reports as one of many reference points in its consideration of Request 16-11. Accordingly, reconsideration is not warranted based on the argument that the BAMC will consider the CPE Process Review Reports to the exclusion of the Requestors' submissions in Request 16-11.

As to the Requestors' due process claims, the BAMC recognizes ICANN org's commitment to conform with *relevant* principles of international law and conventions. However, any commitment to provide due process is voluntary and not coextensive with government actors' obligations. Constitutional protections do not apply with respect to a corporate accountability mechanism. California non-profit public benefit corporations, such as ICANN organization, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>91</sup> Pursuant to this explicit authority, ICANN org established the Reconsideration Request and IRP processes, as well as the procedures that would govern those processes. ICANN organization was not required to establish any internal corporate accountability mechanism, but instead did so voluntarily. Accordingly, the Requestor does not have the "right" to due process or other "constitutional" rights with respect to ICANN's accountability mechanisms.

Even if ICANN organization *did* have due process obligations, and even though the "rights" the Requestors invoke do not apply to corporate accountability mechanisms, the Requestors have not explained how the alleged misapplication of ICANN org's policies resulted in a denial of due process. ICANN org *did* take due process into account when it designed the

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<sup>91</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

accountability mechanisms, including the Reconsideration Request process that the Requestors exercised by submitting Request 16-11 and the IRP Process that the Requestors exercised in the Despegar IRP. ICANN org’s accountability mechanisms—that is, Reconsideration Requests and the Independent Review Process—consider the CPE Provider’s compliance with the Guidebook and with ICANN organization’s Articles of Incorporation and Bylaws. They consider whether the CPE Provider complied with its processes, which requires the adjudicator (the BAMC, Board, or an Independent Panel) to consider the outcome in addition to the process.

Accordingly, the accountability mechanisms, including this reconsideration request, provide affected parties like the Requestor with avenues for redress of purported wrongs, and substantively review the decisions of third-party service providers, including the CPE Provider. This is not grounds for reconsideration.

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

## **VI. Recommendation**

The BAMC has considered the merits of Request 18-6 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN’s Mission, Commitments and Core Values when it passed the 2018 Resolutions. Accordingly, the BAMC recommends that the Board deny Request 18-6.