

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-17

8 JANUARY 2014

The Requester seeks reconsideration of the New gTLD Program Committee's 4 June 2013 resolution accepting the Governmental Advisory Committee's consensus advice to reject the Requester's application for the .GCC string.

I. Brief Summary.

The Requester applied for the .GCC string. The Objector in the underlying proceedings filed a legal rights objection ("LRO") to .GCC. Then, the GAC issued consensus advice that ICANN not approve the .GCC application. The NGPC accepted this advice. As the Requester's application was not permitted to proceed, the objection proceedings were terminated before an expert determination was rendered. The Requester claims that: (1) the GAC failed to provide rationale for its consensus advice on the .GCC application; (ii) the NGPC failed to provide an rationale for accepting this GAC advice; (iii) ICANN has not provided rationale for not allowing the LRO proceedings to conclude; and (iv) ICANN has not provided any rationale for disregarding GNSO input regarding the protection of International Organization identifiers.

In light of these above stated claims, the Requester essentially asks that: (i) the NGPC's decision to accept GAC advice be reversed; (ii) the NGPC request that the GAC provide rationale for its advice; (iii) the NGPC instruct the Expert Panel to render a determination on the terminated LRO proceedings; (iv) the NGPC consider the "forthcoming GNSO Council resolution relating to IGO acronym protection at the top level, and the consequent Board action in response to the Council's resolution"; and (iv) upon receiving the GAC's rationale, the expert

determination on the LRO, and the GNSO Council's resolution, the NGPC reconsider whether to accept the GAC advice to reject Requester's application for the .GCC string.

As a preliminary matter, the Request is untimely and fails on this basis alone. The challenged NGPC resolution was published on 6 June 2013. The Request was received on 14 November 2013, significantly more than the required fifteen days from the date upon which the challenged resolution was first published, thereby rendering the Request untimely under the Bylaws.

With respect to the claim that the GAC failed to provide an explanation/rationale for its consensus advice, reconsideration is available for challenges to staff or Board actions or inactions, not for challenges to advisory committees or any other ICANN bodies.

With respect to the claim that the NGPC failed to provide rationale for its rejection of the .GCC application to the extent the Requester claims that the NGPC acted without considering material information – *i.e.*, without considering either an expert determination on the LRO and the GNSO Working Group's Final Report – the claim does not support reconsideration. The information identified was not available to the NGPC at the time of the 4 June 2013 Resolution. And even if the information was available when the Resolution passed, the Requester has not identified what the information would have provided to the NGPC and how it would have changed the decision taken.

With respect to the remaining claims – that the NGPC failed to explain why the LRO proceedings on the .GCC application were terminated or that the NGPC failure to provide rationale for the alleged disregard of GNSO input - neither constitutes a Board action that is subject to reconsideration. Even if assuming that a Board action could be reconsidered based

upon a claim that the Board violated an established policy or process in taking that action, the Requester has not demonstrated any policy or process violation.

Therefore, the BGC recommends that Request 13-17 be denied.

II. Facts.

A. Background Facts.

The Requester GCCIX, W.L.L. (“Requester” or “GCCIX”) submitted a new gTLD application for the .GCC string.

The GAC issued a GAC Early Warning (<https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>) on 20 November 2012, stating that the governments of Bahrain, Oman, Qatar and UAE and the Gulf Cooperation Council expressed their serious concerns with respect to (1) The applied for new gTLD exactly matches a name of an Intergovernmental Organization, and (2) Lack of community involvement and support. The rationale for their concerns was set out in the GAC Early Warning notice.

On 13 March 2013, the Cooperation Council for the Arab States of the Gulf (“CCASG”) filed a legal rights objection (“LRO”) to the Requester’s application, claiming rights to the GCC acronym.¹

On 11 April 2013, the Governmental Advisory Committee (“GAC”) issued its Beijing Communiqué, which included consensus advice to ICANN that it not approve the Requester’s application for the .GCC string.² Specifically, the GAC advised the Board that, pursuant to

¹ CCASG filed a LRO asserting that the applied-for .GCC string “infringes the existing legal rights of the objector.” (Guidebook, Section 3.2.1.)

² The New gTLD Program includes a procedure pursuant to which the GAC may provide advice to ICANN concerning a specific application for a new gTLD. The procedures are set out in Module 3 of the Applicant Guidebook (“Guidebook”) (<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>).

Section 3.1 of the Guidebook, the GAC “has reached consensus on GAC Objection Advice” on the application for .GCC.³ (Beijing Communiqué, Pg. 3, available at <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.)

On 18 April 2013, ICANN published the GAC advice thereby notifying the Requester and triggering the 21-day applicant response period.⁴ (<http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>.) Prior to the 10 May 2013 deadline, the Requester submitted to the Board a response to the GAC consensus advice, which referenced the information provided in the GAC Early Warning notice. (<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1936-21010-en.pdf>; *see also* Summary and Analysis of Applicant Responses to GAC Advice, Briefing Materials 3 (“NGPC Briefing Material”) available at <https://www.icann.org/en/groups/board/documents/briefing-materials-3-04jun13-en.pdf>.)

On 15 May 2013, the Requester filed a response to CCASG’s LRO. (Request, Pg. 5; Exhibit B to Request: GCCIX’s Response to Legal Rights Objection and supporting exhibits.)

The NGPC developed a scorecard intended to contain the NGPC’s response to the GAC advice found in the Beijing Communiqué (“NGPC Scorecard”). (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-04jun13-en.pdf>.) With respect to the .GCC string, the NGPC Scorecard stated in pertinent part:

³ GAC advice regarding a new gTLD application may include consensus advice: “[T]hat a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.” (Guidebook, Section 3.1.) The GAC reached consensus with respect to only two gTLD applications (.AFRICA and .GCC).

⁴ Where GAC advice is received by the Board concerning an application, ICANN is required to: “[P]ublish the advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.” (Guidebook, Section 3.1.)

The NGPC accepts [the GAC] advice. The [Guidebook] provides that if “GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.”

(NGPC Scorecard, Pg. 2.)

On 4 June 2013, the NGPC adopted the NGPC Scorecard (“4 June 2013 Resolution”).

(<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm#1.a>.)

Staff was therefore directed not to approve the Requester’s application for the .GCC string, and the Requester was invited to either withdraw the application or “seek relief according to ICANN’s accountability mechanisms.” (NGPC Scorecard, Pg. 2.)

Because the Requester’s application was not permitted to proceed, CCASG’s LRO was terminated before a determination could be rendered.⁵

On 19 June 2013, the Requester submitted a letter to the ICANN Board expressing its dissatisfaction with the NGPC’s 4 June 2013 action and the NGPC’s (and GAC’s) purported failure to provide an explanation for the action. (Exhibit A to Response.) Requester was seeking a rationale for the NGPC’s decision and requesting that CCASG’s LRO be allowed to continue.

On 5 September 2013, ICANN responded to the Requester’s 19 June 2013 letter.

On 25 September 2013, the Requester’s counsel responded to ICANN’s 5 September 2013 letter, making similar claims as those asserted in the formal Request and again seeking a rationale for the NGPC’s decision and requesting that CCASG’s LRO be allowed to continue.

⁵ A letter from the Arbitration and Mediation Center of the World Intellectual Property Organization (“WIPO”), the independent dispute resolution provider assigned to administer LROs (Guidebook, Section 3.2.3), was received on 20 November 2013 in response to the Request. The letter noted that the Request was “incorrect in asserting that ‘expert panelist fees [...] have not been refunded’”; WIPO refunded the panel fees to Requester on 17 September 2013. (<http://www.icann.org/en/groups/board/governance/reconsideration/wipo-to-bgc-20nov13-en.pdf>.)

(Exhibit A to Response.)

B. Requester's Claims.

Requester seeks reconsideration on the following grounds:

First, the Requester claims that the GAC failed to provide an explanation/rationale for its consensus advice that the application for .GCC should not proceed and that the NGPC failed to provide an explanation/rationale for its acceptance of the GAC advice on .GCC's application.

(Request, Section 8, Pgs. 7-10.)⁶

Second, the Requester claims that ICANN has not provided any rationale for failing to allow WIPO to render a decision on CCASG's LRO, even though the issues raised in the GAC advice "appear to be pertinent" to CCASG's LRO because CCASG "was the prime instigator of the GAC advice to reject the .GCC application." (Request, Pg. 11.)

Third, the Requester claims that ICANN has not provided any rationale for disregarding GNSO input regarding the protection of International Organization identifiers, and specifically the GNSO Working Group's "Final Report on the Protection of IGO and INGO Identifiers in All gTLDs Policy Development Process" (hereinafter, GNSO Working Group's Final Report).⁷

(Request, Pgs. 12-13; Exhibit C to Request.)

C. Relief Requested.

The Requester asks that the NGPC's decision to accept GAC advice be reversed, pending further investigation by the NGPC. The Requester asks that the NGPC request from the GAC its

⁶ The Requester asserts that it has repeatedly requested (and reiterates its request) for "written documentation of the rationale" for the GAC and the NGPC's rejection of the .GCC application. (Request, Pgs. 7-10; Exhibit A to Request.)

⁷ As suggested in the Request, the GNSO Council has since adopted the Working Group's "Consensus recommendations" that IGO acronyms "under consideration in this PDP shall not be considered as 'Strings Ineligible for Delegation'" at the top level. (<http://gns0.icann.org/en/council/resolutions#201311>.)

rationale for its advice so that the Board may “legitimately evaluate whether to accept” the advice. Requester also asks that the NGPC instruct WIPO to render a decision on the terminated LRO to Requester’s application for the .GCC string. The Requester further asks that the NGPC consider the “forthcoming GNSO Council resolution relating to IGO acronym protection at the top level, and the consequent Board action in response to the Council’s resolution.” Upon receiving the GAC’s rationale, WIPO’s expert determination on the LRO, and the GNSO Council’s resolution, Requester asks that the NGPC reconsider whether to accept the GAC advice to reject Requester’s application for the .GCC string. (Request, Section 9, Pgs. 15-16.)

III. Issues.

As discussed in the foregoing Section, Requester asks ICANN to consider: (i) whether the GAC and the NGPC failed to provide a rationale for its rejection of the .GCC application; (ii) whether ICANN failed to provide a rationale for terminating the LRO process with respect to the .GCC application; and (iii) whether ICANN failed to provide a rationale for disregarding GNSO input regarding the protection of IGO identifiers, and specifically, the GNSO Working Group’s Final Report.

In view of the claims set forth in Request 13-17, the issues for reconsideration are whether the purported failure to provide rationales for the following actions supports reconsideration:

1. The GAC’s and the NGPC’s rejection of the .GCC application;
2. ICANN’s termination of CCASG’s LRO before a determination could be rendered; and
3. ICANN’s alleged disregard of GNSO input regarding the protection of IGO identifiers, and specifically, the GNSO Working Group’s Final Report.

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with the criteria specified in Article IV, Section 2.2 of the Bylaws.⁸ (Bylaws, Art. IV, § 2.)

Reconsideration requests must be submitted within fifteen days after:

- For requests that challenge Board actions, the date on which information about the challenged Board action is first published in a resolution with an accompanying rationale.
- For requests that challenge staff inaction, the date on which the affected person reasonably concluded (or reasonably should have concluded) that action would not be taken in a timely manner.

(Bylaws, Art. IV, § 2.5.)

To properly initiate a request for reconsideration, the requesting party must complete the Reconsideration Request Form posted on the ICANN website ("Reconsideration Request Form").⁹ The requesting party must also acknowledge and agree to the terms and conditions set forth in the Reconsideration Request Form when filing. (Bylaws, Art. IV, § 2.6.)

When challenging a Board action or inaction, the requesting party must provide a:

[D]etailed explanation of the material information not considered by the Board. If the information was not presented to the Board, provide

⁸ Article IV, Section 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
- (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.

⁹ See <http://www.icann.org/en/groups/board/governance/reconsideration/request-form-11apr13-en.doc>.

the reasons why [requesting party] did not submit the material information to the Board before it acted or failed to act. ‘Material information’ means facts that material to the decision. ...

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration.

(Reconsideration Request Form, Section 8 “Detail of Board or Staff Action – Required Information”.)

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee (“BGC”) recommends, and in this case the NGPC agrees, that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws.

(Bylaws, Art. IV, § 2.9.)

V. Analysis and Rationale.

A. The Request Is Untimely.

The Request is untimely and fails on this basis alone. The challenged NGPC resolution was published on 6 June 2013. The Request was received on 14 November 2013, more than fifteen days from the date upon which the challenged resolution was first published, thereby rendering the Request untimely under the Bylaws.

In a 25 September 2013 correspondence, the Requester asked for the “prompt initiation of the Reconsideration Request process described in ICANN’s Bylaws, Art. IV.” (Exhibit A to Request: 25 September 2013 Letter from GCCIX’s counsel to ICANN.)¹⁰ In a 31 October 2013

¹⁰ Exhibit A to Request consists of a set of correspondence between Requester and ICANN from 4 June 2013 through 31 October 2013. (Request, Pg. 17.)

response, ICANN made it clear to Requester that the time to file a reconsideration request based on the 4 June 2013 NGPC resolution had “expired.” (Exhibit A to Request: 31 October 2013 Letter from ICANN to GCCIX’s counsel.)

In the Request, Requester claims that it was not until ICANN’s 31 October 2013 correspondence that it “became evident” that ICANN would not be providing the requested rationale for the 4 June 2013 NGPC resolution, and thus, the Request is timely because it was submitted within fifteen days of that correspondence. (Request, Pgs. 2 & 14.)

As noted above, reconsideration requests must be submitted within fifteen days after “the date on which information about the challenged Board action is first published in a resolution with an accompanying rationale.” (Bylaws, Art. IV, § 2.5.) Although Requester now appears to be claiming that the Request is timely based on a purported inaction – *i.e.*, the date Requester concluded that staff would not be providing the requested rationale for the 4 June 2013 NGPC resolution – the Request itself does not challenge this alleged inaction. Instead, the Request challenges the 4 June 2013 decision of the NGPC. Accordingly, the “deadline to file a Reconsideration Request to this decision expired on 21 June 2013”; fifteen days after the challenged resolution was published. (Exhibit A to Request: 31 October 2013 Letter from ICANN to GCCIX’s counsel.)

Notwithstanding the foregoing, even if the Request was timely, the BGC finds that the stated grounds for the Request do not support reconsideration.

B. The Purported Failure to Provide Rationales Do Not Support Reconsideration of a Board Action or Inaction.

The Requester contends that the GAC and the NGPC failed to provide a rationale for their respective decisions to reject Requester’s application for the .GCC string. The Requester also claims that ICANN (which presumably refers to the NGPC) failed to provide a rationale for

certain actions that, but for the actions, would have resulted in additional information relevant to the Requester's application. (Request, Section 8, Pgs. 7-13.)

A challenge of a Board action (or inaction) must be based upon the Board taking an action (or inaction) without consideration of material information or as a result of the Board's reliance on false or inaccurate material information.¹¹ (Bylaws, Art. IV, § 2.2.) It is unclear from the Request how the NGPC's purported failure to provide an explanation for certain actions upon request constitutes an action or inaction that is subject to reconsideration.

To state a request for reconsideration of a Board action (or inaction), the Requester must:

- (1) identify the information that the Board had available to it but did not consider; and
- (2) identify that the information would be material to that decision. If the Board did not have the information, the Requester must explain why it did not provide that information to the Board in advance of the decision that is being challenged. The Requester has not alleged or provided any evidence demonstrating that the Board took action without considering material information.¹²

In fact the Board had access to the GAC Early Warning notice, the GAC Advice, and the applicant's response to the GAC advice which referenced the GAC Early Warning notice. The entire Request is instead premised on an alleged failure to provide explanations for Board (through the NGPC) actions. As such, the Requester's claims do not provide a proper basis for reconsideration under ICANN's Bylaws.

¹¹ Requester is not challenging a staff action. (Request, Section 1, Pg. 1.) To challenge a staff action, Requester would need to demonstrate that the staff action violated an established policy or process. (Bylaws, Art. IV, § 2.2.) Requester has made no such claims.

¹² Requester is also not claiming that the 4 June 2013 Resolution was the result of the NGPC's reliance on false or inaccurate material information.

1. The GAC's and NGPC's Alleged Failure to Provide a Rationale for the Rejection of the .GCC Application is not a Proper Basis for Reconsideration.

The Requester contends that reconsideration is warranted because the GAC failed to provide rationale for its consensus advice that the application for .GCC not proceed and that the NGPC failed to explain why it accepted this advice.¹³ (Request, Section 8, Pgs. 7-10.) The Requester's contention is not supported. Reconsideration is not the proper mechanism to challenge this action. First, as noted above, reconsideration is available for challenges to staff or Board actions or inactions, not for challenges to advisory committees or any other constituencies established under ICANN's Bylaws. (Bylaws, Art. IV, § 2.2.)

Second, to the extent the Requester claims that the NGPC acted without considering material information – *i.e.*, the NGPC accepted the GAC's advice to reject Requester's application for the .GCC string without considering WIPO's determination on CCASG's LRO and the GNSO Working Group's Final Report – the claim would still not support reconsideration. The information identified was not available to the NGPC at the time of the 4 June 2013 Resolution. WIPO had not rendered a determination on CCASG's LRO and, thus, there was no expert determination for the NGPC to consider. Similarly, the GNSO Working Group's Final Report was not issued until 10 November 2013 – five months after the challenged resolution.

Even if the information was available at the time of the 4 June 2013 Resolution, the Requester has not identified what the information would have provided to the NGPC and how it would have changed the decision taken. The Requester does not even suggest that a WIPO

¹³ It should also be noted that the 4 June 2013 resolution did include a lengthy rationale stating, among other things, why (and under what authority) the NGPC is addressing the GAC advice, which stakeholders were consulted, what concerns or issues were raised by the community, what significant materials the Board reviewed as part of its deliberations, what factors the Board found to be significant, and whether there was positive or negative community impacts. (4 June 2013 Resolution.)

determination on the LRO would result in a different outcome on its application; rather, Requester suggests only that a determination should have been obtained prior to making a decision on the .GCC application.

2. The NGPC’s Alleged Failure to Provide a Rationale for Terminating CCASG’s LRO Before a Determination Could be Rendered does not Support Reconsideration.

The Requester claims that the NGPC has not provided any rationale for failing to allow WIPO to render a decision on CCASG’s LRO, even though the issues raised in the GAC advice “appear to be pertinent” to CCASG’s LRO because CCASG “was the prime instigator of the GAC advice to reject the .GCC application.” (Request, Pg. 11.)

For the reasons stated above, the Requester’s arguments here likewise do not support reconsideration in that the NGPC’s purported failure to provide an explanation for terminating the LRO process with respect to .GCC’s application does not constitute a Board action that is subject to reconsideration.

Further, assuming a Board action could be reconsidered based upon a claim that the Board violated an established policy or process in taking that action (although this is not a proper ground for reconsideration), the Requester has not demonstrated any policy or process violation. Requester asserts that the “Applicant Guidebook specifically suggests that the ICANN Board should consider [the WIPO determination on the LRO], or to provide a rationale for the refusal to do so.” (Request, Pg. 5.) To be clear, the Guidebook provides only that the “Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure.” (Guidebook, Section 3.1 (emphasis added).) This discretionary provision does not require the NGPC to seek the advice of the WIPO-designated experts, nor does it require the NGPC to provide a rationale for deciding not to. While seeking advice from

independent experts is an avenue that the NGPC could have taken when considering the GAC advice on .GCC, the plain language of the Guidebook does not support any suggestion that the NGPC violated an established policy or process, and therefore made a decision without material information, when it did not seek the input of independent experts.

3. The NGPC's Purported Failure to Provide a Rationale for Allegedly Disregarding the GNSO Working Group's Final Report is not a Proper Basis for Reconsideration.

The Requester claims that ICANN has not provided any rationale for disregarding GNSO input regarding the protection of IGO identifiers, and specifically the GNSO Working Group's Final Report. (Request, Pgs. 12-13; Exhibit C to Request.)

For the same reasons stated above, the Requester has not stated a proper basis for reconsideration in that the NGPC's purported failure to provide a rationale for the alleged disregard of GNSO input, including the GNSO Working Group's Final Report, does not constitute a Board action that is subject to reconsideration.

Further, similar to above, assuming a Board action could be reconsidered based upon a claim that the Board violated an established process in taking that action (although this is not a proper ground for reconsideration), the Requester has not identified any policy or process that the NGPC contradicted. There is nothing in the Guidebook that requires the NGPC to wait for or otherwise seek GNSO input before considering GAC advice on new gTLDs, nor is there anything in the Guidebook that requires the NGPC to provide a rationale for deciding not to wait for or seek GNSO input. The Guidebook makes clear that ICANN is required to consider GAC advice "as soon as practicable." (Guidebook, Section 3.1.) Accordingly, there is no support for the Requester's contention that the NGPC should have waited more than five months for the GNSO Working Group's Final Report before accepting the GAC advice on the .GCC application.

VI. Decision.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and we therefore recommend that the Request be denied without further consideration.