

**RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE
RECONSIDERATION REQUEST 13-2
1 MAY 2013**

On 30 March 2013 (revised on 7 April 2013), Nameshop, through Sivasubramanian Muthusamy, submitted a reconsideration request (“Request”) to the Board Governance Committee (“BGC”). The Request asked the Board to reconsider two items: (1) inaction on the consideration of Nameshop’s letter of “appeal” sent after denial of Nameshop’s change request to change its applied-for string in the New gTLD Program from .IDN to .INTERNET (the “Change Request”); and (2) the decision of the Support Applicant Review Panel (“SARP”) that Nameshop did not meet the criteria to be eligible for financial assistance under ICANN’s Applicant Support Program. As to item (1), the Nameshop identifies that it is challenging both staff and Board action.

I. Relevant Bylaws.

This Request was submitted under the Bylaws effective 20 December 2012. Article IV, Section 2.2 of that version 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.

When challenging a staff action or inaction, a request must contain, among other things, “a detailed explanation of the facts as presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies).” Bylaws, Art. IV, § 2.6(g). When challenging Board action or inaction, a request must contain “a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act.” Bylaws, Art. IV, § 2.6(h).

Dismissal of a request for reconsideration is appropriate if the BGC finds that the requesting party does not have standing because it failed to satisfy the criteria set forth in the Bylaws. Bylaws, Art. IV, § 2.16. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff acted in contravention to established policies.

For a request for reconsideration to be timely, it must to be submitted within thirty days of when the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action, or in the event of inaction, the date on which the affected

person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner. The Request was received on 30 March 2013, with non-substantive amendments provided on 7 April 2013. Thus, to the extent that Nameshop's Request is seeking reconsideration of ICANN's denial of the Change Request, that portion of the Request is not timely. ICANN communicated the denial to Nameshop on 18 February 2013, which is more than 30 days prior to the date that Nameshop initially submitted the Request. The other portions of the Request, however, are timely under the Bylaws. Bylaws, Art. IV, § 2.5. Given the amendment to the Request, the Bylaws require that the BGC publicly announce by 7 May 2013 (30 days after the amendment to the Request was submitted) its intention either to decline to consider or to proceed to consider the Request. Bylaws, Art. IV, § 2.9.

III. Background.

Nameshop is an applicant in the New gTLD Program, applying for the string .IDN. Nameshop also submitted an application to participate in ICANN's Applicant Support Program, which, if successful, could have resulted in Nameshop receiving a \$138,000 award towards the application fee for the New gTLD Program.

The Change Request

Within the New gTLD Applicant Guidebook ("AGB"), procedures are identified for initial evaluation of the applied-for string, among other things. See Module 2, AGB. Section 2.2.1.4 of the AGB explains the Geographic Names Review portion of the initial evaluation, stating "Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names. . . . **All** applied-for gTLD strings will be reviewed according to the requirements in this section, **regardless of whether the application indicates it is for a geographic name.**" (AGB Section 2.2.1.4, emphasis added.) The AGB continues, "Applications for strings that are country or territory names will not be approved, as they are not available under the New gTLD Program in this application round. A string shall be considered to be a country or territory name if: i. it is an alpha-3 code listed in the ISO 3166-1 standard." (AGB Section 2.2.1.4.1.) The three-letter code "IDN" is included on the ISO 3166-1 alpha-3 list as a representation of Indonesia. See <http://unstats.un.org/unsd/tradekb/Knowledgebase/Country-Code>.

According to Nameshop, its understanding was that because it intended to apply for a generic string, the geographic review portion of the AGB was "not pertinent" to the evaluation of its application, and Nameshop therefore "completely missed" the prohibition on alpha-3 codes listed in the ISO 3166-1 standard. (Request, Section 8.1.) After information on the applied-for strings was released in June 2012, on 18 July 2012 Nameshop emailed members of the ICANN Board as well as to ICANN staff explaining its intention to not operate the TLD "in any manner as a country level TLD" and asking for ICANN to "consider .IDN for delegation" or "if there are difficulties, to allow [Nameshop] to change the string to another string." (18 July 2012 emails to Cherine Chalaby and Kurt Pritz.) On 1 November 2012, ICANN provided Nameshop with formal response to that communication, confirming that that ICANN cannot waive the restrictions set forth in the AGB regarding the alpha-3 codes. (1 November 2012 Letter from Kurt Pritz.)

Prior to ICANN’s confirmation that the geographic names evaluation criteria would not be waived for the .IDN string, on 30 September 2012, Nameshop ultimately submitted a change request pursuant to the [New gTLD Application Change Request Process and Criteria](#) (the “Change Request”). The “Change Request” sought to change Nameshop’s applied-for string from “.IDN” to “.INTERNET.” On 19 February 2013, Nameshop received ICANN’s formal notification that the Change Request was rejected after careful evaluation against the criteria. (Letter from Christine Willett.)

Nameshop then, on 27 February 2013, submitted a notice to the Customer Service Center that it wished to appeal ICANN’s decision on the Change Request, and sent an email to ICANN’s President and CEO and two other Board members requesting an “appeal” of the ruling on the Change Request. (27 February 2013 email to Fadi Chehadé.) The email was also sent to the Chair of the New gTLD Program Committee, who acknowledged receipt of the letter and indicated that it was for ICANN staff to handle. (Request, Section 5.1.) The AGB does not set forth any “appeal” process, only that an “applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the Application.” (AGB, Module 6 (Terms and Conditions).) In addition, no other letter “appeal” process exists within ICANN.

The Applicant Support Program Denial

In March 2010, the Board requested “stakeholders to work through their SOs and ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs.” [Resolution 2010.03.12.47](#). Following from this Resolution, the Joint Applicant Support Working Group (JAS-WG) was formed and ultimately delivered a [final report](#) to the community, noting recommendations for the development of a financial support panel. The Board then directed work to implement the recommendations of the JAS-WG. [Resolutions 2012.12.08.01 – 2012.12.08.03](#). A [Financial Assistance Handbook](#) was developed and [posted for public comment](#) on 20 January 2011. Ultimately, the Support Applicant Review Panel (SARP) was established and tasked with evaluating applicants requesting financial assistance against criteria established within the Financial Assistance Handbook.

Nameshop was one of the three applicants that applied to ICANN for financial assistance under the Financial Assistance Program. On 11 March 2013, Christine Willett, ICANN’s Vice President, gTLD Operations, sent a letter to Nameshop notifying it that the SARP completed its financial assistance review and the SARP determined that Nameshop’s application failed to meet the Public Interest Benefit, Financial Need and Financial Capabilities criteria, in multiple ways. (11 March 2013 Letter from Christine Willett.) The letter continued, “[d]ue to this determination, your application is ineligible for further review under the New gTLD Program and the evaluation fee amount of USD 47,000 will be refunded as stated in the Financial Assistance Handbook.” (*Id.*)

IV. Nameshop's Request for Reconsideration.

Nameshop seeks reconsideration of multiple items relating to the Change Request and ICANN's adoption of the SARP's decision on its application. As to the Change Request, Nameshop claims that it is seeking reconsideration of "Board/Staff inaction on the Change Request pertains to inaction on the appeal to the Chair, CEO and COO by email on February 27, 2013, which was forwarded to the Chair and Members of the new gTLD program." (Request, Section 4.1.) With respect to the SARP determination, Nameshop seeks reconsideration of "Staff action/inaction and Board inaction on the decision of SARP panel pertains to the SARP panel decision notified by a message and file attachment at the CRM portal on March 13 2013." (Request, Section 4.2.)

V. Stated Grounds For The Request.

In relation to the Change Request, the Request is brought on the following grounds, set forth in Section 11.1 of the Request:

- A "certain ambiguity" in the AGB "concerning alpha 3 country names";
- A "complete absence of electronic safeguards within the form to refuse prohibited/reserved strings *during* the process" of applying for the .IDN string that would have provided an indication that the string was prohibited or reserved, as well as "no directives" from ICANN regarding the applied-for string;
- The applicant's perceived merits of the Change Request. In relation to the SARP determination, the Request is brought on the grounds that:
- ICANN did not design a suitable application for financial support, which would probably have provided the required information about the need and capabilities of the applicant in the right perspective";
- ICANN did not require the applicant to make a strong and forceful argument for financial support, nor call for the documentation to prove the merits and needs of the applicants;
- The panel did not perform additional research to meet the applicant's expectations; and
- The information in the application was sufficient to meet the applicant requirements.

Nameshop purports that it qualifies for applicant support and meets all criteria identified. (Request, Section 11.2.)

V. Request for Stay.

Nameshop does not request a stay of any action. Instead, Nameshop requests “corrective and positive action.” (Request, Section 8.1.)

VI. Analysis of the Request.

In our opinion, the Request fails to state any grounds that support reconsideration. As a primary matter, the Request, at base, challenges the merits of ICANN’s decisions in rejecting the Change Request and adopting the SARP member panels’ determination, and does not address any failures to meet documented process (for staff action) or failure to consider material information (for Board action) outside of why the information presented should have been sufficient for ICANN to grant to Nameshop its desired outcomes. Accordingly, we conclude that none of the stated grounds supports reconsideration, and therefore recommend that the Request be denied in full.

A. Change Request

1) Staff Action/Inaction

In order to present a proper Reconsideration Request based on staff action or inaction, Nameshop must provide “a detailed explanation of the facts as presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies).” The Request states that it is seeking Reconsideration of staff’s inaction on the email setting forth an “appeal,” sent on 27 February 2013. But the Request does not identify any established ICANN policy (or process) that required ICANN to take any action on the email correspondence. First, neither the AGB or any other documentation within ICANN sets up an “appeal” mechanism outside of the established accountability mechanisms (the Ombudsman, Reconsideration or Independent Review), therefore there is no policy or process for an “appeal” that ICANN failed to follow. Second, there is no established ICANN policy or process that requires ICANN staff to take any action on correspondence, outside of ICANN’s practices of acknowledgement (which was provided in this case), and the posting of correspondence when warranted and/or requested. Therefore, ICANN staff did not act inconsistently with any ICANN policies when it did not act upon the email setting out an “appeal” of the Change Request.

Notably, the grounds set forth to support Reconsideration of this issue do not address the appeal process at all, nor do they address potential policy violations. Instead, Nameshop merely states that it believes that the Change Request should have been granted in the first place. Nameshop cites to: an “ambiguity” in the AGB regarding the prohibition on alpha-3 codes, without citation to the text of the AGB section; a perceived failure in the design of the application system so that it does not warn or reject when an applicant selects a string that is prohibited under the terms of the AGB; and a failure of ICANN staff to provide “directives” to Nameshop after the application was submitted, without reference to any requirement for such “directives.” Nameshop also re-states its opinions on the merits of its Change Request as grounds for Reconsideration.

The grounds cited make clear that Nameshop is asking for a re-determination of its Change Request, and a decision that the Change Request should be granted. That is not a proper use of the reconsideration process. As Bruce Tonkin noted at the 11 April 2013 Board meeting, the reconsideration process does not allow for a full-scale review of a new gTLD application. (Preliminary Report of 11 April 2013 meeting, at <http://www.icann.org/en/groups/board/documents/prelim-report-11apr13-en.htm>.) The focus instead is on the *process* followed in reaching decisions on New gTLD Applications. Here, Nameshop does not and cannot point to where ICANN staff violated any process or policy in the review of the Change Request.

Moreover, even if Nameshop had grounds to seek reconsideration of the staff action in denying the Change Request – which Nameshop has not stated – Nameshop’s Request is time-barred. The denial of the Change Request was received by Nameshop on 19 February 2013, which is more than 30 days prior to the filing of the Request. Further, issues related to Nameshop’s claimed potential “ambiguities” in the AGB or lack of “directives” from ICANN staff have been known to Nameshop since at least 30 September 2012 when the Change Request was submitted, and likely before. Though neither of these grounds states any violation of ICANN policy, the time to challenge these actions through the Reconsideration Process has long passed.

2) Board Action/Inaction

Challenges of Board action or inaction must be based upon the ICANN Board taking action or refusing to take action without consideration of material information. That some members of the Board received communications from Nameshop regarding the “appeal” does not create Board action or inaction on an item. The [New gTLD Application Change Request Process and Criteria](#) makes clear that it is the staff within the New gTLD Program department, and *not* the ICANN Board, that takes the decision on the change request. Moreover, just as with ICANN staff, the ICANN Board is not obligated to act on correspondence that is sent to the Board. There are no grounds stated regarding why the Board would be expected to take any action on correspondence regarding a staff decision on a Change Request. When the Board acts, it takes those actions through resolution after all quorum requirements are met. (Bylaws, Article VI, Sections 17, 19.) The reconsideration process does not call for – and cannot be used – to create new obligations of the Board to act whenever a piece of correspondence is sent to some or all members. Nameshop has not set forth, nor can it, that there is a requirement for the Board to act on the Change Request or the letter regarding the appeal.

B. The SARP Decision

Similar to the Change Request, Nameshop is asking for reconsideration of the SARP panel’s decision that Nameshop failed to meet the qualifications for ICANN’s Applicant Support Program. Nameshop does not challenge the process the SARP used, nor the process by which ICANN accepted the SARP’s decision. Instead, Nameshop challenges ICANN’s design of the application for financial support, which was released in January 2012. Without citation to any ICANN policy, Nameshop states that ICANN’s poor design of the application and failure to require the financial assistance applicant to make a strong argument in favor of financial support

were the grounds for failure in the SARP process. Similar to Nameshop's failed arguments on the Change Request, it is not documented ICANN policy that ICANN is obligated to design failsafe applications that include ICANN's urging applicants to make their strongest and best presentation in support of their applications. Indeed, one of the three applicants for financial support was successful, and the other applicant has already conceded that the SARP determination on its application was appropriate. None of the other financial assistance applicants have identified any issues with the sufficiency of the documented information.

Nameshop failed to identify any process that the SARP or the ICANN failed to follow in the consideration of the financial assistance application. Instead, Nameshop states its belief on the sufficiency of its application and that all criteria were met, and cites this as a grounds for reconsideration. The SARP evaluation, which follows the Financial Assistance Handbook at <http://archive.icann.org/en/topics/new-gtlds/draft-financial-assistance-handbook-20dec11-en.pdf> and takes into account the criteria set forth at <http://archive.icann.org/en/topics/new-gtlds/draft-applicant-support-criteria-10dec11-en.pdf>, allows for the SARP – at its discretion – to seek clarifying information from the applicant, but does not impose a requirement to do so. Therefore, Nameshop's citation to the SARP's failure to perform additional research as the applicant would have wished does not demonstrate a failure of process sufficient to support Reconsideration.

Finally, given the recommended action on the Change Request (denial of reconsideration), there remains no question that the application for .IDN is not eligible for financial assistance because geographic strings (as defined in the AGB) are not eligible for financial assistance. Therefore, reconsideration of the SARP decision on Nameshop's application is also moot.

VIII. Recommendation.

Based on the foregoing, the BGC concludes that Nameshop has not stated proper grounds for reconsideration, and we therefore recommend that Nameshop's Request be denied without further consideration. This Request challenges the substantive decisions taken within the New gTLD Program on a specific application and not the processes by which those decisions were taken. Reconsideration is not, and has never been, a tool for requestors to come to the Board to seek the reevaluation of staff decisions. This is an essential time to recognize and advise the ICANN community that the Board is not a mechanism for direct, de novo appeal of staff (or panel) decisions with which the requester disagrees. Seeking such relief from the Board is, in fact, in contravention of established processes and policies within ICANN.