

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: City of Spa

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

The City of Spa is seeking a reconsideration of ICANN staff's action/inaction as articulated in its response

(<https://www.icann.org/resources/correspondence/chehade-to-lanotte-2014-10-03-en>) to the letter to the ICANN Chair and CEO by the Belgian Deputy Prime Minister, Johan Vande Lanotte

(<https://www.icann.org/resources/correspondence/lanotte-to-chehade-crocker-2014-07-01-en>).

The description in ICANN staff's response made clear that the GAC Advice(s) on the .SPA applications (<https://gacweb.icann.org/display/GACADV/2014-03-27-spa>, <https://gacweb.icann.org/display/GACADV/2014-06-25+.spa>), were not properly applied as explained by the Applicant Guidebook (AGB) for the new gTLD process.

More specifically, ICANN staff's explanation indicates that the GAC Advice(s) were not taken into consideration as government input as specified by the AGB in the Geographic Names Panel process.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

On March 27, 2014, a GAC Advice on .SPA was issued:

<https://gacweb.icann.org/display/GACADV/2014-03-27-spa>, clearly indicating that "the GAC understands that the relevant parties in these discussions are the city of Spa and the applicants."

On May 14, 2014, the ICANN Board New gTLD Program Committee (NGPC) accepted the GAC Advice.

On June 25, 2014, another Consensus GAC Advice on .SPA was issued:

<https://gacweb.icann.org/display/GACADV/2014-06-25+.spa> reiterating that the relevant parties included the City of Spa.

On July 1, 2014, the Deputy Prime Minister of Belgium, Johan Vande Lanotte sent a letter to the Chair Mr. Crocker and CEO Mr. Chehade of ICANN.

On September 8, 2014, the ICANN Board NGPC accepted the GAC Advice.

On October 3, 2014, ICANN Staff responded with a letter (posted on October 6, 2014). This ICANN Staff Letter made clear that the GAC Advice(s) were in fact not taken as government input as specified in the AGB.

5. On what date did you become aware of the action or that action would not be taken?

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

City of Spa became aware of the action/inaction on October 6, 2014 when the said ICANN Staff Letter was published.

This Reconsideration Request is submitted on October 21, 2014 within 15 days of the action taken.

6. Describe how you believe you are materially affected by the action or inaction:

City of Spa is materially affected by this action/inaction as the public interest of the City of Spa, its brand and its people is severely infringed upon if the said accepted GAC Advice(s) were not taken into consideration in the new gTLD process for the .SPA applications.

Without proper implementation of the new gTLD process as described in the AGB, and taking into consideration the GAC Advice(s) as stipulated in the ICANN Bylaws, the interests of City of Spa may be irreparably damaged.

Tourism and the provision of Spa water-related services are some of the most important economic activities of the city, and such activities rely on the use and branding of the city's name "Spa". Spa is the eponymous city that gave its name to the wellness centres that offer water treatments (balneotherapy). Since the 14th century, the city of Spa is internationally renowned for its healing cold springs, which not only supplies the thermal stations, but also the internationally well-known water manufacture Spadel, which produces, commercialises and exports the "Spa" water (Spadel is leader in branded mineral waters in the Benelux countries, present in France, the United Kingdom, Germany and exports its flagship brand "Spa" in more than 30 countries throughout the world). Furthermore, the city is also renowned for its casino, its Formula One grand prix and its music festivals (amongst which the "francofolies de Spa", which is the most important musical event of the french-speaking community in Belgium). The geographic nature of the word "spa" is undeniable and is recognized worldwide, including in the USA (according to the online Merriam-Webster English dictionary, "spa" is recognized as a noun whose etymological origin is the name of the city of Spa, and as a geographical name referring to the same city).

Given the geographic character of the string "SPA", and given that the economy of the city and its region highly relies on the international renown of the city's name, the GAC was right to be concerned about the delegation of the ".SPA"

string and to repetitively urge the applicants to reach an agreement with City of Spa, which is indeed a relevant party in the “.SPA” delegation process.

The failure of ICANN staff to implement the said accepted GAC Advice(s) means that the input from City of Spa government, as a relevant government of the .SPA Applications has not been sought. This is a violation of the process specified in the AGB, where it explicitly states that (AGB 2.2.1.4.2):

*For each application, the Geographic Names Panel will determine which governments are relevant **based on the inputs of the applicant, governments, and its own research and analysis.***

City of Spa further confirms that it has not been consulted or have received any correspondence from ICANN Staff or any individual or party indicating that they are seeking its input as part of the Geographic Names Panel on the New gTLD program for the .SPA applications.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

City of Spa believes that no other parties are adversely affected by the action/inaction.

City of Spa also believes that no other parties are adversely affected should the remedies sought in this Reconsideration Request be implemented. Further explanation is provided in response to 8. below.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. “Material information” means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

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. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

Statements in the ICANN Staff Letter () indicates actions/inactions materially inconsistent with established ICANN policies: including the New gTLD program Applicant Guidebook (AGB), along with the GAC Advice considerations within the AGB and the GAC Advice(s) on .SPA accepted by the ICANN Board NGPC

1. AGB Specifies that inputs of governments must be taken into consideration to determine which governments are relevant for each new gTLD Application

The AGB (2.2.1.4.2) clearly specifies that:

For each application, the Geographic Names Panel will determine which governments are relevant based on the inputs of the applicant, governments, and its own research and analysis.

We understand that the inputs from all of:

1. Applicant(s)
2. Governments, AND
3. Own research and analysis by the Geographic Names Panel

Must be taken into consideration in determining which governments are relevant for each application.

Furthermore AGB: 2.2.1.4 stipulates that *“applied-for gTLD strings will be*

reviewed according to the requirements... regardless of whether the application indicates it is for a geographic name."

Which means that even if the applicant(s) did not originally identify an application to be for a TLD string requiring government support or non-objection, that may become required if inputs from governments are accepted by ICANN.

In the case for .SPA, the ICANN Board NGPC has accepted the said GAC Advice(s) on .SPA which clearly indicates that the relevant government for such TLD application is the City of Spa.

2. ICANN Staff Letter clearly indicates that the GAC Advice(s) were not taken as government input in determining which governments are relevant for the .SPA applications

The ICANN Staff Letter

(<https://www.icann.org/resources/correspondence/chegade-to-lanotte-2014-10-03-en>) explains clearly that the Geographic Names Panel used only the 4 criteria from the AGB as listed in that letter in its consideration and failed to recognize the overarching (5th) requirement that *"the Geographic Names Panel will determine which governments are relevant based on the inputs of the applicant, governments, and its own research and analysis."*

Furthermore, based on public records at the New gTLD website (<https://gtldresult.icann.org/application-result/applicationstatus/viewstatus>), the initial evaluation (IE) results for the two remaining .SPA applications were completed respectively on:

- June 7, 2013 for Asia Spa and Wellness Promotion Council (1-1309-81322) -- <http://newgtlds.icann.org/en/program-status/application-results/ie-1-1309-81322-en.pdf>
- August 16, 2013 for Foggy Sunset LLC (1-1619-92115) – <http://newgtlds.icann.org/en/program-status/application-results/ie-1-1619-92115-en.pdf>

Both dates are well before the March 27, 2014, GAC Advice on .SPA (<https://gacweb.icann.org/display/GACADV/2014-03-27-spa>), where the GAC provided clear government input.

Therefore the Geographic Names Panel could not possibly have taken into consideration the said accepted GAC Advice(s) as government inputs.

3. ICANN Staff Letter indicates that it has proceeded beyond Initial Evaluation, in violation of the accepted GAC Advice(s)

The .SPA applications were identified in GAC Advices from Beijing (April 11,

2013: <https://gacweb.icann.org/display/GACADV/2013-04-11-gTLDStrings>), Durban (July 18, 2013: <https://gacweb.icann.org/display/GACADV/2013-07-18-gTLDStrings>), and Buenos Aires (November 20, 2013: <https://gacweb.icann.org/display/GACADV/2013-11-20-spa>).

The GAC Advices, which were accepted by the ICANN Board NGPC stipulated that applications for the .SPA new gTLD “not to proceed beyond Initial Evaluation” subject to the parties having reached agreement or the GAC issuing final advice.

As explained in 2. above, the GAC provided final advice on March 27, 2014, (<https://gacweb.icann.org/display/GACADV/2014-03-27-spa>).

The ICANN Staff Letter however indicates that the GAC Advice was only taken into consideration for Modules 3 and 4 which are BEYOND initial evaluation.

More specifically, the accepted said GAC Advice(s) must also be appropriately applied to Module 2 which is NOT BEYOND initial evaluation.

The fact that the ICANN Staff Letter explained the application of the GAC Advice only beyond initial evaluation and its explanation of the Geographic Names Panel that did not take into consideration the accepted said GAC Advice(s) clearly indicates that the process failed to uphold the GAC Advice(s) and the ICANN Board NGPC's acceptance of which.

Had the said accepted GAC Advice(s) been taken properly into consideration, the Geographic Names Panel must consider the GAC Advice as “inputs of governments” and therefore identify the City of Spa as a relevant government, and thereupon should at least seek the input specifically from the City of Spa before making its final decision.

The City of Spa confirms that we have not received any correspondence from ICANN or any individual or party indicating that they are seeking our input in relation to the .SPA new gTLD applications.

4. ICANN Staff Letter further indicates that inputs from Applicant(s) were not fully taken into consideration

The AGB 3.1 identified GAC Advices as a formal part of the new gTLD process:

Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish 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.

No part of the AGB relieves the Geographic Names Panel (or any Initial Evaluation Processes for that matter) of taking into consideration GAC Advices (regardless of whether they form an objection) in their evaluation of each application.

No part of the AGB relieves the Geographic Names Panel of taking into consideration the response of applicants to GAC Advices as formally included in the AGB 3.1.

The ICANN Staff Letter erroneously indicated that *“none of the .SPA applicants declared in their original applications the intent “[...] to use the gTLD for purposes associated with the city name”.*”

While in the Application Process, the .SPA applicants answered “NO” to Question 21: Geographic Names (“(a) Is the application for a geographic name?”), the requirements of the AGB is substantively broader than the answer to this question alone.

More specifically, AGB: 2.2.1.4 stipulates that *“applied-for gTLD strings will be reviewed according to the requirements... regardless of whether the application indicates it is for a geographic name.”*

Therefore, the indication explained in the ICANN Staff Letter that the Geographic Names Panel took into consideration ONLY the answer to Question 21 to determine whether statements in the application in fact indicated intent to use the gTLD for purposes associated with the city name failed to take into consideration the AGB in its entirety and more importantly failed to take into consideration the GAC Advice process formally included in the AGB.

At least one of the applicants indicated in their response to the GAC Advices that they concur with the broader understanding of the “purposes associated with the city name” in the light of the GAC deliberations and advices:

- <http://newgtlds.icann.org/sites/default/files/applicants/28aug13/gac-advice-response-1-1309-81322-en.pdf>
- <http://newgtlds.icann.org/sites/default/files/applicants/08may14/gac-advice-response-1-1309-81322-en.pdf>

In considering the broader definition in the AGB, in fact, it is clear from applicant statements from BOTH remaining applications for .SPA that the applicant will use the TLD “primarily for purposes associated with the city name” (even if it is not for purposes associated with the city or its citizens):

- ASWPC application (18a):
 - .spa is dedicated to the spa and wellness community
- Donuts (Foggy Sunset, LLC) application (18a):
 - There are literally hundreds of different uses of the word SPA, broadly including day spas, dental spas, garden spas, medical

spas, bath spas, hot tubs, soda fountains, etc.

Note that ALL of the listed “different uses of the word SPA... day spas, dental spas...” are “primarily for purposes associate with the city name” as explained above, despite the continued insistence by Foggy Sunset LLC otherwise (in their subsequent response to GAC advices). Again, AGB: 2.2.1.4 stipulates that *“applied-for gTLD strings will be reviewed according to the requirements... regardless of whether the application indicates it is for a geographic name.”*

We understand and agree with the ICANN Staff Letter explanation that the definition of “geographic names” in the context of the New gTLD Program was elaborated over several years of community input as part of the development of the AGB. This is why we now explain that ICANN Staff may have missed parts of the related portions of the AGB as they execute on the AGB.

When the AGB was finalized, there was much discussion on how geographic names (TLDs) requiring government support or non-objection could be identified and handled. As explicitly also included in the AGB Section 2.2.1.4.2:

“City names present challenges because city names may also be generic terms or brand names, and in many cases city names are not unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process.”

Therefore the process envisioned by the AGB provides an important flexibility for governments to raise concerns especially towards city names, and the AGB Section 2.2.1.4.2 further explains that the determination of *“which governments are relevant”* to a geographic name requiring government support (or non-objection) is based *“on the inputs of the applicant, governments, and its own research and analysis.”*

Which means that even if the applicant did not originally identify an application to be for a TLD string requiring government support or non-objection, that may become required if inputs from governments are accepted by ICANN.

In the case for .SPA, the ICANN Board NGPC has accepted the GAC Advice on .SPA which clearly indicates that the relevant government for such TLD application is the city of Spa.

Also according to AGB: 2.2.1.4.2: *“An application for a city... will require documentation of support or non-objection... if: (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.”* The fact that “SPA” is a city name as listed on official city documents is apparent.

It is important to note that here, the AGB specifically uses the phrase *“purposes associated with the city name”* and NOT just “purposes associated with the city”.

This represents a significant difference for the specific case of “SPA” because the city name “Spa” is the etymological origins of the term “spa”, which is associated with the city’s thermal spring water, now synonymous with hydrotherapy and springs with healing properties.

The use of “spa” for purposes related to hydrotherapy and springs with healing properties must therefore logically be interpreted as *“purposes associated with the city name.”* It is also important to note that the AGB specifically used *“associated”* which casts a wider net to allow governments to appropriately weigh in to address the challenge of city names, as identified in AGB: 2.2.1.4.2, *“because city names may also be generic terms or brand names”*.

It is very important to note that there is a significant difference for our purposes where a generic word that had already existed and then is being used as a city name and where a city name is generalized and used as a word. For example, in the cases of “.pink” or “.orange” or “.tours”, the respective generic word existed before the naming of the city, and therefore the use of the TLD string in its generic word meaning does NOT immediately imply that it is used for *“purposes associated with the city name”*. However, for “.spa”, because the etymological origin of the word stems from the city, any use of the word to represent springs with curative properties immediately and necessarily imply that it is used for *“purposes associated with the city name.”* (again, note that is the case even if the purpose of the TLD is not primarily associated with the city itself or its citizens).

This accurate understanding of the nature and origin of the word “spa” is further echoed by the letters from the Deputy Prime Minister, Mr. Johan vande Lanotte on July 1, 2013 (<http://www.icann.org/en/news/correspondence/lanotte-to-chehade-crocker-01jul13-en.pdf>) and March 20, 2014 (<http://www.icann.org/en/news/correspondence/lanotte-to-chehade-crocker-20mar14-en.pdf>), which clearly explains that use of the TLD string “.spa” for purposes related to springs with healing properties must logically be interpreted as *“purposes associated with the city name.”*

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

City of Spa asks ICANN to take into consideration the said accepted GAC Advice(s) and implement it properly according to the AGB in full.

More specifically, to follow through with the specification in the AGB: 2.2.1.4.2, where it specifies that *“for each application, the Geographic Names Panel will determine which governments are relevant based on the inputs of the applicant, governments, and its own research and analysis”*, that is, to actually consult the City of Spa as a relevant government to the .SPA Applications as indicated by

the said accepted GAC Advice(s), which is a clear expressed input of governments, before making its decision.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

The action/inaction by ICANN Staff as indicated in the said ICANN Staff Letter presents a material harm and adverse impact to the City of Spa because the public interests of the City of Spa could be irreparably damaged by the failure of ICANN to uphold its policies and processes as contemplated in the New gTLD program in the AGB, especially in the protection supposedly afforded for city names.

Allowing private companies to register a .spa string without the support of City of Spa creates a high risk for the name "Spa" be captured by a company that want to use it to profit from its meaning (and from its etymology, which refers to the City name), limiting the possibility of utilizing it in the public interest of City of Spa, its citizens and its enterprises. It allows room for confusion in the public and consumers, as it is unavoidable that a ".spa" will evoke the city, its population and its local productions.

The City of Spa looks to ICANN to uphold the integrity of the new gTLD process, respect cultural heritage, serve the public interest, and follow the appropriate processes and requirements already in the AGB.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

None.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Authorised Signatory for the City of SPA

Signature

Date : October 21, 2014


Joseph Houssa

BOURGMESTRE




Marie-Claire Fassin

DIRECTRICE GENERALE