

DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-4

14 APRIL 2015

The Requester, Schwarz Domains & Services GmbH & Co. KG, seeks reconsideration of ICANN’s decision to deny the Requester’s request, submitted pursuant to the New gTLD Application Change Request Process and Criteria (“Change Request Process”), to change its application for the string .SCHWARZGROUP to an application for the string .KAUFLAND.

I. Brief Summary.

The Requester submitted an application for .SCHWARZGROUP (the “Application”) on behalf of Schwarz Dienstleistung KG, which, according to the Requester, holds the trademark rights for the Schwarz and Schwarz Group brands. On 28 August 2014, the Requester submitted a change request seeking to change the applied-for string from .SCHWARZGROUP to .KAUFLAND. ICANN staff evaluated the Requester’s change request in accordance with the Change Request Process. The Requester’s change request was denied because, among other reasons, “[r]equests to change applied-for strings generally are not acceptable. The only exceptions have been in the cases of typographical or otherwise minor errors,” and the Requester’s change request instead proposed an entirely new string.¹ On 15 December 2014, the Requester submitted a second change request, which was substantially identical to the first. The

¹ Request, § 3, Pg. 4.

Requester's second change request was denied, on the same grounds as the first request, on 3 February 2015.²

On 17 February 2015, the Requester filed the instant request for reconsideration ("Request"), seeking reconsideration of ICANN's decision to deny the Requester's change request seeking to propose an entirely new string. Specifically, the Requester claims: (i) the Change Request Process was not developed in accordance with established ICANN policy; and (ii) ICANN staff did not evaluate the Requester's change request in accordance with the Change Request Process.

The Requester's claims do not support reconsideration. ICANN did not violate any established policy or procedure in implementing the Change Request Process, and ICANN staff evaluated the Requester's change request in accordance with the Change Request Process. As such, the Requester has failed to demonstrate that ICANN's denial of the change request violates any ICANN policy or procedure. The BGC therefore concludes that Request 15-4 be denied.

II. Facts

A. Background Facts.

The Requester submitted an application for .SCHWARZGROUP on behalf of Schwarz Dienstleistung KG, which, according to the Requester, holds the trademark rights for the Schwarz and Schwarz Group brands.

On 28 August 2014, the Requester submitted a change request seeking to change its applied-for string from .SCHWARZGROUP to .KAUFLAND. In support of its change request, the Requester stated that Schwarz Dienstleistung KG "has decided to no longer make a distinction between the services rendered under the SCHWARZ and SCHWARZ GROUP

² Request, § 3, Pgs. 4-5.

brands, and will henceforth only use the trademark SCHWARZ in relation to its activities.”³ Consequently, because the trademark “Schwarz Group” has, in the Requester’s words, “become useless,” the Requester submitted the change request to “chang[e] the string for the .SCHWARZGROUP application into .KAUFLAND.”⁴ Kaufland Warenhandel GmbH & Co. KG is “within the same overarching corporate structure” as Schwarz Dienstleistung KG.⁵

On 29 August 2014, the Requester received an email from ICANN stating that the Requester’s change request “was denied due to the nature of the proposed change.”⁶ ICANN further explained:

Requests to change applied-for strings generally are not acceptable. The only exceptions have been in the cases of typographical or otherwise minor errors. As you may recall, the list of applied-for strings was not publicly announced until Reveal Day, in order to prevent applicants from amending their applied-for strings based on submissions from other applicants. In the time since the list of strings was published, changes to applied-for strings (other than the aforementioned corrections to minor errors) have not been accepted. This is in the interest of fairness to all applicants, which is one of the criteria against which change requests are considered, as well as one of the tenets of the Program.⁷

On 15 December 2014, the Requester submitted a second change request (“Change Request”), which was substantially identical to its first request. The only difference between the first change request and the second was that, in the second change request, the Requester asked for an in-person meeting with ICANN staff “to determine the most efficient and effective way forward.”⁸

³ Request, § 3, Pg. 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at § 3, Pg. 3.

⁷ *Id.* at § 3, Pgs. 3-4.

⁸ *Id.* at § 3, Pg. 4.

In January 2015, ICANN held a conference call with the Requester to discuss the Change Request.

On 3 February 2015, the Requester received an email from ICANN denying its Change Request. ICANN explained that the Request was “carefully evaluated according to the criteria,” however, because it was not a “typographical correction, and instead [proposed] an entirely new string,” it was not approved.⁹

On 17 February 2015, the Requester filed the instant Request seeking reconsideration of ICANN staff’s decision to deny the Requester’s Change Request.

B. Relief Requested.

The Requester asks ICANN to “reverse its decision” denying the Requester’s change request.¹⁰

III. Issues.

In view of the claims set forth in the Request, the issues for reconsideration are whether ICANN’s denial of the Requester’s Change Request violated applicable policies or procedures because:

1. The Change Request Process “has not been developed in accordance with ICANN’s policy development process,” and, moreover was “developed after the closing of the application window in Q2 of 2012;¹¹ and
2. The criteria relevant to the evaluation of change requests, as found on ICANN’s website¹² and section 1.2.7 of the Guidebook, should have led ICANN to grant the Requester’s change request.¹³

⁹ *Id.* at § 3, Pg. 4-5.

¹⁰ *Id.* at § 9, Pg. 9.

¹¹ *Id.* at § 8, Pgs. 7-8.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Change Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁴ Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC¹⁵ agrees to the extent the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. The BGC's review is limited to whether ICANN violated any established policy or procedure in reaching its decision with regard to the Requester's change request.

The Change Request Process was implemented pursuant to Section 1.2.7 of the Guidebook, which provides:

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.¹⁶

This section of the Guidebook further states:

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

(continued...)

¹² See <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

¹³ Request, § 8, Pg. 8.

¹⁴ 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.

¹⁵ New gTLD Program Committee.

¹⁶ Guidebook, § 1.2.7.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.¹⁷

The Change Request Process was created during the application window in order to allow applicants to notify ICANN of changes to application materials, as required by Section 1.2.7 of the Guidebook.¹⁸ In evaluating each change request, ICANN staff considers all available information concerning the change request against the seven change request determination criteria specified on the New gTLD microsite under New gTLD Application Change Request Process and Criteria, at <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>. These criteria were carefully developed to enable applicants to make necessary changes to their applications while ensuring a fair and equitable process for all applicants.¹⁹ The weight of each criterion may vary on a case-by-case basis, depending on the facts and circumstances surrounding the change request, the application, and the string.²⁰

V. Analysis and Rationale.

A. ICANN Acted in Accordance with Established Policy in Developing the Change Request Process.

The Requester claims that ICANN's development of the Change Request Process itself violates established policy, for two reasons. First, the Requester claims that the Change Request Process has "not been developed in accordance with ICANN's policy development process."²¹

¹⁷ *Id.*

¹⁸ Change Request overview, *available at*: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Request, § 10, Pg. 10.

Second, the Requester claims that the Change Request Process was “developed after the closing of the application window in Q2 of 2012.”²² The requester’s claims are not supported.

As an initial matter, any challenge to ICANN’s conduct in developing the Change Request Process is time-barred. Reconsideration requests must be filed within 15 days of the complained-of staff action.²³ The Change Request Process was developed “during the application window in order to allow applicants to notify ICANN of changes to application materials.”²⁴ While the Requester contends that updates to the Change Request Process recently have been made,²⁵ it asserts that the latest update occurred on September 30, 2014, many months before the Requester submitted the instant reconsideration request. The proper time to challenge the development of the Change Request Process has long since passed.

In any event, the Requester has not demonstrated that ICANN staff violated established policy in developing the Change Request Process. First, the Request claims that “ICANN’s Change Request Process and Criteria have not been developed in accordance with ICANN’s policy development process.”²⁶ The Requester provides no citation, so it is unclear to which “policy development process” it refers. Insofar as the Requester is referring to the provision in ICANN’s Bylaws that governs Board approval of policy-development process (“PDP”) recommendations made by ICANN’s Generic Names Supporting Organization,²⁷ the Requester’s argument fails.

²² *Id.*

²³ Bylaws, Art. IV, § 2.5.

²⁴ Change Request Overview, *available at*: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

²⁵ Request, § 8, Pg. 7.

²⁶ *Id.*

²⁷ *See* Bylaws, Art. X, Annex A, § 9.

The GNSO's PDP is not applicable here because the evaluation of individual gTLD applications – and, in turn, the evaluation of change requests relating to those applications – is not part of the “policy development process” within ICANN. The PDP for the introduction of new generic top-level domains began in 2005 and ended on 8 August 2007 when the Generic Names Supporting Organization (“GNSO”) published the Final Report on the Introduction of New Generic Top-Level Domains (the “GNSO Final Report”), which sets forth the principles and implementation guidelines for the introduction of new generic top-level domains.²⁸ On 28 June 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs set forth in the GNSO Final Report.²⁹

After approval of the policy, ICANN undertook an open and transparent implementation process, culminating in the Board's approval of the Guidebook and the launch of the New gTLD Program in June 2011. The Guidebook documents how ICANN has implemented the GNSO policy recommendations on new gTLDs. Actions taken pursuant to the Guidebook – such as the development of the Change Request Process – do not constitute policy or policy development. The Bylaws provisions concerning policy development invoked by the Requester therefore have no application here.

The Requester also argues that “ICANN has not proven that its Change Request Process and Guidelines has been approved by the ICANN Board.”³⁰ However, the Change Request Process was created during the application window in order to allow applicants to notify ICANN of changes to application materials, as required by the Guidebook.³¹ There is no policy or

²⁸ See <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

²⁹ See http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm#_Toc76113171.

³⁰ Request, § 8, Pg. 8.

³¹ Change Request overview, *available at*: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

procedure requiring the Board to approve each of the dozens of procedures used in the implementation of the Guidebook's provisions.

Finally, the Requester contends that because the Change Request Process was developed after the closing of the gTLD application window, applicants did "not have the opportunity to prepare their applications in accordance with a "clear and pre-published process using measurable, transparent and objective criteria."³² This argument is unavailing. Section 1.2.7 of the Guidebook specifically provides that "[i]f at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms."³³ The Change Request Process did not introduce any new requirement unforeseen at the time the Requester submitted its Application, but instead was developed as a means to permit applicants to comply with Section 1.2.7 of the Guidebook.³⁴ As such, the Requester has not stated a basis for reconsideration with respect to the development of the Change Request Process.

B. ICANN Staff Evaluated the Requester's Change Request in Accordance with the Change Request Process.

The Requester argues that ICANN staff violated policy or procedure because it failed to properly apply and balance the established Change Request Process criteria.³⁵ In determining whether to approve a change request, the factors considered by ICANN staff include:

1. *Explanation* – Is a reasonable explanation provided?

³² Request, § 8, Pgs. 7-8.

³³ Guidebook, § 1.2.7.

³⁴ Moreover, the terms and conditions of the new gTLD applications submitted by the Requester provide that "ICANN reserves the right to make reasonable updates and changes to [the Guidebook] and to the application process," and that New gTLD applications "will be subject to any such updates and changes." New gTLD Application Terms and Conditions ¶ 14, *available at* <http://newgtlds.icann.org/en/applicants/agb/terms>.

³⁵ Request, § 10, Pgs. 11-13.

2. *Evidence that original submission was in error* – Are there indicia to support an assertion that the change merely corrects an error?
3. *Other third parties affected* – Does the change affect other third parties materially?
4. *Precedents* – Is the change similar to others that have already been approved? Could the change lead others to request similar changes that could affect third parties or result in undesirable effects on the program?
5. *Fairness to applicants* – Would allowing the change be construed as fair to the general community? Would disallowing the change be construed as unfair?
6. *Materiality* – Would the change affect the evaluation score or require re-evaluation of some or all of the application? Would the change affect string contention or community priority consideration?
7. *Timing* – Does the timing interfere with the evaluation process in some way? ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.³⁶

The Requester contends each of these factors weigh in favor of approving the Change Request, and thus ICANN's denial of the Change Request constitutes a violation of ICANN policy or procedure.³⁷ The Requester's argument, however, simply reflects its substantive disagreement with ICANN's decision to deny its Change Request. The Requester presents no

³⁶ Change Request Overview, *available at*: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

³⁷ Request, § 10, Pgs. 11-13.

evidence that ICANN staff failed to apply the required factors in violation of established policy or procedure.

In evaluating change requests, all available information is considered against the seven criteria above. The weight of each criterion may vary on a case-by-case basis, depending upon the facts and circumstances surrounding the change request, the application, and the string. In this instance, ICANN's 3 February 2015 letter setting forth ICANN's decision to deny the Requester's Change Request expressly stated that the request was "carefully evaluated according to the criteria listed at [the New gTLD Application Change Request Process and Criteria Website]."³⁸

As ICANN made clear to the Requester, both in its denial of the Change Request and during the January 2015 conference call with the Requester, in balancing the Change Request Process criteria, factors two, five, and six above tipped the balance in favor of denying the Requester's Change Request. To start, the second factor – *Evidence that original submission was in error* – cut strongly against permitting the Change Request because, as the Requester concedes, its "proposed change [was] **not** made in view of correcting an error."³⁹ And as ICANN explained when it denied the Change Request:

Requests to change applied-for strings are not accepted. The only exceptions have been to correct typographical errors. Because the request under case 148002 is not a typographical correction, and instead is to propose an entirely new string, we cannot approve such a request.⁴⁰

³⁸ *Id.* at § 3, Pgs. 4-5.

³⁹ *Id.* at § 3, Pg. 5 (emphasis added).

⁴⁰ *Id.*

Next, the fifth factor – *Fairness to applicants* – inquires whether granting the change request would be “construed as fair to the general community.”⁴¹ As ICANN explained, granting this Change Request would have been unfair because “changes to applied-for strings (other than the aforementioned corrections to minor errors) have not been accepted. This is in the interest of fairness to all applicants, which is one of the criteria against which change requests are considered.”⁴² While the Requester asserts that, “[i]n [its] view, no other applicants are affected by this particular Change Request,” the Requester merely expresses its substantive disagreement with ICANN’s determination that the approving Change Request would be unfair, which is not a proper basis for reconsideration.

Finally, the sixth factor – *Materiality* – turns on whether the proposed change would “affect the evaluation score or require re-evaluation of some or all of the application.”⁴³ Here, the Requester concedes that its proposed “change [would have affected] the evaluation score or require[d] re-evaluation of some or all of the application.”⁴⁴ Indeed, the Requester’s Change Request proposes an entirely new string, so the evaluation process would have to start from the beginning. This would require ICANN to re-convene the multitude of evaluation teams that have since been disbanded following completion of their respective roles in the evaluation process, a task that ICANN considered “practically impossible” at this juncture.⁴⁵ While the Requester believes that ICANN’s position is “simply not credible,” it merely speculates that “there must be a way to bring together” members of the third party evaluation teams to review

⁴¹ Change Request Overview, *available at*: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

⁴² Request, § 3, Pg. 4.

⁴³ Change Request Overview, *available at*: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

⁴⁴ Request, § 10, Pg. 12.

⁴⁵ *Id.* at § 10, Pg. 15.

the Requester's Change Request.⁴⁶ At bottom, the Requester simply disagrees with ICANN's assessment of the Materiality criterion.

These seven criteria, and the process for evaluating them, were carefully developed to enable applicants to make necessary changes to their applications while ensuring a fair and equitable process for all applicants. As ICANN explained to the Requester, change requests to change applied-for strings "generally are not acceptable. The only exceptions have been in cases of typographical or otherwise minor errors."⁴⁷ To date, there have been only four approved change requests to change applied-for strings due to typographical or otherwise minor errors. Here, the Requester has proposed to change its Application to an entirely new string – .KAUFMAN – that bears no resemblance to its original applied-for string – .SCHWARZGROUP.⁴⁸ Granting the Requester's Change Request would undermine many of the policies of fairness and equity the Requester invokes here. As ICANN stated in its 29 August 2014 correspondence with the Requester, "the list of applied-for strings was not publicly announced until Reveal Day, in order to prevent applicants from amending their applied-for strings based on submissions from other applicants . . . in the interest of fairness to all applicants."⁴⁹ Granting the Requester's Change Request would, in effect, allow the Requester to apply for an entirely different string with the advantage of already knowing other applicants' submissions. Alternatively, the Requester's Change Request may be understood as an attempt to cut the line, so to speak, and apply for its preferred string before the next round of gTLD applications begins. Both interpretations necessitate the same result, namely, that the

⁴⁶ *Id.*

⁴⁷ *Id.* at § 3, Pg. 4.

⁴⁸ *Id.* at § 3, Pg. 2.

⁴⁹ *Id.* at § 10, Pg. 13.

Requester's Change Request be denied in accordance with ICANN's core value of applying its "policies neutrally and objectively, with integrity and fairness."⁵⁰

Because this Change Request was "carefully evaluated" according to all seven change request evaluation factors, the Requester does not point to any violation of policy or procedure by ICANN staff.⁵¹ Any substantive disagreement with the result of ICANN staff's analysis is not a proper basis for reconsideration.

The Requester further contends that, in denying the Requesters' change request, "ICANN has – in addition – utilized other criteria than the ones that are made available at [the New gTLD Application Change Request Process and Criteria Website].⁵² In particular, the Requester contends that ICANN considered the following unlisted criteria: (i) the fairness of the Requester's proposed changes towards the community; and (ii) the practicality of re-convening the gTLD Evaluation Teams to evaluate the Requester's proposed changes against the criteria set forth in the Guidebook.⁵³ These are not, however, additional criteria. As noted above, the Change Request Process criteria explicitly requires ICANN staff to consider "fairness to applicants" and whether the proposed change would "require re-evaluation of some or all of the application."⁵⁴

The Requester's claim that "ICANN has not provided for arguments on why the Change Request has been denied" likewise is without merit.⁵⁵ After explaining that the Requester's Change Request "was carefully evaluated according to the Criteria listed at [the New gTLD

⁵⁰ Bylaws, Art. I, § 2.

⁵¹ Request, § 3, Pgs. 4-5.

⁵² Request, § 8, Pg. 8.

⁵³ *Id.*

⁵⁴ See Change Request Overview, available at: <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

⁵⁵ Request, § 10, Pg. 13.

Application Change Request Process and Criteria Website].⁵⁶ As noted above, ICANN furthered detailed its rationale as follows:

Requests to change applied-for strings are not accepted. The only exceptions have been to correct typographical errors. Because the request under case 148002 is not a typographical error, and instead is to propose an entirely new string, we cannot approve such a request.⁵⁷

Finally, the Requester argues that ICANN acted unfairly by “treating applicants who are in the same position in a dissimilar way,” and specifically alleges that “ICANN has approved identical, at least similar, change requests in similar cases.”⁵⁸ The Requester cites a successful change request applicant – DotConnectAfrica Trust, which was permitted to change its applied-for string from .DOTAFRICA to .AFRICA – and argues that, by granting some change requests but not others, ICANN violated its Bylaws by not “applying documented policies neutrally and objectively, with integrity and fairness.”⁵⁹ Contrary to the Requester’s assertions, DotConnectAfrica Trust’s change request from .DOTAFRICA to .AFRICA, was not similar, let alone identical, to the Requester’s Change Request, particularly insofar as the Requester proposed to change its Application to an entirely new string – .KAUFMAN – that bears no resemblance to its original applied-for string – .SCHWARZGROUP.

At bottom, the Requester has presented no evidence that ICANN staff failed to follow established policy in evaluating either its own Change Request or any other change request. As discussed, ICANN staff properly applied the Change Request Process criteria in evaluating the Requester’s Change Request. The Requester’s substantive disagreement with ICANN staff’s evaluation on the Requester’s – or any other – Change Request is not a basis for reconsideration.

⁵⁶ *Id.* at § 3, Pgs. 4-5.

⁵⁷ *Id.* at § 3, Pg. 5.

⁵⁸ Request, § 8, Pg. 8.

⁵⁹ Bylaws, Art. I, § 2.

VI. Determination.

Based on the foregoing, the BGC concludes the Requester has not stated proper grounds for reconsideration, and therefore denies Request 15-4. If the Requester believes it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board (or NGPC) consideration is required. In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 15-4 shall be final and does not require Board (or NGPC) consideration.⁶⁰ As discussed above, Request 15-4 seeks reconsideration of a staff action or inaction. As such, after consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

⁶⁰ Bylaws, Art. IV, § 2.15.