RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-13

24 AUGUST 2015

The Requester, Commercial Connect, LLC ("Requester"), seeks reconsideration of the Community Priority Evaluation ("CPE") panel's report, and ICANN's acceptance of that report, finding that the Requester did not prevail in CPE for the .SHOP string ("CPE Report"). The Requester also challenges various procedures governing the New gTLD Program, as well as the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for its Application.

I. Brief Summary.

The Requester submitted a community-based application for the .SHOP gTLD ("Application"). The Requester's Application was placed into a contention set with eight other applications for .SHOP, two applications for .SHOPPING, and one application for .通販 (Japanese for "online shopping") (".SHOP/SHOPPING Contention Set"). Since the Requester's Application is community-based, the Requester was invited to, and did, participate in CPE. The Application did not prevail in CPE. As a result, the Application was placed back into the contention set.

The Requester claims that the CPE panel considering its Application ("CPE Panel"): (i) violated established policy or procedure in its consideration of the expressions of support for and opposition to the Requester's Application; and (ii) improperly applied the CPE criteria. The Requester also challenges various procedures governing the New gTLD Program including, among other things, the String Similarity Review process and the adjudication of various string

confusion objections, which ultimately resulted in the composition of the .SHOP/.SHOPPING Contention Set.

The Requester's claims are unsupported. First, all of the issues raised by the Requester are time-barred. Second, as to the Requester's challenge to the CPE Report, the Requester has not demonstrated that the CPE Panel acted in contravention of any established policy or procedure in rendering the CPE Report. The CPE Panel evaluated and applied the CPE criteria in accordance with all applicable policies and procedures, including but not limited to its consideration of the expressions of support for and opposition to the Requester's Application. The Requester presents only its substantive disagreement with the CPE Report, which is not a basis for reconsideration. Similarly, the Requester has not demonstrated a basis for reconsideration with respect to the other issues it raises regarding: (a) the procedures set forth in the Guidebook; (b) the outcome of the String Similarity Review; and (c) the outcome of its string confusion objections. The BGC therefore recommends that Request 15-13 be denied.

II. Facts.

A. Background Facts.

In 2000, the ICANN Board adopted a measured and responsible application process for the introduction of new gTLDs.[1] The Requester submitted an application for .SHOP during this "proof-of-concept" round, but the .SHOP string was not approved at that time.

In 2012,[2] as part of the New gTLD Program, the Requester submitted a community-based application for .SHOP. Section 1.5.1 of the Guidebook provides that because the Requester applied for .SHOP in the 2000 proof-of-concept round but was not awarded the string at that

[1] ICANN TLD Application Process: Information for Applicants, *available at* http://www.icann.org/en/tlds/tld-application-process.htm

[2] The Requester states that it submitted its application in 2008. Request, § 9, Pg. 14. However, applications were not accepted in connection with the New gTLD Program until 2012. We assume this was a clerical error and that the Requester is referring to the .SHOP application it submitted in 2012.

time, it was eligible for a US$86,000 credit towards its New gTLD Program application fee.[3] On 15 June 2012, the Requester received a US$86,000 offset for its .SHOP Application. Per the Guidebook, acceptance of the US$86,000 was subject to "confirmation that the [Requester] was not awarded any TLD string pursuant to the 2000 proof-of-concept application round and that the [Requester] has no legal claims arising from the 2000 proof-of-concept process."[4]

As provided by the Guidebook, a String Similarity Review was conducted for all 1,930 new gTLD applications in order to determine whether any strings were so visually similar as to create a possibility of user confusion and to ensure that any such strings were placed into contention sets.[5] In February 2013, following String Similarity Review, the Requester's Application was placed into a contention set with eight other applications for .SHOP.

The Requester then proceeded to file 21 separate string confusion objections against applicants for strings that the Requester asserted "so nearly resemble[d] [.SHOP] that [they were] likely to deceive or cause confusion" to the "average, reasonable Internet user."[6] Among the applications against which the Requester filed objections were applications for .BUY, .ECOM, .SALE, .SHOPPING, .SHOPYOURWAY, and for strings representing words such as "web shop" in languages such as Chinese, Japanese, and Arabic.[7]

All but two of the Requester's objections were overruled. The Requester's string confusion objection to an application for .SHOPPING was sustained, as was its string confusion objection to an application for .通販 (Japanese for "online shopping").[8] The latter determination

[3] Guidebook, § 1.5.1.
[4] *Id*. at § 1.5.1.
[5] *Id*. at § 2.2.1.1.
[6] Guidebook, § 3.5.1.
[7] *See* http://newgtlds.icann.org/en/program-status/odr/determination.
[8] *See* Determination on ICDR Case No. 50 504 T 00267 13, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-1631-16988-en.pdf; Determination on ICDR Case No. 50 504 T 00261 13, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1318-15593-en.pdf

was perceived as inconsistent with another expert determination overruling the Requester's string confusion objection to an application for the .购物 gTLD (Chinese for "shop").[9]

Following an extensive process that included the evaluation of two reconsideration requests,[10] a report by ICANN's staff, and a public comment period, on 12 October 2014, the NGPC directed ICANN staff to establish a very limited review process, whereby the ICDR would appoint "a three-member panel to re-evaluate the materials presented, and … render a Final Expert Determination [in .SHOP/.通販 and one other string confusion proceeding]" ("NGPC Resolution").[11] On 18 August 2015, the three-member Final Review Panel issued its Final Expert Determination which states that "this Final Review Panel reverses the Expert Determination and finds that the Applicant has prevailed and the Objection is dismissed."[12].

Currently, the relevant contention set consists of nine applications for .SHOP (including Requester's Application), two applications for .SHOPPING, and one application for .通販 (Japanese for "online shopping").

The Requester elected to participate in CPE, and on 21 May 2105, the CPE Panel issued the CPE Report, determining that the Requester's Application did not prevail in CPE.

On 10 July 2015, the Requester filed Reconsideration Request 15-13 seeking

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[9] *See* NGPC Resolutions 2014.11.07.NG01-02, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-11-07-en (noting the perceived inconsistency).

[10] On 4 September 2013, Amazon E.U. S.a.r.l ("Amazon"), the applicant for 通販 (Japanese for "online shopping"), sought reconsideration of the expert determination sustaining The Requester's objection to Amazon's application (a*vailable at* https://www.icann.org/en/system/files/files/request-amazon-04sep13-en.pdf). On 5 September 2013, The Requester sought reconsideration of the expert determination overruling its objection to the .购物 gTLD (Chinese for "shop")(a*vailable at* https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf). Both reconsideration requests were denied, but the BGC recommended (and the NGPC accepted the recommendation) that the ICANN staff prepare a report regarding how to address a small number of perceived inconsistent string confusion objection determinations. *See* NGPC Resolutions 2014.11.07.NG01-02, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-11-07-en.

[11] *See* Rationale for NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.

[12] http://newgtlds.icann.org/sites/default/files/drsp/21aug15/determination-2-1-1318-15593-en.pdf

reconsideration of the CPE Report, and challenging various procedures governing the New gTLD Program, as well as the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for its Application.

B. Relief Requested.

The Requester asks that ICANN:

1. Award .SHOP to the Requester because "it has claimed community standing and should have been trusted as a community applicant";[13]

2. Award .SHOP to the Requester "based on [the Requester's] original application [from 2000]," which the Requester asserts is "still active" and which "should have precedence over any other newer application" submitted as part of the New gTLD Program;[14]

3. "Review and fix issues with string similarity especially with any and all similar and confusing eCommerce strings;"[15]

4. "[S]et in place a formal objection and/or appeal mechanism for the CPE determinations;"[16] and

5. "Direct how a community applicant can proceed to delegation without passing CPE."[17]

III. The Relevant Standards for Evaluating Reconsideration Requests and Community Priority Evaluation.

A. Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[18] The Requester challenges both staff and Board action.

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[13] Request, § 9, Pg. 14.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN's Bylaws states 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); or
(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

Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC[19] agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws. Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and in this case the NGPC agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.[20]

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to determinations rendered by panels formed by third party service providers, such as the Economist Intelligence Unit ("EIU"), where it can be stated that a panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.[21]

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE panel reports. Accordingly, the BGC is not evaluating the substantive conclusion that the Application did not prevail in CPE. Rather, the BGC's review is limited to whether the CPE Panel violated any established policy or procedure.

B. Community Priority Evaluation.

The standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – a firm selected to perform CPE – has published supplementary guidelines ("CPE

(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.

[19] New gTLD Program Committee.

[20] Bylaws, Art. IV, § 2.

[21] *See* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc, BGC Recommendation on Reconsideration Request 13-5.

Guidelines") that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.[22]

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.[23] CPE is performed by an independent panel appointed by the EIU.[24] A CPE panel's role is to determine whether the community-based applicant fulfills the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive a minimum of 14 points on the scoring of foregoing four criteria, each of which is worth a maximum of four points

IV. Analysis and Rationale.

The Requester challenges the "correctness" of the CPE Report, as well as various procedures governing the New gTLD Program, the String Similarity Review process and the adjudication of various string confusion objections, which ultimately resulted in the contention set for its Application. As explained below, all of the issues raised by the Requester are time-barred. Further, insofar as the Requester is challenging the CPE Report, the Requester has not demonstrated any misapplication of any policy or procedure by the CPE Panel in rendering the CPE Report. The Requester instead only presents its substantive disagreement with the scoring and analysis in the CPE Report, which is not a basis for reconsideration. Similarly, the Requester has not demonstrated a basis for reconsideration with respect to the other issues it raises regarding the procedures set forth in the Guidebook or the processing of its Application.

A. Reconsideration Request 15-13 Is Time-Barred

[22] For CPE Guidelines see http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.
[23] Guidebook, § 4.2.
[24] *Id*. at § 4.2.2.

Reconsideration requests must be filed within 15 days of "the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action."[25] The Requester seeks reconsideration of the CPE Report finding that the Requester's Application did not qualify for community priority. The CPE Report was published on 21 May 2015. Thus, any reconsideration request challenging the CPE Report must have been filed by 5 June 2015. The Requester, however, did not file Request 15-13 until 10 July 2015, over a month after the filing deadline.

Request 15-13 also challenges certain procedures set forth in the Guidebook, including the fact that CPE exists at all, and the absence of a substantive appeals process for CPE determinations. However, the current Guidebook was adopted in 2012, years before the Requester filed Request 15-13. Finally, although not quite clear, it seems that the Requester is challenging the outcome of the String Similarity Review and string confusion objections that resulted in the .SHOP/.SHOPPING Contention Set. However, the .SHOP/.SHOPPING Contention Set was constituted in its present form in 2014.[26] Insofar as Request 15-13 challenges Guidebook procedures, the String Similarity Review, or the adjudication of the Requester's string confusion objections, those challenges are time-barred by years.

The Requester provides no explanation for its delay in filing this reconsideration request. Request 15-13 is untimely, and on that basis alone, the BGC recommends that Request 15-13 should be denied.

B. No Reconsideration is Warranted with Respect to the CPE Report.

[25] Bylaws, Art. IV, § 2.5(b).

[26] The Requester filed a timely reconsideration request seeking reconsideration of the expert determination in one of its string confusion objections. The NGPC denied that reconsideration request on 7 November 2014. *See* https://www.icann.org/resources/pages/13-10-2014-02-13-en.

The Requester challenges the determination of the CPE Panel that its Application did not qualify for community priority. However, the Requester has demonstrated no violation of any established policy or procedure by the CPE Panel.

1. The Requester's Claim that the CPE Panel Violated Applicable Policy or Procedure is Without Support.

The Requester raises several issues related to the CPE Panel's consideration of the expressions of support for and opposition to its Application. Specifically, the Requester claims that the CPE Panel failed to consider documented support for the Application, sent validation letters containing errors to the Requester's supporters, and erred when it found that the Application had received opposition from a relevant entity. None of the Requester's claims are supported.

First, the Requester claims that the CPE Panel did not consider "third party verifiable proof of over 1000 separate in-person and face-to-face obtained support."[27] However, the fourth CPE criterion, "Community Endorsement," calls for CPE panels to assess a community's "documented" support for and opposition to a community-based application.[28] In assessing that support and opposition, the CPE panel considers "application comments on the application" as well as "correspondence (letters of support or objection related to the application)."[29] To be considered, the written documentation of support or opposition must "contain a description of the process and rationale used in arriving at the expression of [support or opposition]."[30]

Here, the Requester provided the CPE Panel only with a spreadsheet containing the names and contact information of alleged supporters. The Requester never submitted written documentation of support that included "a description of the process and rationale used in

[27] Request, § 8, Pg. 13.
[28] Guidebook, § 4.2.3.
[29] CPE FAQs, Pg. 4, *available at* http://newgtlds.icann.org/en/applicants/cpe.
[30] CPE Guidelines, Pgs. 18, 20.

arriving at the expression of [support or opposition],"[31] even after receiving a clarifying question from the CPE Panel asking for such documentation.[32] Having failed to submit the required documentation, the Requester has not presented grounds for reconsideration with respect to this issue.[33]

Second, the Requester argues that the CPE Panel sent validation letters with "expired dates of when to reply" to the Requester's supporters.[34] In fact, only one validation email sent by the CPE Panel had a typographical error in the form of an incorrect "reply-by" date. The typographical error was discovered and corrected in subsequent validation emails to other supporters. Importantly, the recipient of the single verification email with the typographical error did respond and verified its letter of support for the Requester, which the CPE Panel considered. Because the CPE Panel verified and considered the supporter's letter, the typographical error (which was corrected) had no effect on the CPE scoring of the Application. As such, the Requester has not demonstrated that the CPE Panel violated any established policy or procedure in its validation and consideration of letters of support for the Application.

Third, the Requester disputes the CPE Panel's determination that there was "relevant opposition" to the Application from a "multinational company" that is "within the community explicitly addressed by the application," and that the opposition "relat[ed] to the [Requester's] right to regulate a namespace in which the opponent has a place."[35] The Requester argues that "[n]o qualified and formal entity that represented a substantial portion of our community filed

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[31] *Id*.
[32] CPE FAQs at 4-5 (CPE panels may submit clarifying questions to applicants, asking them, among other things, to clarify issues relating to community support or opposition).
[33] CPE Guidelines, Pgs 17-18.
[34] *Id*., § 8, Pg. 14. CPE panels "will attempt to validate all letters" submitted in support of or in opposition to an application "to ensure that the individuals who have signed the documents are in fact the sender, have the authority to speak on behalf of their institution, and that the panel clearly understands the intentions of the letter." *See* CPE FAQs, *available at* newgtlds.icann.org/en/applicants/cpe/faqs-31oct13-en.pdf.
[35] CPE Report, Pgs. 8-9.

any formal objections."

Contrary to what the Requester asserts, a multinational corporation did submit an application comment opposing the Application.[36] That opposition was verified by the CPE Panel in accordance with established procedure. Insofar as the Requester is claiming that the corporation's opposition should not have been considered, its argument simply constitutes a substantive disagreement with the CPE Panel's determination that the corporation's objection comprised "relevant opposition," and does not demonstrate a violation of established policy or procedure.

The Requester has not stated a basis for reconsideration with respect to the CPE Panel's consideration of the expressions of support for and opposition to the Application.

2. The CPE Panel Applied the CPE Criteria in Accordance With Established Policies and Procedures.

The Requester objects to the CPE Panel's decision to award only five of the possible 16 points to the Application. As noted above, the reconsideration process does not call for the BGC to evaluate the CPE Panel's substantive conclusion, but only whether the CPE Panel (or ICANN staff) violated any established policy or procedure. As discussed below, insofar as the Requester claims that the number of points awarded by the CPE Panel for various criteria was "wrong," the Requester does not claim that the CPE Panel violated established policy or procedure, but instead challenges the substantive determinations of the CPE Panel. That is not a basis for reconsideration.[37]

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[36] *See* https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/8303.

[37] In addition to its objections to the scoring of each CPE criterion, the Requester generally objects that the CPE Report was inconsistent with other CPE panel reports regarding entirely different applications. *See* Request, § 6, Pg. 5. However, the Requester provides no support for this argument, other than the conclusory statement that "[t]he CPE Panel established criteria early in the CPE determinations which later, in direct opposition to those standards (created with [the] .eco decision) scored other applicants such as .gay .music and .shop in the opposite manner." *Id*. Again, in the absence of a demonstrated violation of policy or procedure, the Requester's substantive disagreement with the CPE Report is not a basis for reconsideration.

a. The CPE Panel Applied the First CPE Criterion in Accordance With Established Policies and Procedures.

The Requester claims that the CPE Panel improperly awarded the Requester's Application zero out of four points on the first criterion, which evaluates "the community as explicitly identified and defined according to statements in the application" through the scoring of two elements—1-A, delineation (worth two points), and 1-B, extension (worth two points).[38]

i. CPE Element 1-A ("Delineation").

Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the delineation element, an application must identify a "clearly delineated, organized, and pre-existing community." The Guidebook defines community as "implying more [] cohesion than a mere commonality of interest," and requiring "an awareness and recognition of a community among its members."[39] Section 4.2.3 also sets forth further guidelines for determining delineation. In awarding zero out of two points for element 1-A (delineation), the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines.[40]

The CPE Panel found that while the Application identified a "clear and straightforward membership," it did not "have awareness and recognition of a community among its members" because the "proposed community encompasses a very large and growing field of diverse and geographically dispersed online retailers."[41] The CPE Panel also found that the community defined in the Application had neither "at least one entity mainly dedicated to the community" nor "documented evidence of community activities," noting that the Requester itself "acknowledge[d] that the proposed community was not organized, and that [the Requester] has

[38] Guidebook, § 4.2.3; *see also* Request, § 8, Pgs. 11-12.
[39] Guidebook, § 4.2.3.
[40] CPE Report, Pg. 1-4.
[41] *Id*., Pg. 2.

sought to organize the proposed community members. . . ."[42] Finally, the CPE Panel found that the community was "construed to obtain a sought-after generic word as a gTLD string," which the CPE Panel viewed as supporting the conclusion that the relevant community had not been active prior to September 2007.[43]

The Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 1-A. Instead, the Requester simply objects to the CPE Panel's substantive conclusion, arguing that the community does have cohesion because it consists of online retailers who use Secured Socket Layer ("SSL") certificates.[44] However, the CPE Panel specifically noted that "[w]hile the application's reliance on SSL certificates delineates a subset of retailers, . . . [u]se of SSL [] is not sufficient to ensure that all entities using it are aware of one another as a community, and that the proposed community coheres as per the [Guidebook]."[45] While the Requester may disagree with the CPE Panel's conclusion, such disagreement is not a basis for reconsideration.

The Requester further argues that its own efforts to organize a community of online retailers dates back to 2000, and that those efforts demonstrate both that there is an entity mainly dedicated to the community and that the community existed prior to September 2007.[46] However, the CPE Panel found that the Requester's reliance on its own efforts to organize the community actually demonstrated that the community was not in fact pre-existing.[47] The Requester's arguments reflect only substantive disagreement with the CPE Panel's finding, and are not a proper basis for reconsideration.

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[42] *Id*., Pg. 3.
[43] *Id*., Pgs. 3-4.
[44] Request, § 8, Pg. 11.
[45] CPE Report, Pg. 2.
[46] Request, § 8, Pg. 11-12.
[47] CPE Report, Pg. 3.

ii. CPE Element 1-B ("Extension").

The Requester also objects to the CPE Panel awarding its Application zero out of two points on element 1-B (extension). To receive a maximum score for the extension element, an application must identify a "community of considerable size and longevity."[48] In order for a community to be of considerable size or to demonstrate longevity, it must in fact be a community (*i.e.*, demonstrate "awareness and recognition of a community among its members").[49]

The Requester does not identify any policy or procedure that the CPE Panel violated in scoring element 1-B. In awarding zero out of two points for element 1-B (extension), the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines. In particular, the CPE Panel found that the defined community was of considerable size, but concluded that it did not meet the size requirement because it was not in fact a community (*i.e.*, did not demonstrate the requisite awareness and recognition of a community).[50] The Requester erroneously argues that the CPE Panel determined that the community as defined in the Application was not of considerable size.[51]

The CPE Panel also found that the relevant community as defined in the Application could not demonstrate longevity because the proposed community was "construed to obtain a sought-after generic word as a gTLD" and thus "d[id] not meet the [Guidebook's] standards for a community."[52] Here, the Requester points to its own efforts to organize the community, which purportedly commenced "11+" years ago, arguing that such efforts demonstrate longevity.[53]

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[48] Guidebook § 4.2.3.
[49] *Id*.
[50] CPE Report, Pg. 4.
[51] Request, § 8, Pg. 12.
[52] *Id*.
[53] Request, § 8, Pg. 12.

However, this simply demonstrates the Requester's substantive dispute with the CPE Panel's conclusion that the Requester's proposed community could not demonstrate longevity because it was organized and "construed to obtain a sought-after generic word as a gTLD."[54] The Requester's substantive disagreements with the CPE Panel's findings are not a proper basis for reconsideration.

b. The CPE Panel Applied the Second CPE Criterion in Accordance With Established Policies and Procedures.

The Requester claims that the CPE Panel improperly awarded the Application zero out of four points on the second criterion, which evaluates "the relevance of the string to the specific community that it claims to represent" through the scoring of two elements—2-A, nexus (worth three points), and 2-B, uniqueness (worth one point).[55] To receive a maximum score for element 2-A, the applied-for string must "match[ ] the name of the community or [be] a well-known short-form or abbreviation of the community name."[56] To fulfill the requirements for element 2-B, a string must have "no other significant meaning beyond identifying the community described in the application."[57]

In awarding zero out of four points for the second criterion, the CPE Panel accurately described and applied the Guidebook scoring guidelines, and scored the mandatory questions listed in the CPE Guidelines.[58] The Application defines the community as "eCommerce operators that directly sell to the general public on the internet."[59] The CPE Panel reviewed that definition and found that, because the Application focused on the "e-commerce community," the .SHOP string: (1) "does not *match* the name of the community as defined in the application";

[54] *Id*., § 8, Pgs. 11-12; CPE Report, Pg. 4.
[55] Guidebook, § 4.2.3.
[56] *Id*.
[57] Guidebook, § 4.2.3.
[58] CPE Report, Pgs. 4-5.
[59] Requester's Application, § 20(d), *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/307.

and (2) "over-reaches substantially beyond the [Requester's] proposed community . . . because the string .SHOP identifies both online (*i.e.*, e-commerce) as well as brick-and-mortar entities that sell goods and services."[60]

The Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring the second criterion. Rather, the Requester argues that the scoring does not reflect the "amount of research spent on determining the best string for eCommerce" and that "[t]he use of the word .SHOP to represent a community of shoppers who will be operating online 'Shops' should be an acceptable use and correlation."[61] Again, the Requester's disagreement with the CPE Panel's finding is not a proper basis for reconsideration.

c. The CPE Panel Applied the Third CPE Criterion in Accordance With Established Policies and Procedures.

The Requester claims that the CPE Panel improperly awarded the Application three out of four points on the third criterion, which evaluates an applicant's registration policies through the scoring of four elements—3-A, eligibility (worth one point); 3-B, name selection (worth one point); 3-C, content and use (worth one point); and 3-D, enforcement (worth one point).[62]

The Requester challenges the CPE Panel's evaluation of criterion 3-B, name selection. To receive a maximum score for the name selection element, an applicant's policies must "include name selection rules consistent with the articulated community-based purpose of the applied-for gTLD."[63] In awarding zero out of one point for element 3-B (name selection), the CPE Panel accurately described and applied the Guidebook scoring guidelines and scored the mandatory questions listed in the CPE Guidelines.[64]

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[60] CPE Report, Pg. 5.
[61] Request, § 8, Pg. 12.
[62] *Id*.
[63] *Id*.
[64] CPE Report, Pg. 6.

The CPE Panel found that the Application "d[id] not directly refer to [the Application's] community-based purpose in discussion of name selection rules, nor [were] they implicitly based on the community-based purpose of the applied for TLD, which [was] to 'aid in [] development of a safer, cheaper, and more secure platform for eCommerce . . . .'"[65] The CPE Panel also noted that the Application's name selection rules in fact contained only technical requirements that were "the same as the minimum requirements for any second level domain in a gTLD."[66]

The Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 3-B. Rather, the Requester mischaracterizes the CPE Panel's conclusion, stating that the CPE Panel "fe[lt] that the [p]eople offering SHOPs on the Internet are not consistent with the strings meaning of SHOP."[67] As discussed, the CPE Panel's determination was based on its finding that the Application's name selection rules contained only technical requirements and were not based on the community-based purpose of the Application.[68] As such, the Requester has not stated a basis for reconsideration with respect to the CPE Panel's scoring of element 3-B.[69]

C. The Requester Is Not Entitled to Priority Based Upon Its Earlier Application for .SHOP.

The Requester submitted an application for .SHOP during ICANN's proof-of-concept round in 2000. The Requester was not awarded a TLD at that time, and now argues that because it applied for .SHOP in 2000, it should be entitled to priority over all applications in the

[65] *Id*.
[66] *Id*.
[67] Request, § 8, Pg. 10.
[68] CPE Report, Pg. 6.
[69] The Requester addresses the fourth CPE criterion, "Community Endorsement," only insofar as the Requester challenges the CPE Panel's consideration of the expressions of support for and opposition to the Requester's Application. As discussed above, The Requester does not state a basis for reconsideration with respect to that issue.

.SHOP/.SHOPPING Contention Set, which were all submitted as part of the New gTLD Program.[70]

The Requester points to no policy or procedure that would entitle it to priority over other applicants for .SHOP. To the contrary, on 15 June 2012, the Requester received a US$86,000 offset to its New gTLD Program application fee as a result of its previous application for .SHOP in 2000. As provided in the Guidebook, acceptance of that credit was subject to "confirmation that the [Requester] was not awarded any TLD string pursuant to the 2000 proof-of-concept application round and that the [Requester] has no legal claims arising from the 2000 proof-of-concept process."[71]

The Requester's argument is not a basis for reconsideration.

D. The Requester's Other Challenges to the Guidebook's CPE Procedures Do Not Warrant Reconsideration.

The Requester raises several other issues regarding the application review procedures set forth in the Guidebook, arguing, among other things, that: (a) CPE should not be required at all; (b) the Guidebook improperly fails to provide an appeals mechanism for CPE panel determinations; and (c) the Guidebook does not conform to the recommendations of ICANN's Generic Names Supporting Organization ("GNSO").[72] As discussed above, any challenge to the procedures set forth in the Guidebook are time-barred. Furthermore, in challenging the approval of the Guidebook, the Requester seeks reconsideration of Board action but does not demonstrate, as it must, that the Board either failed to consider material information or relied on false or inaccurate material information before approving the New gTLD Program and the Guidebook.[73]

[70] Request, § 9, Pg. 14.
[71] Guidebook, § 1.5.1.
[72] Request, § 3, Pgs. 2-3; *id*., § 8, Pgs. 10.
[73] Bylaws, Art. IV, § 2.2.

As detailed in the Board's Rationales for the Approval of the Launch of the New gTLD Program, the Guidebook procedures—including the absence of an appeals mechanism for CPE panel determinations and other determinations by third-party evaluators in the context of the New gTLD Program—were adopted by the ICANN Board only after years of rigorous policy development and implementation that included extensive review and analysis by ICANN, as well as input and comment from legal and arbitration experts, numerous ICANN constituents and Internet stakeholders, and community members from around the world.[74] The current version of the Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts.[75] If the Requester had concerns related to these issues, it should have pursued them at the time through the available accountability mechanisms, not years later, only after receiving the CPE Report with which it disagrees.[76]

The Requester also argues that CPE should not be required at all, because the GNSO's recommendation was that an application's assertion of community representation should be "taken on trust."[77] Again, the Requester fails to show how the existence of CPE is a basis for reconsideration. Furthermore, the Requester misreads the language of the GNSO's recommendation. Specifically, the GNSO's recommendation was that:

> Where an applicant lays any claim that the TLD is intended to support a particular community such as a *sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions:*
>
> *(i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application*; and

[74] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program ("ICANN Board Rationales") at Pgs. 66-67, *available at* .
[75] *See* Guidebook, Cl. Ex. RM-5, Preamble.
[76] Bylaws, Art. IV, § 2.5 (15-day limitation period for reconsideration requests); *see also Booking.com v. ICANN*, Final Declaration, ¶ 30 ("[T]he time has long since passed" for parties to seek review of the Guidebook procedures); *available at* https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf
[77] Request, § 6, Pgs. 7, 8-9.

(ii) a formal objection process is initiated.[78]

In accordance with this 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 that results in a community priority evaluation."[79] The community-based applicant must elect to undergo CPE if it seeks priority over other competing applications for the same string.[80]

Reconsideration is not appropriate because the Requester has not demonstrated that the Board failed to consider material information or relied on false or inaccurate material information in approving the Guidebook, which provided for CPE and included no appeals mechanism for CPE results.

D. The Requester Has Not Stated a Basis for Reconsideration with Respect to the String Similarity Review and the Determinations on String Confusion Objections that Resulted in the .SHOP/.SHOPPING Contention Set.

The Requester asks that the Board "[r]eview and fix the issue with name similarity especially with any and all similar and confusing eCommerce strings."[81] The Requester appears to claim that applications for various strings other than .SHOP should be included in the Requester's contention set because, in the Requester's view, "issuing multiple random and similar gTLDs will only yield very small registrations [on each gTLD] which in turn would make sustainability unfeasible."[82] Although Request 15-13 is unclear, we understand the Requester to make two different challenges in this respect. First, the Requester appears to challenge the Board's adoption of the String Similarity Review and string confusion objections

[78] GNSO Final Report on the Introduction on New Generic Top Level Domains, Recommendation IG H *available at* http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.
[79] Guidebook § 1.2.3.2.
[80] *Id*.
[81] Request, § 9, Pg. 14.
[82] Request, § 6, Pg. 6. The Requester does not specify the other strings, but appears to be referring to strings against which it filed String Confusion Objections, such as SALE, .ECOM, .BUY, .SHOPYOURWAY, and for strings representing words such as "web shop" in languages such as Chinese, Japanese, and Arabic.

procedures. Second, the Requester appears to challenge the actions of third-party evaluators and the Board with respect to: (1) the String Similarity Review performed for the Requester's .SHOP Application; and (2) the adjudication of the Requester's string confusion objections. Neither challenge warrants reconsideration.

1. The Requester's Challenge to Procedures Governing String Similarity Review and String Confusion Objections Is Time-Barred and Does Not Warrant Reconsideration.

The Requester appears to challenge the String Similarity Review and string confusion objection procedures set forth in the Guidebook, arguing that the procedures will result in the "issuing [of] multiple random and similar gTLDs."[83] However, not only is any challenge to the Guidebook procedures long since time-barred, but the Requester has not demonstrated a basis for reconsideration with respect to those procedures.

The Guidebook provides two methods for ensuring that confusingly similar strings are placed in the same contention set. First, during Initial Evaluation, a String Similarity Review was conducted, during which a third-party expert evaluator—the String Similarity Review Panel—identified "visual string similarities that would create a probability of user confusion."[84] New gTLD applications for strings determined to be so visually similar as to create a possibility of user confusion were placed into contention sets.[85]

Next, even if an application was not identified as being visually similar during the String Similarity Review, an existing TLD operator or another new gTLD applicant could file a string confusion objection. Unlike String Similarity Review, string confusion objections were "not limited to visual similarity. Rather, confusion based on any type of similarity (including visual,

[83] *Id*.
[84] Guidebook, § 2.2.1.1 (emphasis added).
[85] *Id*.

aural, or similarity of meaning) [could] be claimed by an objector."[86] The Guidebook provided for string confusion objections to be upheld only if the objected-to string "so nearly resemble[d] [the objector's string] that [it was] likely to deceive or cause confusion" to the "average, reasonable Internet user."[87] If a string confusion objection is sustained, then the objected-to application is placed in a contention set with the objector's applied-for string.[88]

Again, these Guidebook procedures were put in place years ago, after an extensive process of public comment and input. Insofar as the Requester is challenging those processes, Request 15-13 is long since time-barred. Furthermore, the Requester's assertions in this regard challenge Board action, and the Requester has not identified any material information the Board failed to consider, or any false or inaccurate material information that the Board relied upon, in adopting the procedures governing String Similarity Review or string confusion objections.

2. The Requester's Challenges to the String Similarity Review and to the Outcome of the Requester's String Confusion Objections Are Time-Barred and Do Not Warrant Reconsideration.

Insofar as the Requester is objecting to the String Similarity Review performed for the Requester's .SHOP Application, no reconsideration is warranted. That String Similarity Review concluded in February 2013 and resulted in the Requester's Application being placed into a contention set with eight other applications for .SHOP.[89] The Requester does not identify any policy or process violation in the String Similarity Review Panel's determination that no other existing or applied-for gTLDs had a confusing visual similarity to .SHOP. The Requester argues that the panel "received incorrect instructions," but provides no explanation as to what those incorrect instructions may have been, and does not identify any established procedure the panel

[86] *Id*.
[87] Guidebook, § 3.5.1.
[88] *Id*., § 3.2.2.1.
[89] *See* http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-26feb13-en.pdf.

violated in conducting the String Similarity Review.[90] And again, any challenge to a process that was completed over two years ago is long since time-barred.

The Requester also filed 21 separate string confusion objections against applicants for strings the Requester asserted "so nearly resemble[d] [.SHOP] that [they were] likely to deceive or cause confusion" to the "average, reasonable Internet user."[91] Insofar as the Requester is objecting to the outcomes of those objections, the Requester also has not stated a basis for reconsideration.

Among the applications against which the Requester filed objections were applications for .BUY, .ECOM, .SALE, .SHOPPING, .SHOPYOURWAY, and for strings representing words such as "web shop" in languages such as Chinese, Japanese, and Arabic.[92] All but two of the Requester's objections were overruled. The Requester's objection to an application for .SHOPPING was sustained, as was its objection to .通販 (Japanese for "online shopping").[93] The latter determination was perceived as inconsistent with another expert determination overruling the Requester's string confusion objection to .购物 (Chinese for "shop").

Following an extensive process that included the evaluation of two reconsideration requests,[94] a report by ICANN's staff, and a public comment period, on 12 October 2014, the NGPC approved Resolutions 2014.10.12.NG02 and 2014.10.12.NG03, which directed ICANN

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[90] Request, § 6, Pg. 5. The Requester also argues that it was "impossible to object" because the time to respond was shortened. *Id*. The results of the String Similarity Review were released on 26 February 2013. *See* https://www.icann.org/news/announcement-2013-02-26-en. This was well before the deadline to file string confusion objections, on 13 March 2013. *See* https://newgtlds.icann.org/en/program-status/odr. The Requester ultimately filed 21 such objections.

[91] Guidebook, § 3.5.1.

[92] *See* http://newgtlds.icann.org/en/program-status/odr/determination.

[93] *See* Determination on ICDR Case No. 50 504 T 00267 13, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-1631-16988-en.pdf; Determination on ICDR Case No. 50 504 T 00261 13, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1318-15593-en.pdf

[94] Reconsideration Request 13-9, *available at* https://www.icann.org/en/system/files/files/request-amazon-04sep13-en.pdf; Reconsideration Request 13-10, *available at* https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf.

staff to establish a very limited review process, whereby the ICDR would appoint "a three-member panel to re-evaluate the materials presented, and … render a Final Expert Determination [in .SHOP/.通販 (Japanese for "online shopping") and one other string confusion proceeding]" ("NGPC Resolution").[95] That review is currently ongoing.

The Requester has not identified any violation of established policy or procedure by the third-party experts who ruled on the Requester's myriad string confusion objections. Nor has the Requester identified any material information that the NGPC failed to consider, or any false or inaccurate material information that the NGPC relied upon, in determining to have a three-member panel re-evaluate the Requester's objection to .通販 (Japanese for "online shopping"). And, once again, any challenge to the outcomes of the Requester's string confusion objections or to the NGPC Resolutions are plainly time-barred.

The Requester therefore has not demonstrated any basis for reconsideration with respect to either: (1) the procedures for String Similarity Review and string confusion objections; or (2) the outcome of those processes, which resulted in the Requester's Application currently being in contention with nine applications for .SHOP (including Requester's own), two applications for .SHOPPING, and the application for .通販 (Japanese for "online shopping").

V. Recommendation.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore recommends that Request 15-13 be denied.

In terms of the timing of the BGC's recommendation, it notes that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation

[95] *See* Rationale for NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.

with respect to a reconsideration request within thirty days, unless impractical.[96] To satisfy the thirty-day deadline, the BGC would have to have acted by 10 August 2015.[97] However, due to the timing of the BGC's meetings in July and August, the first practical opportunity for the BGC to consider Request 15-13 was 24 August 2015.

[96] *Id*., Art. IV, § 2.16.
[97] Thirty days from the date the Requester submitted its Request would have been 9 August 2015, a Sunday.