

Rebuttal to the BAMC Recommendation in Reconsideration Request 18-6

Requesters submit this Rebuttal to the Board Accountability Mechanisms Committee's ('BAMC') Recommendation on Reconsideration Request 18-6 (the 'Recommendation'). The Recommendation concerns Requesters' request that the Board (i) reverse Resolutions 2018.03.15.08 through 2018.03.15.11 (the '2018 Resolutions'), (ii) provide full transparency, (iii) organize a hearing for Requestors following disclosure of the documents asked for, and (iv) handle Reconsideration Request 18-6 ('RfR 18-6') together with Reconsideration Request 16-11 ('RfR 16-11').

In its Recommendation, the BAMC refuses to handle RfR 18-6 together with 16-11 and recommends the Board to deny RfR 18-6. However, as Requesters explain in this rebuttal, the BAMC's Recommendation is based on both factual errors and on a misrepresentation of Requesters' position and of the applicable rules.

I. FACTUAL ERRORS IN THE BAMC RECOMMENDATION

A. ICANN Has Not Considered the Correspondence Received after the Publication of the CPE Process Review Reports

The BAMC opines that the ICANN Board (i) 'considered all material information when it adopted the 2018 Resolutions' and (ii) 'took into consideration [...] the correspondence received after the publication of the CPE Process Review Reports in adopting the Resolutions'.¹ That is simply not true.

Following the publication of the CPE Process Review Reports, Requesters have sent three letters to the ICANN Board, laying out reasons why the ICANN Board should not accept the findings made in the CPE Process Review Reports. The first letter was sent on 16 January 2018, the second on 1 February 2018, and the third on 22 February 2018.

The 2018 Resolutions refer to the letter of 1 February 2018, but not the other two. The

¹ BAMC Recommendation on Reconsideration Request 18-6 of 14 June 2018, p. 3

rationale of the 2018 Resolutions provides that the ICANN Board ‘understands the arguments raised in the letter’. However, the ICANN Board has ignored these arguments without any explanation. The Board did not consider a single argument and yet decided to accept the findings of the CPE Process Review Reports. The Board simply added that Requesters can submit their arguments in support of pending RfR 16-11 that was put on hold during the CPE Process Review. By making a decision before considering Requesters’ arguments, the ICANN Board is putting the cart before the horse.

B. ICANN Has Not Resolved all Challenges

According to the BAMC, all of the Requesters’ challenges have been resolved, with the exception of Reconsideration Request 16-11.² However, Reconsideration Request 16-11 cannot be seen in an isolated fashion. In Reconsideration Request 16-11, ICANN was asked to take appropriate measures vis-à-vis HTLD’s application for .hotel by cancelling said application. This request was already made on 5 June 2015, but, to date, ICANN has refused to take appropriate action, in spite of an IRP decision ruling that ICANN must take action. Also, Requesters’ requests for transparency on the CPE process and the CPE Process Review and their challenges to the lack of transparency thereof have been ignored (*infra*). Therefore, not all of Requesters challenges have been resolved.

C. ICANN Has Ignored Requesters’ Requests for Transparency and Document Disclosure

Requesters have always asked for full transparency in relation to the .hotel CPE, including in RfR 16-11. To date, ICANN has largely ignored this request and has failed to organize the CPE Process Review in an open and transparent manner in spite of being urged to do so by an IRP Panel.

On 17 September 2016, the ICANN Board instructed its President and CEO, or his designee(s), to undertake a review of the process by which ICANN has interacted with the

² BAMC Recommendation on Reconsideration Request 18-6 of 14 June 2018, p. 4.

CPE provider.³ At the time, there was no reason for Requesters to doubt ICANN being fully transparent about this review. On 26 April 2017, the Chair of the Board Governance Committee (BGC) informed Requesters about the status of the review. From this communication, it was apparent that the review was conducted by ICANN's President and CEO, as material was being collected 'as part of the President and CEO's review'. The material was going to be 'forwarded to the BGC in due course'.⁴

On 2 June 2017 (3 June 2017 at the recipient's end), ICANN suddenly informed Requesters that ICANN had selected FTI Consulting to perform the CPE Process Review.⁵ On 14 June 2017, Requesters raised questions about ICANN's decision. Requesters asked the ICANN Board for (i) transparency about the selection process, (ii) details about FTI Consulting's mandate, (iii) the assurance that ICANN would take responsibility for ensuring compliance with ICANN's obligations, commitments and core values by FTI Consulting, etc.⁶ On 11 July 2017, ICANN responded that it had forwarded this request to ICANN's Documentary Information Disclosure Policy (DIDP).⁷ On 17 July 2017, ICANN staff decided that the requests made on 14 June 2017 to the ICANN Board were, to a large extent, 'not appropriate DIDP requests'.⁸

In response, Requesters made clear that their request for transparency was not addressed to ICANN staff within the framework of the DIDP, but to the ICANN Board. Requesters asked that the ICANN Board dealt separately with the part of the request that was considered inappropriate for the DIDP process. Requesters also challenged the reasons invoked by ICANN staff for their refusal to disclose certain documents.⁹

³ ICANN, *Approved Board Resolution 2016.09.17.01*, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>.

⁴ ICANN, *Update on the Review of the New gTLD Community Priority Evaluation Process*, 26 April 2017, <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

⁵ ICANN, *Community Priority Evaluation Process Review Update*, 2 June 2017, <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

⁶ Letter from Flip Petillion to ICANN Board of 14 June 2017 (**Exhibit 1**).

⁷ Letter from ICANN to Flip Petillion of 11 July 2017, <https://www.icann.org/en/system/files/correspondence/icann-to-petillion-2-11jul17-en.pdf>.

⁸ ICANN, *DIDP Request No. 20170614-1*, 17 July 2017, <https://www.icann.org/en/system/files/files/didp-20170614-1-petillion-obo-travel-reservations-srl-et-al-response-14jul17-en.pdf>.

⁹ Letter of Flip Petillion to ICANN Board of 27 July 2017 (**Exhibit 2**).

These requests were made to the ICANN Board within the framework of RfR 16-11. To date, ICANN has not reacted to these requests.

D. ICANN Has Not Provided Details Concerning the Selection Process for the CPE Process Reviewer

The BAMC considers that ICANN ‘provided details concerning the selection process for the CPE process reviewer almost one year ago, in furtherance of its effort to operate to a maximum extent feasible in an open and transparent manner.’¹⁰

As a matter of fact, ICANN has given little detail on the selection process of the CPE process reviewer, and it has given far less information than is required from an organization that must ‘operate to the maximum extent feasible in an open and transparent manner’.

All ICANN did was inform Requesters that ‘FTI was chosen to assist in the CPE review following consultation with various candidates’ and that ‘FTI was selected because FTI has the requisite skills and expertise to undertake this investigation.’¹¹ Requesters are left in the dark as to the selection criteria ICANN used, the identity of the ‘various candidates’, the skills and expertise ICANN considered required to undertake the investigation and how FTI objectively met the undisclosed requirements. As entities immediately affected by the investigation, Requesters are entitled to more transparency and accountability than a generic message that could have been used for just any service provider.

II. THE BAMC’S MISCHARACTERIZATION OF REQUESTERS’ POSITION AND THE APPLICABLE RULES

A. BAMC’s Decision Prevents Requesters from Having a Fair, Neutral, Objective and Meaningful Review of their Complaints Made in Reconsideration Request 16-11

Requesters are entitled to a fair, neutral, objective and meaningful review of their complaints made in the framework of RfR 16-11. Maintaining the 2018 Resolutions would mean that the ICANN Board fails to offer Requesters a meaningful review of their complaints regarding

¹⁰ BAMC Recommendation, p. 13.

¹¹ ICANN, Community Priority Evaluation Process Review Update, 2 June 2017, <https://www.icann.org/en/system/files/files/cpe-review-02jun17-en.pdf>.

HTLD's application for .hotel, the CPE process and the CPE Review Process made in the framework of RfR 16-11. Indeed, accepting the findings of the CPE Process Review and finding that no overhaul or change to the CPE process is necessary is incompatible with a fair, neutral and objective application of documented policies.

The BAMC maintains that there is no policy or procedure requiring the Board or ICANN to develop a particular methodology for the CPE Process Review¹² and concludes that, therefore, no policy violation was made.

However, the fact that ICANN has neither developed a particular methodology for the CPE Process Review nor disclosed the policies and procedures to be applied during CPE Process Review, is no proof that policies and procedures were applied correctly. One of the main purposes for the ICANN Board to organize the CPE Process Review was to *analyze* whether ICANN's policies and procedures were applied correctly during CPE. The related RfRs had been put on hold to make a meaningful review possible and to address the alleged inconsistencies in the CPE Process. The CPE Process Review has made no analysis whatsoever and the alleged inconsistencies have been left unaddressed. At the end of the day, the ICANN Board will need to decide whether or not it accepts the CPE results. The ICANN Board must exercise due diligence and care in making a reasoned decision and examine whether the CPE policies and procedures were applied consistently and correctly. Accepting a report that is based on flawed methodology does not qualify as reasoned decision-making, particularly when these flaws have been identified in correspondence of which the Board (i) acknowledges receipt, (ii) claims to understand the arguments, but (iii) refuses to address before taking a decision.

Requesters urged the ICANN Board to address Requesters' concerns and to hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review.

¹² BAMC Recommendation, pp. 15-16.

B. Requesters Are Entitled to Due Process

The BAMC acknowledges that it will consider the CPE Process Review Reports in the course of its evaluation of RfR 16-11, but then makes a convoluted argument as if Requesters have no due process rights in their dealings with ICANN.¹³

In making this argument, the BAMC is effectively ignoring that ICANN must comply with principles of international law, which includes due process. ICANN's Articles of Incorporation and Bylaws put principles of international law first, meaning that its Bylaws and accountability mechanisms cannot supersede principles of international law and must be interpreted in conformity with principles of international law, including due process.

Requesters' due process rights are violated if they are not given a fair opportunity to challenge FTI's reports. ICANN deprived Requesters from this opportunity by accepting FTI's conclusions before hearing and addressing Requesters' concerns. The fact that the BAMC refuses to hear RfRs 16-11 and 18-6 together limits Requesters' due process rights even further. The BAMC states that it will hear Requesters' arguments within the framework of RfR 16-11, but is refusing to reconsider a decision that it took while RfR 16-11 was pending and that greatly impacted Requesters' arguments without hearing Requesters first. Requesters cannot accept the BAMC's reasoning that both RfRs cannot be handled together because RfR 16-11 was filed under different (previous) Bylaws. Under the previous Bylaws, the BAMC was not involved in the consideration of RfRs. Yet, the ICANN Board has decided to have the BAMC take over the role of the BGC in RfR 16-11. ICANN cannot have it both ways and there is no reason why Requesters would be entitled to less robust accountability standards under RfR 16-11 than under RfR 18-6.

C. No Nondisclosure Conditions Apply to Requesters' Requests for Transparency

The BAMC maintains that documents requested with respect to the CPE and the CPE Process

¹³ BAMC Recommendation, pp. 18-19.

Review are not made publicly available because they are subject to certain nondisclosure conditions.¹⁴ ICANN also claims to have performed a balancing test, evaluating whether the public interest in disclosing documents outweighs the harm that may be caused by such disclosure.¹⁵

However, neither ICANN nor the BAMC provide any analysis on whether each requested document is covered by a nondisclosure condition. *E.g.*, ICANN responded to Requesters that ‘correspondence between the ICANN organization and the CPE provider is not appropriate for disclosure for the same reasons identified in ICANN’s response to [...] DIDP Request 20140804-1’.¹⁶

As already explained at length in our letter of 27 July 2017, ICANN cannot rely on its response to DIDP Request 20140804-1 to deny the disclosure of correspondence between the ICANN organization and the CPE provider. Rather than repeating the content of this letter, it is incorporated herein by reference.¹⁷

ICANN can also not expect Requesters to accept without question ICANN’s conclusion that the public interest is outweighed by the harm that may be caused by disclosure. ICANN must operate to the maximum extent feasible in an open and transparent manner. ICANN has not done so with respect to the CPE and the CPE Review Process. With respect to the CPE process, ICANN claims that its contract with the CPE provider does not require the disclosure of relevant documents. ICANN should not have entered into a contract that prevents documents relevant to the public interest from being shared with ICANN and disclosed to the public. In addition, nothing prevents ICANN from disclosing the documents it has access to. With respect to the CPE Review Process, the way in which FTI Consulting has been selected

¹⁴ BAMC Recommendation, p. 14.

¹⁵ ICANN DIDP, Response to Request No. 20170614-1, 17 July 2017, <https://www.icann.org/en/system/files/files/didp-20170614-1-petillion-obo-travel-reservations-srl-et-al-response-14jul17-en.pdf>; ICANN DIDP, Response to Request No. 20180115-1, 14 February 2018, <https://www.icann.org/en/system/files/files/didp-20180115-1-ali-response-redacted-14feb18-en.pdf>; BAMC Recommendation on Request 18-1, 5 June 2018, <https://www.icann.org/en/system/files/files/reconsideration-18-1-dotmusic-bamc-recommendation-request-05jun18-en.pdf>.

¹⁶ ICANN DIDP, Response to Request No. 20170614-1, 17 July 2017, <https://www.icann.org/en/system/files/files/didp-20170614-1-petillion-obo-travel-reservations-srl-et-al-response-14jul17-en.pdf>.

¹⁷ Letter of Flip Petillion to ICANN Board of 27 July 2017 (**Exhibit 2**).

is being kept secret; the names and *curricula vitae* of the FTI individuals involved in the review are being kept secret; many of the documents which were shared with the CPE Process Reviewers have been and still are kept secret; the terms and scope of FTI's work for ICANN are being kept secret; etc. Reconsidering the CPE process through a largely secretive review process clearly violates ICANN's obligation to be as open and transparent as possible.

D. The BAMC Mischaracterizes the Despegar et al. IRP Declaration

The BAMC submits that the *Despegar et al.* IRP Panel's finding that Requesters' description of inconsistencies regarding the CPE of .hotel have merit is 'an overstatement' and qualifies it as a side note.¹⁸ The BAMC puts emphasis on the fact that the Panel's finding was made 'on the basis solely of the arguments provided by [the Requesters]'

The reason why the finding was made 'on the basis solely of the arguments provided by [the Requesters] is because Requesters' arguments have never been contested.

In addition, the Panel's finding was anything but a side note. The Panel wrote two extensive paragraphs on the need for providing consistency, although the Panel erroneously believed that there was little or nothing ICANN could do about it.¹⁹ Considering that ICANN has been organizing the CPE Process Review, it can do something about it.

However, ICANN's obstinate refusal to look into, and effectively analyze, the consistency issues identified by Requesters confirms an unwillingness to address these issues.

E. Requesters' Concerns About the CPE Process Review Have Never Been Addressed

The lack of transparency surrounding the CPE Process Review made it impossible for anyone, including the ICANN Board, to assess the weight of the conclusions made by the CPE Process Reviewer. This concern, together with the CPE Process Reviewer's failure to consider the various fairness, nondiscrimination and consistency objections, has never been addressed. The BAMC proclaims that ICANN's 'accountability mechanisms, including this

¹⁸ BAMC Recommendation, p. 17.

¹⁹ Despegar et al. IRP Declaration, §§ 146-147.

reconsideration request, provide affected parties like the Requestor (*sic*) with avenues for redress of purported wrongs, and substantively review the decisions of third-party service providers, including the CPE Provider.²⁰ However, to date, ICANN has consistently refused to substantively review the clearly erroneous decisions of the CPE Provider. The consistency issues with the .hotel CPE, which solely on the basis of Requesters' arguments have merit, have never been addressed, analyzed or even contradicted.

F. The Fact that FTI Developed the Methodology for CPE Review is Irrelevant

The BAMC argues that FTI, not the Board or ICANN, defined the methodology for the CPE Process Review Reports.²¹ That is simply irrelevant. The Board charged ICANN's President and CEO or its designee(s) to perform the review. The Board remains responsible for assessing whether the report is based on a sound methodology and whether its conclusions are reliable. That is clearly not the case.

G. The BAMC Mischaracterizes the Scope of the CPE Process Review

The CPE Process Review Reports uncritically repeated the conclusions found in the CPE Panel's reports and did not discuss or consider the various fairness, nondiscrimination and consistency objections. FTI did not ask whether the criteria the CPE Panel claimed to apply were the criteria laid out in the Applicant Guidebook and GNSO Policy. The approach followed by the CPE Process Reviewer was a 'description' of the CPE Panel's reports, but not an 'evaluation' to determine whether the CPE Panel's reports were actually following the applicable guidelines in a neutral and nondiscriminatory manner.

The BAMC attempts to justify this failure to analyze the consistency issues effectively by claiming that such analysis is beyond the scope of FTI's investigation. Requesters have difficulty understanding how analyzing consistency issues in the application of CPE criteria by the CPE provider would be beyond the scope of a report that is entitled 'analysis of the

²⁰ BAMC Recommendation, p. 20.

²¹ BAMC Recommendation, p. 15.

application of the community priority evaluation (CPE) criteria by the CPE provider in CPE reports'.²² The report itself mentions that the BGC determined that the review would include 'an evaluation of whether the CPE criteria were applied consistently throughout each CPE report'. Moreover, ICANN's General Counsel confirmed in March 2017 that there was going to be 'a full look at the community priority evaluation', that the evaluators were 'digging in very deeply' and 'trying to understand the complex process of the new gTLD program and the community priority evaluation process'.²³ The lack of actual analysis in the report shows that FTI did not live up to this mission and that the results of the report should not be accepted. One ICANN Board member seems to have understood this and expressed her concern 'about the rigor of the study and some of its conclusions' in an abstention statement.²⁴ However, this criticism was effectively silenced by the Chair of the Board, who took the vote before hearing the abstention statement, hereby making it impossible for the Board to have an open discussion about legitimate concerns with respect to FTI's report which echoed Requesters' criticism.

III. CONCLUSION

Based on the foregoing and on the reasons expressed in RfR 18-6, Requesters respectfully request that the Board deny the BAMC Recommendation and grant RfR 18-6.

Respectfully submitted,

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²² FTI Scope 2 Report, *Analysis of the application of the community priority evaluation (CPE) criteria by the CPE provider in CPE reports*, 13 December 2017, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

²³ ICANN, *Transcripts Copenhagen – Public Forum 2*, 16 March 2017 – 13:45 to 16:45 CET, https://sched.ws/hosted_files/icann58copenhagen2017/60/158CPH_Thu16Mar2017-Public%20Forum%20-en.pdf, p. 12.

²⁴ San Juan ICANN Board Meeting, 15 March 2018, at Pg. 12-13, available at <https://static.ptbl.co/static/attachments/170857/1522187137.pdf?1522187137>, pp. 12-13.