

## **Rebuttal to the BAMC’s Recommendation on Reconsideration Request 18-4**

Requestor<sup>1</sup> submits this rebuttal to the BAMC’s Recommendation on Request 18-4 (the “**Recommendation**”).<sup>2</sup> The Recommendation affirmed the Resolutions, which adopted the CPE Process Review Reports, and raised issues that Requestor will address in this rebuttal—specifically Requestor’s position regarding the BAMC’s invitation and the ICANN Board’s violations of the ICANN’s Bylaws.

### **1. Requestor Sought a Fair Opportunity to Present Its Concerns to the BAMC**

The Recommendation misconstrues Requestor’s position regarding the BAMC’s invitation to make additional submissions on Reconsideration Request 16-3. It states, without further clarification, that Requestor rejected the BAMC’s invitation to “submit additional information relating to Request 16-3” and to “make a telephonic oral presentation to the BAMC in support of Request 16-3.”<sup>3</sup> This description oversimplifies Requestor’s response to the BAMC’s limited invitation, which imposed significant constraints on Requestor’s ability to fully address Reconsideration Request 16-3 in light of the CPE Process Review Reports. For instance, the invitation limited the written submission to ten pages and the BAMC presentation to a telephonic presentation.<sup>4</sup> In response to the BAMC’s invitation, Requestor repeatedly asked for a meaningful opportunity to make additional submissions to ICANN regarding the CPE Process Review Reports.<sup>5</sup> Over three months have passed since Requestor first submitted its requests in response to the BAMC’s invitation,<sup>6</sup> but neither ICANN nor the BAMC have responded to Requestor.

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<sup>1</sup> This rebuttal adopts the same exhibits and terms as in dotgay’s Reconsideration Request 18-4. *See* Exhibit 44, Reconsideration Request 18-4 (13 Apr. 2018).

<sup>2</sup> *See* Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018).

<sup>3</sup> *Id.* at pp. 8-9.

<sup>4</sup> *See* Exhibit 46, Roadmap for Consideration of Pending Reconsideration Requests Relating to Community Priority Evaluation (CPE) Process that Were Placed On Hold Pending Completion of the CPE Process Review (15 Feb. 2018); Exhibit 47, Email from R.M. Wong to ICANN Board (5 Apr. 2018).

<sup>5</sup> *Id.*; Exhibit 48, Letter from A. Ali to C. Chalaby and C. Disspain (23 Mar. 2018), pp. 4-5. Requestor made several other requests in response to the BAMC’s invitation. *See id.* (listing seven requests).

<sup>6</sup> *See id.*

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

As explained in Reconsideration Request 18-4 (“**Request 18-4**”), the ICANN Board failed to comply with the ICANN Bylaws.<sup>7</sup> Pursuant to the Bylaws, the ICANN Board must (1) “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that ... [shall] seek input from the public, for whose benefit ICANN in all events shall act”<sup>8</sup> and “promote well-informed decisions based on expert advise;”<sup>9</sup> (2) “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment;”<sup>10</sup> and (3) “encourage fact-based policy development work.”<sup>11</sup> The ICANN Board failed to adhere to these requirements when it adopted the Resolutions. The Recommendation, however, supports the ICANN Board’s clear violations of these obligations and, in doing so, makes several misstatements that Requestor corrects below.<sup>12</sup>

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

Request 18-4 provides sufficient evidence that the ICANN Board failed to comply with its obligations under the ICANN Bylaws. The Recommendation contends that “Requestor provides no evidence demonstrating how the Resolutions violate ICANN’s commitment to fairness, or that the Board’s action is inconsistent with ICANN’s [other] commitments.”<sup>13</sup> Yet, even within Request 18-4, Requestor provided ICANN with significant evidence supporting its claims, such as the Expert Opinions of Persona Data Redacted; the Council of Europe’s report; and the former ICANN Ombudsman’s “Dot Gay Report.”<sup>14</sup> These documents clearly constitute evidence supporting

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<sup>7</sup> See generally Exhibit 44, Reconsideration Request 18-4 (13 Apr. 2018).

<sup>8</sup> Exhibit 13, ICANN Bylaws (22 July 2017), Art. 1, Section 1.2(a)(iv).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at Article 1, Section, 1.2(a)(v).

<sup>11</sup> *Id.* at Article 1, Section, 1.2(a)(iv).

<sup>12</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), pp. 10-19.

<sup>13</sup> *Id.* at p. 10.

<sup>14</sup> See, e.g., Exhibit 38, Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the First Expert Opinion of Professor William N. Eskridge, Jr. (13 Sep. 2016); Exhibit 11, Letter from A. Ali on behalf of dotgay to the ICANN Board,

Requestor’s concerns about the CPE Process Review and the ICANN Board’s adoption of the CPE Process Review Reports.<sup>15</sup>

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

## **B. FTI’s Methodology for the CPE Process Review Is Materially Flawed**

The Recommendation also misconstrues Requestor’s concerns about the ICANN Board’s actions by focusing on one simple, meaningless argument: “The Requestor has not identified a policy or procedure requiring FTI to do more because none exists.”<sup>20</sup> Requestor has not argued that the ICANN Board breached its obligations because FTI failed to comply with a non-existent ICANN policy or procedure or because ICANN failed “to develop a particular methodology for

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attaching the Second Expert Opinion of Personal Data Redacted (31 Jan. 2018); Exhibit 19, Personal Data Redacted “Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective,” Council of Europe Report DGI(2016)17 (Nov. 2017); Exhibit 28, Personal Data Redacted “Dot Gay Report” (27 July 2016).

<sup>15</sup> See Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), p. 11 (describing Requestor’s Reconsideration Requests, Personal Data Redacted, the Council of Europe Report, and the former ICANN Ombudsman’s Report as “evidence”).

<sup>16</sup> Exhibit 13, ICANN Bylaws (22 July 2017), Article 1, Sections 1.2(a), 1.2(b)(ii) (ICANN must “seek[] and support[] broad, informed participation . . . to ensure that the bottom-up multistakeholder policy development process is used to ascertain the global public interest and that those processes are countable and transparent.”).

<sup>17</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), p. 19.

<sup>18</sup> See Exhibit 49, Response to Request No. 20180115-1 (14 Feb. 2018); see also Exhibit 50, Response to Request No. 20170610-1 (10 July 2017); Exhibit 51, Response to Request No. 20170518-1 (18 June 2017).

<sup>19</sup> See Exhibit 30, Letter from A. Ali to ICANN Board (8 Aug. 2017); Exhibit 31, Reconsideration Request 17-3 (30 June 2017); Exhibit 32, Reconsideration Request 17-4 (25 July 2017); Exhibit 33, Reconsideration Request 18-2 (15 Mar. 2018).

<sup>20</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), pp. 11-13.

the CPE Process Review.”<sup>21</sup> Rather, as described in Request 18-4, Requestor has argued that the ICANN Board’s actions violate the ICANN Bylaws because FTI improperly implemented its review methodology in conducting the CPE Process Review.<sup>22</sup> This resulted in a methodologically flawed set of reports on the CPE process. The ICANN Board violated the ICANN Bylaws because it clearly failed to make a well-informed decision and to fairly apply its documented policies by adopting the flawed CPE Process Review Reports through the Resolutions.

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

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<sup>21</sup> *Id.* at p. 11.

<sup>22</sup> *See id.*

<sup>23</sup> Requestor reserves the right to contest FTI’s choice of investigative methodology for the CPE Process Review, which is not at issue in Request 18-4.

<sup>24</sup> *Id.* at p. 11.

<sup>25</sup> *Id.* at p. 14.

<sup>26</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 4 (emphasis added).

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

**Second**, FTI failed to interview all of the relevant individuals with “knowledge pertinent to the subject being investigated.”<sup>31</sup> FTI had the capability to review the community applicants affected by the CPE Provider’s CPEs, but refused to talk with any of the applicants. FTI’s chosen excuse for refusing to obtain additional evidence from the community applicants, that the CPE Provider “evaluated applications ... without additional input from applicants,”<sup>32</sup> is inexcusable. FTI was tasked with reviewing the CPEs to determine whether the “CPE criteria were applied consistently throughout each CPE report.”<sup>33</sup> It was not restrained by either the New gTLD Program Applicant Guidebook or the CPE Guidelines.

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<sup>27</sup> *Id.*

<sup>28</sup> Exhibit 52, CFE Code of Professional Standards Interpretation and Guidance, p. 8 (emphasis added).

<sup>29</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

<sup>30</sup> *Id.* at pp. 7-8.

<sup>31</sup> *Id.* at p. 4.

<sup>32</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), p. 13.

<sup>33</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 1.

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

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

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<sup>34</sup> Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), pp. 3-9.

<sup>35</sup> Exhibit 52, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

<sup>36</sup> Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 8.

<sup>37</sup> Exhibit 52, CFE Code of Professional Standards Interpretation and Guidance, p. 8.

<sup>38</sup> See generally Exhibit 53, FTI Consulting, Compilation of the Reference Material Relied Upon by the CPE Provider in Connection with the Evaluations which are the Subject of Pending Reconsideration Requests (13 Dec. 2017).

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

FTI clearly failed to critically analyze the information that it received, simply accepting the information as true without exercising any professional skepticism. This is evident in its interviews of the CPE Provider’s personnel as well. FTI interviewed only two CPE Provider personnel from the “core team.”<sup>40</sup> The independent evaluators examined a community application and applied the CPE criteria.<sup>41</sup> The core team simply met to discuss the evaluators’ completed work and helped resolve and different conclusions between the evaluators.<sup>42</sup> Despite the limited influence the two interviewees had in scoring the community applications, FTI accepted their broad statements as universally true for the entire evaluation process. For instance, based on the two interviews, FTI asserted the CPE Provider stated that “they were strict constructionists and used the Applicant Guidebook as their ‘bible’. Further, the CPE Provider states that it relied first and foremost on material provided by the applicant.”<sup>43</sup> These generalizations are clearly unreliable as they are based on claims made by two CPE core team members on the evaluation process under the purview of the independent evaluators.

FTI clearly failed to adhere to the methodology that it *chose to adopt* for the CPE Process Review Reports. By ignoring these failures in order to adopt the CPE Process Review Reports

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<sup>39</sup> See *id.* at pp. 14-57.

<sup>40</sup> Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 8 (distinguishing between the core team and the independent evaluators); see also Exhibit 54, Economist Intelligence Unit, “Community Priority Evaluation Panel and its Processes” (7 Aug. 2104) (“The Community Priority Evaluation panel comprises a core team, in addition to several independent evaluators. The core team comprises a Project Manager, who oversees the Community Priority Evaluation project, a Project Coordinator, who is in charge of the day-to-day management of the project and provides guidance to the independent evaluators, and other senior staff members, including The Economist Intelligence Unit’s Executive Editor and Global Director of Public Policy. Together, this team assesses the evaluation results. Each application is assessed by seven individuals: two independent evaluators, and the core team, which comprises five people.”).

<sup>41</sup> Exhibit 35, FTI Consulting, Communications Between ICANN Organization and the CPE (13 Dec. 2017), p. 8.

<sup>42</sup> *Id.* at pp. 8-9.

<sup>43</sup> *Id.* at p. 15.

and attempt to justify the CPE Provider’s clearly discriminatory application of the CPE criteria in the CPE Reports, the ICANN Board violated its Bylaws-imposed obligations.

### C. The CPE Process Review Reports Are Substantively Flawed

The Recommendation further misconstrues Requestor’s concerns about the substance of the CPE Process Review Reports. It argues that (1) “FTI was Not Required to Agree with the Findings of Prior Third-Party Reports;”<sup>44</sup> and (2) “FTI was not directed to conduct an investigation that supported (or contradicted)” the independent evaluations.<sup>45</sup> Neither of these statements properly describe Requestor’s concerns with the CPE Process Review Reports. Requestor is not stating that FTI was *required* to fully agree with the independent authority.<sup>46</sup> Rather, Requestor argues that FTI’s review was substantively flawed because it did not *address* any of the relevant independent evaluations, regardless of whether ICANN directed FTI to support or contradict them, and instead ignored their existence rather than rebut their conclusions.<sup>47</sup> By failing to consider divergent views on the CPE Process, FTI produced a series of substantially flawed reports. The ICANN Board could not have adopted the CPE Process Review Reports without violating its obligation to act for the public benefit, make well-informed decisions based on expert advice, and apply documented policies consistently, neutrally, objectively, and fairly.

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<sup>44</sup> Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), pp. 13-14. The Recommendation stresses that these independent evaluations were issued before FTI completed the CPE Process Review, as if this fact renders them irrelevant to FTI. *Id.* Rather, the fact that these evaluations occurred “*before* FTI completed the CPE Process Review Reports” only further emphasizes that FTI needed to properly address them in the review. *Id.* at p. 14.

<sup>45</sup> *Id.* at p. 15.

<sup>46</sup> Requestor believes that FTI reached the wrong conclusions in the CPE Process Review Reports, and reserves the right to contest its conclusions. Request 18-4, though, clearly states that the CPE Process Review Reports are substantively flawed because “[t]here are a significant number of independent evaluations addressing the CPE; FTI did not address any of them, even though they all directly contradict DTI’s conclusions on the CPE process.” Exhibit 44, Reconsideration Request 18-4 (13 Apr. 2018), p. 13.

<sup>47</sup> FTI only states that it “carefully considered the *claims* raised in Reconsideration Requests and Independent Review Process ... proceedings” and the “*claim* that certain of the CPE criteria were applied inconsistently across the various CPEs.” Exhibit 10, FTI Consulting, Analysis of the Application of the Community Priority Evaluation (CPE) Criteria by the CPE Provider in the CPE Reports (13 Dec. 2017), p. 3 (emphasis added). These simple declarations do not address the independent authority directly contradicting FTI’s conclusions.



### 3. Conclusion

Therefore, it is clear that ICANN failed to comply with its Bylaws in passing the Resolutions. The BAMC further perpetuated this violation by recommending that the Board deny Request 18-4.<sup>48</sup> In addition to the reasons stated in the Request 18-4,<sup>49</sup> the Board should grant Request 18-4 and reject the CPE Process Review Reports.



Arif Hyder Ali

29 June 2018

Date

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<sup>48</sup> In its Recommendation, the BAMC noted that it “will consider the CPE Process Review Reports in the course of its evaluation of Request 16-3 ... but this does not mean that the BAMC will find the CPE Process Review Reports to be determinative to its Recommendation on Request 16-3. The BAMC will ‘carefully review and consider’ all of the materials that the Requestor submitted in support of Request 16-3 since 2016, including both *Personal Data Red* Opinions, the [Badgett Opinion], the CoE Report, and the ICC Determination in *ILGA v. Afiliat*, as the Requestor has asked it to do.” Exhibit 45, Recommendation of the BAMC Reconsideration Request 18-4 (14 June 2018), p. 18. Requestor appreciates this assurance from the BAMC.

<sup>49</sup> See generally Exhibit 44, Reconsideration Request 18-4 (13 Apr. 2018).