

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: Asia Spa and Wellness Promotion Council (New gTLD Applicant 1-1309-81322)

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

x 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.)

Asia Spa and Wellness Promotion Council (ASWPC) is seeking a reconsideration of the denial of its Change Request (00129334 – Said Change Request: Exhibit A) submitted in response to the acceptance by the ICANN Board New gTLD Program Committee (NGPC) of the GAC Advice on .SPA (<https://gacweb.icann.org/display/GACADV/2014-03-27-spa>).

The ASWPC believes that the Said Change Request should be accepted and posted for public comments as per the Applicant Guidebook (AGB) and the Change Request 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 May 21, 2014, ASWPC submitted a Change Request (00129334 – Said Change Request) in compliance and according to instructions for Change Requests (Exhibit A)

On July 10, 2014, ICANN Staff responded (Exhibit B) indicating that the Said Change Request is being denied.

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.)

ASWPC became aware of the action (i.e. the denial of its Said Change Request) on July 11, 2014

This Reconsideration Request is submitted on July 25, 2014 within 15 days of the action taken.

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

ASWPC is materially affected by the denial of the Said Change Request because such denial would prejudice against the integrity of its application given the accepted GAC advice for .SPA. As such, it may have direct and potentially adverse impact on ASWPC's ".spa" application, which therefore materially affects ASWPC.

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

ASWPC believes that no other parties are adversely affected by the action.

ASWPC also believes that no other parties are adversely affected should the actions 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.)

The denial of the Said Change Request is materially inconsistent with established ICANN policies: including the New gTLD program Applicant Guidebook (AGB), the GAC Advice on .SPA accepted by the ICANN Board NGPC, and the accepted New gTLD Application Change Request process.

1. Rationale provided by staff for the denial is unfounded

In the letter from ICANN staff explaining the denial of the Said Change Request (Exhibit B), the following rationale was provided:

“This application is a community application. As such, we cannot approve this change request as the changes are material and therefore may impact the outcome of Community Priority Evaluation (CPE) and cause fairness issues to other applicants in the contention set.”

The rationale is unfounded because:

- a. The inclusion of a letter of support or non-objection by a relevant government to a TLD string requiring government support or non-objection has no relevance to whether or not the application is identified as a community application or not (i.e. inclusion of such letter is independent of CPE, whether or not an application is a community application does);
- b. The Said Change Request did not make any changes to any of the questions that impact the Community Priority Evaluation (CPE) for the application (i.e. no changes were submitted to questions 18(a)(b)(c) & 20(a)(b)(c)(d)(e)(f), in fact, no other changes were submitted for any other questions except for 21(a)(b));
- c. There was no need for any material changes to the application (further explanation provided in 2. below); and,
- d. There is no reason for any fairness issue to be raised for any other applicants in the contention set. The inclusion of a letter of support or non-objection by a relevant government to a TLD string requiring

government support or non-objection does not provide any unfair advantage or disadvantage of the applicant over any other applicants in the contention set.

2. Rationale provided by staff for the denial is inconsistent with the AGB

In the letter from ICANN staff explaining the denial of the Said Change Request (Exhibit B), the following rationale was provided further:

“In addition, changing the .spa application to a geographic TLD means that the application must meet the criteria under number 2 of Section 2.2.1.4.2 of the Applicant Guidebook. In order to meet these criteria, the .spa application would need significant and material changes to indicate “that the applicant will use the TLD primarily for purposes associated with the city name.” We note that you did not submit any changes to update the intended use of the TLD.”

The understanding of ICANN staff is incomplete and is inconsistent with the AGB given that the ICANN Board NGPC had accepted the GAC Advice on .SPA as included in the Singapore GAC Communiqué dated March 27, 2014.

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.”*

AGB: 2.2.1.4 further 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 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”* (see Exhibit C for detailed explanation). 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.”*

We further observe that, based on our research very few city names in fact are generalized to become generic words. One only other example we have found is “Badminton” (which was not applied as a gTLD in this round).

Now given:

A. the acceptance of the GAC Advice on the matter serves as an input to which

governments are relevant for the determination of whether a TLD string represents a geographic name requiring government support or non-objection;

B. that the use of “spa” for the purposes of springs with healing properties in fact already means that it is used *“for purposes associated with the city name.”*;

C. that the ASWPC application clearly indicates in its responses to questions 18(a)(b)(c) & 20(a)(b)(c)(d)(e)(f) that its operation of .SPA is dedicated to the spa and wellness community; and,

D. The applied-for string “.SPA” is a city name as listed on official city documents of the City of Spa.

Therefore:

I. It is appropriate for ASWPC to submit the Said Change Request in response to the GAC Advice, and its acceptance by the ICANN Board NGPC; and

II. There is no need for any other changes to the ASWPC, because what is already expressed in the application already indicates *“that the applicant will use the TLD primarily for purposes associated with the city name.”*

3. Action and rationale of staff for such action is inconsistent with the accepted GAC Advice

The GAC Advice on .SPA as included in the Singapore GAC Communiqué dated March 27, 2014 clearly states that *“Regarding the applications for .spa, the GAC understands that the relevant parties in these discussions are the city of Spa”*

In the letter from ICANN staff explaining the denial of the Said Change Request (Exhibit B), ICANN staff further described that:

“...even if changes to update the intended use of the TLD were submitted, they would not be approved because they are significant and would require geographic evaluation causing a delay in the evaluation process. This delay could be prejudicial to the other applicants in contention with this application.”

First of all, as explained in 2. above, there is no need for ASWPC to submit any changes to update the intended use of the TLD, because the intended use of ASWPC application of the TLD to serve the spa and wellness community, coupled with the ICANN Board NGPC’s acceptance of the GAC Advice on .SPA already implies *“that the applicant will use the TLD primarily for purposes associated with the city name.”*

Secondly, the understanding by ICANN staff that any requirement for extended geographic evaluation will cause a delay that *“could be prejudicial to the other applicants in contention with this application”* is inappropriate because such evaluation would be a result of an accepted GAC Advice by the ICANN Board NGPC in full accordance with the AGB and the ICANN bylaws.

All applicants should follow the AGB equally, including accepted GAC advices.

As also mentioned in 2. above, AGB: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.”*

Therefore, given the input by governments in the form of the accepted GAC advice, it is only appropriate for ICANN Staff to follow the AGB in this regard as well, i.e. in the determination of which governments are relevant to and therefore whether the TLD application is to be considered a geographic name requiring government support or non-objection. Any such evaluation should not be considered to be *“causing a delay in the evaluation process... [that] could be prejudicial to the other applicants in contention...”*

4. Said Change Request was submitted in full compliance with the Change Request Process

The Said Change Request was submitted in accordance with the submission guidelines and meets the criteria set forth in the New gTLD Application Change Request Process and Criteria (<http://newgtlds.icann.org/en/applicants/customer-service/change-requests>).

In response particularly to the determination criteria:

Explanation – the Said Change Request (Exhibit A) provided clear explanation that the changes sought is a response to the accepted GAC Advice concerning .SPA.

Error – the Said Change Request was not submitted in error.

Other third parties affected – no other third parties are affected, except perhaps the City of Spa’s interests may be negatively affected by the ICANN staff action which is in conflict with the accepted GAC advice identifying it as a relevant government for the .SPA TLD.

Precedents – We are not aware of any precedents where comparable change requests were denied.

Fairness – there is no fairness implications to other applications in the contention set. Other applicants should also be able to submit similar changes. The inclusion of the changes do not impact CPE. Furthermore, since the changes are to be posted for public comments, affected parties, if any, will have ample time to respond in a similarly fair manner.

Timing – there should be no re-evaluation required based on the changes sought. ASWPC anticipates the possibility of a geographic names extended evaluation not because of the Said Change Request but because of the accepted GAC advice.

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?)

ASWPC asks ICANN to publish the Said Change Request for public comments in accordance with the Change Request process already established for the New gTLD program, and to accept the Said Change Request in accordance with processes already established for the New gTLD program.

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.)

ASWPC believes that the denial of the Said Change Request by ICANN staff is inconsistent with the AGB and that its interpretation of the AGB requirements did not take into consideration of the accepted GAC Advice and the associated implications, especially as it relates to the exceptional case of the “.SPA” TLD.

The integrity of the New gTLD program and the acceptance of GAC Advices by the ICANN Board is also at stake.

ASWPC has patiently followed the new gTLD process including the comprehensive GAC Advice process and is committed to continue following the new gTLD process according to reasonable interpretation of the AGB that is not only market-driven or free-for-all, but one that is non-discriminatory also for legitimate applicants that are sensitive to community and public interests. Certain requirements to consider governments and the protection of public interest were carefully included in the AGB for valid reasons. The situation with “.SPA” is a good example of where the discretion provided by the AGB for

ICANN to do the right thing can best be utilized by ICANN to serve the public interest rather than pure commercial interests.

ASWPC 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. ASWPC stands fully prepared to cooperate with ICANN and comply with all the provisions of the AGB, including those relevant to the evaluation of geographic names requiring government support or non-objection.

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>.

Exhibit A: Said Change Request (Case: 00127557)

Exhibit B: ICANN Staff action/inaction (i.e. denial of Said Change Request)

Exhibit C: Comparison of .SPA and Other City Name Examples

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.



Signature

July 25, 2014

Date

Edmon Chung, as Primary Contact of the
Asia Spa and Wellness Promotion Council (ASWPC) application for “.spa”,
On behalf of ASWPC