

**DETERMINATION**  
**OF THE BOARD GOVERNANCE COMMITTEE (BGC)**  
**RECONSIDERATION REQUEST 14-36**  
**4 SEPTEMBER 2014**

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The Requester, Asia Spa and Wellness Promotion Council, seeks reconsideration of ICANN's decision to deny the Requester's change request seeking to modify portions of its application for the gTLD .SPA.

**I. Brief Summary.**

The Requester submitted a community application for .SPA ("Application") and was placed into a contention set with the other applicant for that string, Foggy Sunset, LLC, which submitted a standard (not community) application. The Requester then submitted a change request to ICANN, seeking both to revise portions of its Application and to supplement its Application with a letter of support from the mayor of the city of Spa, Belgium. ICANN denied the request.

On 25 July 2014, the Requester filed the instant Reconsideration Request ("Request" or "Request 14-36"), seeking reconsideration of ICANN's denial of the Requester's change request to modify portions of its Application. Specifically, the Requester claims ICANN violated applicable policies because it contends that, in denying the change request: (i) ICANN's rationale was "unfounded"; (ii) ICANN violated provisions of the Applicant Guidebook ("Guidebook")<sup>1</sup>; (iii) ICANN contravened advice of the GAC<sup>2</sup>; and (iv) ICANN failed to consider applicable factors in evaluating the change request. The Requester therefore asks

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<sup>1</sup> The Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb>.

<sup>2</sup> Governmental Advisory Committee

ICANN to reconsider its decision to deny the change request and instead to grant it and to publish it for comment.

With respect to each claim asserted, the Requester fails to demonstrate that ICANN's denial of the change request violates any Guidebook provision or any established ICANN policy or procedure. First, the reasons the Requester claims ICANN's rationale was "unfounded" relate to specified criteria ICANN must use to evaluate a change request, and therefore the rationale adheres to the applicable policies and procedures. Second, the change request denial complies with all applicable Guidebook provisions, as well as the GAC advice. Third, the Requester presents no evidence that ICANN staff failed to apply the required factors relevant to a change request in violation of established policy or procedure. Moreover, the Requester has not demonstrated it has been materially adversely affected by the denial of its change request, given that the documentation it sought to add to its Application is not required. The BGC<sup>3</sup> therefore concludes that Reconsideration Request 14-36 be denied.

## **II. Facts.**

### **A. Background Facts.**

On 13 June 2012, the Requester filed the Application for .SPA.

The Requester was placed into a contention set with the other applicant for that string, Foggy Sunset, LLC, which submitted a standard (not community) application.<sup>4</sup>

On 21 May 2014, the Requester submitted a change request seeking to amend the Application in two ways. First, the change request sought to amend the Application to indicate that, in the Requester's view, the Application for .SPA is a geographic name application, related

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<sup>3</sup> Board Governance Committee.

<sup>4</sup> Another applicant for .SPA, Top Level Domain Holdings Limited, withdrew its application.

to the Belgian city of Spa. Second, the change request sought to append a letter of support from the mayor of the city of Spa, Belgium. (Request, Ex. A, Pgs. 5-8.)

On 11 July 2014, the Requester received a letter from ICANN denying the change request. (*See* Request, Ex. B.)

On 25 July 2014, the Requester filed its request for reconsideration of ICANN’s decision to deny the change request (“Request”).

**B. The Requester’s Claims.**

The Requester claims ICANN’s denial of its change request violated applicable policies or procedures because:

- (i) The rationale provided in ICANN’s letter denying the change request is “unfounded” (Request § 8, Pgs. 4-5);
- (ii) The rationale provided in ICANN’s letter denying the change request is inconsistent with section 2.2.1.4 of the Guidebook, which governs geographic name strings (Request § 8, Pgs. 5-7);
- (iii) The denial of the Requester’s change request is inconsistent with the GAC’s 27 March 2014 advice concerning the .SPA string (the “GAC Singapore Advice”),<sup>5</sup> which was accepted by the New gTLD Program Committee (“NGPC”) on 14 May 2014<sup>6</sup> (Request § 8, Pgs. 7-8); and

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<sup>5</sup> *See* Singapore GAC Communiqué, *available at* <https://www.icann.org/news/announcement-55-2014-04-08-en>.

<sup>6</sup> *See* NGPC Annex 1 to Resolution 2014.05.14.NG02, *available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-14may14-en.pdf>, at Pg. 6.

- (iv) The factors relevant to the evaluation of change requests, as found on ICANN's website<sup>7</sup> and section 1.2.7 of the Guidebook, should have led ICANN to grant the Requester's change request (Request § 8, Pg. 8).

### **C. Relief Requested.**

The Requester asks ICANN to reconsider its decision to deny the Requester's change request and instead to grant it in full and to publish it for public comment.<sup>8</sup> (Request § 9, Pg. 9.)

### **III. Issues.**

In view of the claims set forth in Request 14-36, the issues for reconsideration are:

1. Whether ICANN's decision to deny the Requester's change request violated any established policy or procedure by:
  - a. Providing an "unfounded" rationale for denying the change request (Request, § 8, Pgs. 4-5);
  - b. Violating the Guidebook provisions addressing geographic name strings, namely section 2.2.1.4 (Request § 8, Pgs. 5-7);
  - c. Violating the GAC Singapore Advice (Request § 8, Pgs. 7-8); or
  - d. Failing to apply the factors relevant to the evaluation of change requests (Request § 8, Pg. 8).<sup>9</sup>
2. Whether the Requester was materially and adversely affected by the decision to deny its change request.

### **IV. The Relevant Standards for Evaluating Reconsideration Requests.**

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<sup>7</sup> See <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

<sup>8</sup> ICANN will post all *approved* changes in a change log on the gTLD microsite. Relevant changes made to public portions of the application will be posted. Changes made to confidential portions of the application will not be posted, but only summarized to protect confidentiality of the applicant. Posting will occur once the applicant confirms that changes made are correct as requested. See <http://newgtlds.icann.org/en/applicants/customer-service/change-requests>.

<sup>9</sup> See *id.*

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>10</sup> (Bylaws, Art. IV, § 2.) Requester is challenging a staff action. Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC 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 in reaching its decision with regard to the Requester's change request. (Bylaws, Art. IV, § 2.)

**V. Analysis and Rationale.**

**A. The Requester Failed To Demonstrate ICANN Violated Any Established Policy or Procedure.**

The Requester has provided no support for its contention that ICANN incorrectly applied any policy or procedure.

**1. The Requester's Claim that ICANN's Rationale for Denying the Change Request is "Unfounded" Does Not Support Reconsideration.**

The Requester incorrectly claims the "rationale" provided in ICANN's letter denying the change request "is unfounded[.]" (Request, § 8, Pg. 4.) Specifically, the Requester does not agree that: (1) the letter of support might have some effect upon the Community Priority Evaluation ("CPE") process; (2) the change request involved any questions that bear upon CPE;

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<sup>10</sup> 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.

(3) additional material changes would be needed if the change request was granted; and (4) any “fairness issue” exists with respect to the other application in the contention set. (*Id.*, Pgs. 4-5.)

None of the Requester’s disagreements with ICANN’s rationale for denying the change request identify any policy or procedural violation, as they are instead substantive disagreements with ICANN’s decision.<sup>11</sup> Even the Requester’s arguments make clear that ICANN fully evaluated all of the criteria when considering the Requester’s change request. As such, the Requester’s complaints about the “rationale” do not form the proper basis for reconsideration. Only violations of “established ICANN policy(ies)” (Bylaws, Art. IV, § 2) may form the basis of reconsideration requests and the Requester’s arguments that ICANN’s rationale is “unfounded” do not rest upon any policy or procedural violation.

As noted above, each of the Requester’s claims directly relate to specified criteria for evaluating a change request, including whether “allowing the change [would] be construed as fair to the general community” and whether “the timing” of the change request would “interfere with the evaluation process in some way[.]”<sup>12</sup> So, even though the Requester does not agree with ICANN’s conclusions that the proposed changes might bear upon the CPE, would cause an unfairness to other applicants, or would necessitate further material changes to the Application, those matters fall squarely within the purview of the change request evaluation criteria. Specifically, whether the requested changes would impact the CPE and whether an application will need to be substantially revised before evaluation can continue are matters that relate to both the fairness of the proposed change request and the propriety of its timing. The Requester has

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<sup>11</sup> The rationale indicates that the requested change would cause delay to the evaluation process, which would be unfair to the applicant of the application placed in contention with the Application. (Request, Ex. B.)

<sup>12</sup> See New gTLD Application Change Request Process and Criteria, *available at* <http://newgtlds.icann.org/en/applicants/customer-service/change-requests> (citing Guidebook, § 1.2.7).

identified no policy or procedural violation inherent in ICANN’s rationale. As such, no reconsideration is warranted.

## **2. ICANN Did Not Violate the Guidebook Provisions Governing Applications for Geographic Name Strings.**

The Requester incorrectly claims the change request denial violates the Guidebook provisions governing the application and evaluation requirements for geographic name strings. The Requester argues that its change request was merely an effort to provide information necessary to satisfy the geographic name evaluation criteria as set forth in the Guidebook. None of the changes proposed in the change request, however, would have had any bearing on the Geographic Names Panel’s determination that the Requester’s Application for .SPA is *not* an application for a geographic name string.

Three Guidebook provisions appear relevant to this discussion. To start, the Guidebook provides that the Geographic Names Panel (“GNP”)—not the applicant—has the discretion to determine whether the geographic name requirements are triggered:

***A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic name . . . The GNP will review all applications received, not only those where the applicant has noted its applied-for gTLD string as a geographic name. . . . For any application where the GNP determines that the applied-for gTLD string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required.***

(Guidebook, § 2.2.1.4.4.) (emphasis added). To that end, regardless of whether an applicant did or did not designate an application as one for a geographic string, the GNP evaluates each and every application submitted to determine if it is for a geographic name.<sup>13</sup> Accordingly, even though the Requester did not designate its Application as one for a geographic name at the outset,

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<sup>13</sup> See Guidebook, § 2.2.

the GNP evaluated it for that purpose. Changing its self-designation would not change the GNP's evaluation and, therefore, denying such a request does not violate this Guidebook provision.

In deciding whether the Requester's Application was for a geographic name, the GNP was required to look to the definition in the Guidebook, which is any "application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name." (Guidebook, § 2.2.1.4.2.) To determine whether an applicant has so declared, the Guidebook requires a review of whether:

- (a) It is clear from applicant statements within the application that the applicant will use the TLD primarily for purposes associated with the city name; and
- (b) The applied-for string is a city name as listed on official city documents.

(*Id.*) In coming to its determination, therefore, the GNP reviewed the Requester's "statements within the application" about the purpose of the TLD. After doing so, the GNP determined that the Requester's Application for .SPA is *not* for a geographic name string.<sup>14</sup> The denied change request in no way attempted to change the "statements within the application" regarding its intended use of the TLD and the Requester does not argue otherwise. Rather, the Requester merely reiterates in the Request that it "will use the TLD primarily for purposes associated with the city *name*," given that it will use .SPA to promote spa-related purposes (in the sense of hydrotherapy) and all such activities can be traced etymologically to the city of Spa, where certain ancient hot springs are located. (Request, § 8, Pgs. 5-6.) Given that the GNP already evaluated what the Requester said in the application about the purpose of the TLD, and no portion of the change request sought to alter those statements, denying the change request was not a violation of the above Guidebook provision.

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<sup>14</sup> See Initial Evaluation Report re .SPA, *available at* <http://newgtlds.icann.org/sites/default/files/ier/0riusp5e5hoes40ji6vlayi6/ie-1-1309-81322-en.pdf> .

Finally, only if the GNP determined that the Requester's Application is a geographic name, which it did not, would a support letter from the relevant government be necessary. The Guidebook provides:

If an applicant has applied for a gTLD string that is a geographic name (*as defined in this Guidebook*), the applicant is required to submit documentation of support for or non-objection to its application from the relevant governments or public authorities.

(Guidebook, § 1.2.2) (emphasis added). Since the GNP found that the Requester's Application for .SPA was not one for a geographic name, there is no reason for the Requester to provide documentation of support or non-objection from any governmental entity connected to the city of Spa. Accordingly, denying the change request to include an irrelevant letter of support cannot be a violation of this provision of the Guidebook.

In sum, no relevant Guidebook provision was violated in denying the change request, as the GNP had all of the information it needed per the Guidebook to determine that the Requester's Application for .SPA is *not* an application for a geographic name. Notably, the Requester does not even suggest that the GNP was wrong. Further, nothing in the change request sought to alter the information the GNP needed in order to comply with each of the relevant Guidebook geographic name provisions. As no policy or process violation has been stated in this regard, reconsideration is not appropriate.

### **3. ICANN Did Not Violate the GAC Singapore Advice in Denying the Change Request.**

On 27 March 2014, the GAC stated in its Singapore Communiqué that:

Regarding the applications for .spa, the GAC understands that the relevant parties in these discussions are the city of Spa and the applicants. The GAC has finalised its consideration of the .spa string and welcomes the

report that an agreement has been reached between the city of Spa and one of the applicants.<sup>15</sup>

The NGPC then accepted the GAC Singapore Advice, and noted “the applications [for .SPA] will proceed through the normal process.”<sup>16</sup>

The Requester claims that ICANN’s denial of the change request contravened the GAC Singapore Advice. Specifically, the Requester claims ICANN’s determination that “changing the .spa application to a geographic TLD” would cause delays to the CPE process because the Requester would then need to submit “changes to update the intended use of the TLD” was inconsistent with GAC Singapore Advice. (Request, Ex. B.)

Contrary to the Requester’s position, however, the GAC did not advise or require the GNP to designate .SPA as a geographic name string, and did not require ICANN to permit the Requester to amend its application to attempt to be so classified or to include the governmental support letter. The GAC Singapore Advice instead consisted of two statements. First, it noted that certain “discussions” have taken place between the applicants for .SPA and the city of Spa.<sup>17</sup> Further, the GAC stated that it has considered the string and understands that the Requester has “reached an agreement” with the city of Spa. Nothing in the GAC Singapore Advice spoke to whether the Requester’s Application was or should be a geographic name string. In sum, nothing in the GAC Singapore Advice called for any type of change request from the Requester. Accordingly, denying the Requester’s change request is not inconsistent with GAC Singapore Advice and, therefore, reconsideration is not warranted on these grounds.

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<sup>15</sup> See Singapore GAC Communiqué, available at <https://www.icann.org/news/announcement-55-2014-04-08-en>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

#### **4. ICANN Properly Applied the Factors Used to Assess Change Requests.**

The Requester argues ICANN staff violated policy or procedure because it failed to properly apply and balance the established criteria for change requests in denying the Requester's change request. In determining whether to approve a change request, ICANN staff considers the following factors:

- a. *Explanation* – Is a reasonable explanation provided?
  - b. *Evidence that the original submission was in error* – Are there indicia to support an assertion that the change merely corrects an error?
  - c. *Other third parties affected* – Does the change affect other third parties materially?
  - d. *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?
  - e. *Fairness to applicants* – Would allowing the change be construed as fair to the general community? Would disallowing the change be construed as unfair?
  - f. *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?
  - g. *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.<sup>18</sup>

The Requester contends that all of these factors weigh in favor of approving the change request, and thus ICANN's denial of it constitutes a violation of ICANN policy or procedure. (Request, § 8, Pgs. 8-9.) The Requester's argument, however, simply reflects its substantive disagreement with ICANN's decision to deny the change request. The Requester presents no evidence that ICANN staff in fact failed to apply the required factors in violation of established policy.

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 10 July 2014 letter setting forth ICANN's decision to deny the Requester's change request expressly stated that it "was carefully evaluated by the several decision criteria described on the New gTLD microsite" listed above. (Request, Ex. B.) The letter made clear that in balancing the factors, factors five and seven above tipped the balance in favor of denying the Requester's change request. Specifically, ICANN stated that because the Application is a community application, granting the change request would "cause fairness issues to other applicants in the contention set." (Request, Ex. B.) Further, it noted that any further "geographic evaluation" would "caus[e] a delay in the evaluation process. This delay could be prejudicial to other applicants in contention with this application." (*Id.*)

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

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<sup>18</sup> See ICANN, New gTLD Application Change Request Process and Criteria, *available at* <http://newgtlds.icann.org/en/applicants/customer-service/change-requests> (citing Guidebook, § 1.2.7).

equitable process for all applicants. The Requester does not point to any violation of policy or procedure in ICANN's application of the seven change request evaluation factors. ICANN's letter explaining the decision to deny the change request makes clear that ICANN considered the relevant factors in reaching its conclusion. Any substantive disagreement with the result of that analysis is not a proper basis for reconsideration.

**B. The Requester Has Not Demonstrated It Was Materially Affected By The Denial Of Its Change Request.**

Absent evidence that the Requester has been materially and adversely affected by ICANN's decision to deny the Requester's change request, reconsideration is not appropriate. (Bylaws, Art. IV, § 2.2.)

The Requester contends it has been materially affected by the denial of the change request because it "would prejudice against the integrity of the application given the accepted GAC advice for .SPA." (Request, § 6, Pg. 3.) However, as set forth *supra*, the GAC Singapore Advice did not speak to whether or not the Application should be deemed a geographic name string. And the GNP had already determined that the Requester's Application is *not* for a geographic name string.<sup>19</sup> As such, ICANN's decision to deny the Requester's change to modify its self-designation or to include a letter of government support or non-opposition (neither of which were relevant to the GNP's geographic determination) has not materially adversely affected the Requester.

Moreover, the Requester would not be affected—let alone materially so—by the denial of the change request related to the letter of support even if at some future juncture the GNP were to determine that .SPA comprises a geographic name, thereby triggering the governmental documentation requirement:

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<sup>19</sup> See Initial Evaluation Report re .SPA, available at <http://newgtlds.icann.org/sites/default/files/ier/0riusp5e5hoes40ji6vlayi6/ie-1-1309-81322-en.pdf>.

In cases where an applicant has not provided the required documentation, the applicant will be contacted and notified of the requirement, and given a limited time frame to provide the documentation. If the applicant is able to provide the documentation before the close of the Initial Evaluation period, and the documentation is found to meet the requirements, the applicant will pass the Geographic Names review. If not, the applicant will have additional time to obtain the required documentation; however, if the applicant has not produced the required documentation by the required date (at least 90 calendar days from the date of notice), the application will be considered incomplete and will be ineligible for further review.

(Guidebook, § 2.2.1.4.4.) In other words, should documentation of governmental non-opposition to its Application become a requirement for the Requester (which it currently is not), there will be an opportunity to submit the documentation it has already procured.

In sum, the Requester has failed to demonstrate it was materially affected by the denial of its change request, and reconsideration is not warranted for that independent reason as well.

## **VI. Determination.**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-36. 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. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-36 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.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a

Reconsideration Request within thirty days following receipt of the request, unless impractical. (See Bylaws, Art. IV, § 2.16.) To satisfy the thirty-day deadline, the BGC would have to have acted by 24 August 2014. Due to the volume of Reconsideration Requests received within recent months, it was impractical for the BGC to consider Request 14-36 prior to 4 September 2014.