

**DETERMINATION  
OF THE BOARD GOVERNANCE COMMITTEE (BGC)  
RECONSIDERATION REQUEST 14-43  
18 NOVEMBER 2014**

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The Requester, the city of Spa, Belgium, seeks reconsideration of ICANN's decision to process the applications for the gTLD string .SPA as non-geographic name applications.

**I. Brief Summary.**

Three applicants applied for .SPA. One of the applicants withdrew, and the remaining two were placed in a contention set: Asia Spa and Wellness Promotion Council Limited ("ASWPC"), which submitted a community application, and Foggy Sunset, LLC, which submitted a standard (not community) application. Neither applicant answered "yes" to application question 21(a), which asks, "Is the application for a geographic name?"<sup>1</sup> Regardless of whether an applicant designated its application as seeking a geographic name, however, the Geographic Names Panel ("GNP") has independently evaluated each application to determine if it is for a geographic name. Here, the GNP determined that the two .SPA applications (the "Applications") did not meet the criteria set forth in the Applicant Guidebook ("Guidebook") for a geographic name string.<sup>2</sup>

Had the Applications (or either of them) been determined by the GNP to be for a geographic name, then and only then would the Applications have been evaluated against the further criteria in the Guidebook specifically applicable to geographic names. However, because the GNP did not designate the Applications as being for a geographic name, the Guidebook provisions applicable to geographic name strings do not apply to the .SPA Applications. In

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<sup>1</sup> ASWPC submitted a change request to ICANN seeking to designate its application as one seeking to operate a geographic name string, and to supplement its Application with a letter of support from the mayor of the city of Spa, Belgium; ICANN denied the request, and denied ASWPC's reconsideration request challenging that determination. *See generally* Determination of the BGC, Reconsideration Request 14-36, 4 September 2014, *available at* <https://www.icann.org/en/system/files/files/recommendation-aswpc-04sep14-en.pdf>.

<sup>2</sup> The Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb>.

particular, the Guidebook’s requirement that the applicant provide “documentation of support or non-objection from relevant governments or public authorities” does not apply to the applications for .SPA because the Applications were found to be for a non-geographic name.

Separate and apart from the GNP’s determination, the Governmental Advisory Committee (“GAC”) commented on the .SPA applications. The GAC did not advise, however, that the Applications should be deemed applications for geographic names, and the GAC did not instruct the GNP to amend its determination. Rather, the GAC advised the Board not to proceed beyond the initial evaluation stage for the Applications until “agreements between the relevant parties are reached.” The NGPC accepted this advice, and asked the GAC to clarify who it considered to be the “relevant parties.” The GAC responded that the Belgian city of Spa and the applicants for .SPA were the “relevant” parties; the GAC also sought assurance from the NGPC that the Guidebook procedures would be followed with respect to the .SPA applications. The NGPC informed the GAC that the Applications would proceed under the normal procedure pursuant to the Guidebook, and noted that ICANN “would not enter into a registry agreement” for .SPA until the referenced “parties ... reached an agreement or the GAC issu[ed] final advice.” The GAC never advised the Board that any application for .SPA should not proceed, and never issued any advice pursuant to Guidebook section 3.1 relating to any .SPA application. The Requester likewise never submitted a formal objection to any application for .SPA, though it had the opportunity to do so.

In a letter to ICANN dated 1 July 2014, the Requester asked that .SPA be delegated “to the candidate who has a formal agreement with the local authorities of the city of Spa.” ICANN responded and explained that the Guidebook does not permit individual governments to select the outcome for any gTLD application, and further explained that the GNP reviewed the

Applications and specifically did not designate either application for .SPA as one for a geographic name. As such, the Guidebook provisions requiring that an applicant of an application for a geographic name submit documentation of support or non-objection from the relevant government or public authorities, do not apply to either of the applications for .SPA.

The Requester seeks reconsideration of ICANN's decision to treat .SPA as a non-geographic name string. Specifically, the Requester claims that ICANN's conduct violated applicable policies and procedures because it contends that: (i) ICANN violated provisions of the Guidebook; and (ii) ICANN contravened the GAC's advice. The Requester therefore asks ICANN to reconsider its decision to treat the string as a non-geographic name, and to take into account the Requester's input regarding the delegation of the .SPA string.

With respect to each claim asserted, the Requester fails to demonstrate that ICANN violated any policy or procedure. First, ICANN's handling of the Applications complies with all applicable Guidebook provisions. Second, the Requester has identified no ICANN action that is inconsistent with GAC advice in this regard. The Requester's substantive disagreement with the GNP's determination that the Applications are not for geographic names is not evidence of any policy or procedure violation. Accordingly, the BGC<sup>3</sup> denies Reconsideration Request 14-43.

## **II. Facts.**

### **A. The GNP Determined That The Applications For .SPA Were Not For A Geographic Name String.**

On 13 June 2012, ASWPC submitted a community application for .SPA<sup>4</sup> and Foggy Sunset, LLC filed a standard (not community) application for .SPA.<sup>5</sup> Another applicant for .SPA,

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

<sup>4</sup> See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/123>.

<sup>5</sup> See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/599>.

Top Level Domain Holdings Limited, also submitted a standard application on that same date, but later withdrew its application.<sup>6</sup>

The GNP independently evaluates each application submitted to determine if it is for a geographic name,<sup>7</sup> regardless of whether it is so designated in the application. Here, the GNP determined that ASWPC's and Foggy Sunset, LLC's applications for .SPA did not meet the geographic name string criteria set forth in the Guidebook.<sup>8</sup>

After ASWPC's application passed Initial Evaluation ("IE") on 7 June 2013, and Foggy Sunset, LLC's application passed IE on 8 August 2013,<sup>9</sup> they were placed into contention.<sup>10</sup>

### **B. The GAC Advice Concerning .SPA.**

On 11 April 2013, the GAC stated in its Beijing Communiqué that it "has identified certain gTLD strings where further GAC consideration may be warranted, including at the GAC meetings to be held in Durban. [] Consequently, the GAC advises the ICANN Board to: not proceed beyond Initial Evaluation with . . . .spa[.]"<sup>11</sup>

On 4 June 2013, the NGPC accepted this advice, noting that the Guidebook "provides that 'GAC advice will not toll the processing of any applications (i.e., an application will not be suspended but will continue through the stages of the application process)' (AGB § 3.1). . . .

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<sup>6</sup> See Application Details, available at <https://gtdresult.icann.org/applicationstatus/applicationdetails/1406>.

<sup>7</sup> See Guidebook, § 2.2.

<sup>8</sup> See Initial Evaluation Report, Foggy Sunset, available at <http://newgtlds.icann.org/sites/default/files/ier/ciasie0hj3lamxawrle7ia/ie-1-1619-92115-en.pdf>; Initial Evaluation Report, ASWPC, available at <http://newgtlds.icann.org/sites/default/files/ier/Oriusp5e5hoes40ji6vlayi6/ie-1-1309-81322-en.pdf>.

<sup>9</sup> See Initial Evaluation Report, Foggy Sunset, available at <http://newgtlds.icann.org/sites/default/files/ier/ciasie0hj3lamxawrle7ia/ie-1-1619-92115-en.pdf>; Initial Evaluation Report, ASWPC, available at <http://newgtlds.icann.org/sites/default/files/ier/Oriusp5e5hoes40ji6vlayi6/ie-1-1309-81322-en.pdf>.

<sup>10</sup> See Contention Set: SPA, available at <https://gtdresult.icann.org/application-result/applicationstatus/contentionsetdiagram/121>.

<sup>11</sup> See GAC Communiqué, available at <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.

ICANN will allow evaluation and dispute resolution processes to go forward, but will not enter into any registry agreements with the applicants for the identified strings for now.”<sup>12</sup>

On 18 July 2013, the GAC addressed .SPA in its Durban Communiqué (the “GAC Durban Advice”), stating that it “advises the ICANN Board not to proceed beyond initial evaluation until the agreements between the relevant parties are reached.”<sup>13</sup>

On 10 September 2013, the NGPC accepted this advice, reiterated its prior understanding, and noted that it would not enter into a registry agreement with any applicant for .SPA until “the parties . . . reach[] agreement or the GAC issu[es] final advice prior to the close of the ICANN Public meeting in Buenos Aires.”<sup>14</sup>

On 20 November 2013, in its Buenos Aires Communiqué, the GAC advised the Board not to proceed beyond IE for the .SPA applications “until the agreements between the relevant parties are reached[.]”<sup>15</sup>

On 5 February 2014, the NGPC accepted this advice, but noted its “concern about concluding the discussions with applicants and [stating that it] will request the GAC to (1) provide a timeline for final consideration of the string, and (2) identify the ‘interested parties’ noted in the GAC advice.”<sup>16</sup>

On 7 February 2014, the NGPC sent a letter to the GAC seeking “clarification” as to “identification of the ‘relevant parties’” referenced in the Buenos Aires Communiqué.<sup>17</sup>

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<sup>12</sup> See GAC Register of Advice, 2013-04-11, *available at* <https://gacweb.icann.org/display/GACADV/2013-04-11-gTLDStrings>.

<sup>13</sup> See Annex 1 to NGPC Resolution No. 2013.09.10.NG03; ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué, *available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-10sep13-en.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> See Annex 1 to NGPC Resolution No. 2014.02.05.NG01; GAC Advice (Beijing, Durban, Buenos Aires): Actions and Updates, *available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-05feb14-en.pdf>.

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

<sup>17</sup> See 7 February 2014 letter from Board of Directors to GAC, *available at* <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07feb14-en.pdf>

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>18</sup>

On 14 May 2014, the NGPC accepted the GAC’s Singapore Communiqué’s advice concerning .SPA (“GAC Singapore Advice”), and noted “that there is no GAC advice pursuant to section 3.1 of the Applicant Guidebook. As a result, the applications will proceed through the normal process.”<sup>19</sup>

On 25 June 2014, the GAC stated in its London Communiqué (“GAC London Communiqué”) that:

The GAC welcomes the NGPC’s acceptance of the GAC advice on .spa. The GAC reiterates its advice (<https://gacweb.icann.org/display/GACADV/2014-03-27-spa>) on the issue that “the relevant parties in these discussions are the city of Spa and the applicants.” The GAC therefore seeks NGPC’s clarification on whether its explanation that “the applications will proceed through the normal process” means it will follow the Applicant Guidebook taking into consideration the GAC advice.<sup>20</sup>

On 8 September 2014, the NGPC responded to the GAC’s request for clarification concerning .SPA, stating:

Yes. ICANN will follow the Applicant Guidebook taking into consideration the GAC advice. Because neither of the .SPA applications were the subject of GAC advice pursuant to Module 3.1 of the Applicant Guidebook, both applications for .SPA remain active and will continue to be processed pursuant to the procedures of the AGB. Because there is more than one application for the .SPA TLD, the applicants will need to resolve the contention set pursuant to the procedures established in

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<sup>18</sup> See Singapore GAC Communiqué, *available at* <https://www.icann.org/news/announcement-55-2014-04-08-en>.

<sup>19</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>.

<sup>20</sup> See GAC Register of Advice, 2014-06-25 .spa, *available at* <https://gacweb.icann.org/display/GACADV/2014-06-25+.spa>.

Module 4 of the Applicant Guidebook before ICANN will enter into a Registry Agreement with the prevailing applicant.<sup>21</sup>

The GAC did not issue any further advice concerning .SPA.

**C. Background Of Reconsideration Request 14-43.**

On 1 July 2014, the Deputy Prime Minister of Belgium, Mr. Johan Vande Lanotte, sent a letter to ICANN related to the applications for the .SPA string.<sup>22</sup> Specifically, he asked that the string not be delegated to any applicant who has not entered into an agreement with the Requester “meeting the interests” of the city and its businesses.<sup>23</sup>

On 3 October 2014, ICANN responded to Deputy Prime Minister Lanotte’s letter (the “Response Letter”), which was publicly posted on 6 October 2014.<sup>24</sup> The Response Letter explained that the Guidebook does not permit individual governmental entities to select the outcome for any gTLD application, that neither the GAC nor the Requester submitted a formal objection to the Applications (and the time to do so had since passed), and that the GNP “determined that the applications for .SPA do not meet the criteria for a geographic name and[, therefore,] do not require documentation of support or non-objection from the relevant governments or public authorities.”<sup>25</sup>

The Requester filed Reconsideration Request 14-43 on 21 October 2014.

**D. Relief Requested.**

The Requester asks ICANN to reconsider its decision to treat .SPA as a non-geographic name string, and asks ICANN to “actually consult the City of Spa as a relevant government to

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<sup>21</sup> See NGPC Annex 1 to Resolution 2014.09.08.NG02, available at <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf>.

<sup>22</sup> See Request, Pg. 2, § 4; 1 July 2014 Letter, available at <https://www.icann.org/en/system/files/correspondence/lanotte-to-chehade-crocker-01jul13-en.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> See Response Letter, available at <https://www.icann.org/en/system/files/correspondence/chehade-to-lanotte-03oct14-en.pdf>; Request, Pg. 2, § 4.

<sup>25</sup> *Id.*

the .SPA Applications as indicated by the said accepted GAC Advice(s),” citing Guidebook section 2.2.1.4.2. (Request, § 9, Pg. 10.)

### **III. Issues.**

In view of the claims set forth in the Request, the issues for reconsideration are whether the GNP’s determination that the .SPA Applications do not meet the criteria for a geographic name string and ICANN’s decision to proceed with those Applications as a non-geographic name string violated applicable policies or procedures because:

1. ICANN did not comply with the Guidebook provisions governing geographic name strings (Request, § 8, Pgs. 5-6); and
2. ICANN has not sufficiently considered the relevant GAC advice (Request, § 8, Pgs. 6-10).

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

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>26</sup> (Bylaws, Art. IV, § 2.) The 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 processing the applications for .SPA without applying the Guidebook provisions applicable to geographic name strings. (Bylaws, Art. IV, § 2.)

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<sup>26</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.



## **V. Analysis and Rationale.**

The Requester has not demonstrated that ICANN violated any policy or procedure. The Requester seems to conflate two very different and independent procedures, namely the GNP's geographic name determination on the one hand, and consideration of GAC advice issued pursuant to ICANN's Bylaws and the Guidebook on the other hand. In so doing, the Requester has suggested that additional burdens not imposed by the Guidebook or any other applicable policy or procedure should apply here. As established below, however, because the GNP determined that the Applications were not for geographic name, the Guidebook's provisions concerning required letters of support or non-objection are inapplicable. Further, ICANN properly considered all GAC advice.

### **A. ICANN Did Not Violate Any Guidebook Provisions Governing The Applications.**

The Requester incorrectly claims that ICANN violated the Guidebook provisions governing the Applications.

#### **1. The Guidebook's Provisions Governing Geographic Name Strings Do Not Apply To .SPA.**

First, the Requester suggests that ICANN ignored the Requester's input in contravention of the Guidebook's requirement that the GNP consider the input of governments when it assesses which governments are "relevant" to each *geographic name string*. (See Guidebook, § 2.2.1.4.2; Request, § 8, Pg. 9 (emphasis added).) The Requester's position, however, is based upon a faulty premise because there is no application for a geographic name string at issue here. The GNP specifically determined that the applications for .SPA are *not* for a geographic name. Therefore, government input with respect to the Applications was not required.

Three Guidebook provisions are relevant to this discussion. To start, the Guidebook provides that the GNP—and the GNP alone—has the discretion to determine whether an application is for a geographic name:

*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). Accordingly, regardless of whether an applicant did or did not designate an application as one for a geographic string, and regardless of any government’s views on the matter, the Guidebook permits the GNP to make the final determination as to whether each and every application is for a geographic name, which it did.<sup>27</sup>

In deciding whether the Applications were for a geographic name, the GNP was required to look to *four* categories set forth in Guidebook Section 2.2.1.4.2 to determine if the applied-for string “falls into any of 1 through 4” of those categories—namely: (1) capital city name; (2) city name; (3) sub-national place name; or (4) an UNESCO region. (Guidebook, § 2.2.1.4.2.) The definition in the Guidebook regarding a “city name” (which is the only potentially applicable category relating to .SPA) 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.

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<sup>27</sup> See Guidebook, § 2.2.

(*Id.*) In coming to its determination, therefore, the GNP reviewed the “statements within the [A]pplication[s]” about the purpose of the TLD. After doing so, the GNP determined that the applications for .SPA were *not* for a geographic name.<sup>28</sup>

The Requester, however, tries to create an additional requirement for the GNP. Specifically, the Requester claims that, in addition to the four categories the Guidebook sets forth to determine whether a string is for a geographic name, there is an “overarching (5th) requirement” that the GNP must consider governmental input “in determining which governments are relevant for each application” regardless of whether the GNP has determined that the application is for a geographic name. (Request, § 8, Pgs. 5-6.) The Requester is wrong. The Requester confuses the GNP’s threshold evaluation as to whether an application is for a geographic name with the requirements that apply after and *only if* the GNP answers that threshold question in the affirmative.

Only if the GNP had determined that the Applications were for a geographic name, which it did not, would the GNP have any need to “determine which governments are relevant based on the inputs of the applicant, governments, and its own research and analysis.” (Guidebook, § 2.2.1.4.2.) The Guidebook further 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). Because the GNP found that the applications for .SPA were not for a geographic name, the Applications need not include documentation of support or non-objection from any governmental entity. Accordingly, the GNP has no need to determine

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<sup>28</sup> See Initial Evaluation Report, *available at* <http://newgtlds.icann.org/sites/default/files/ier/0riusp5e5hoses40ji6vlayi6/ie-1-1309-81322-en.pdf>; Initial Evaluation Report, Foggy Sunset, *available at* <http://newgtlds.icann.org/sites/default/files/ier/ciasie0hjec3lamxawrle7ia/ie-1-1619-92115-en.pdf>.

which governmental entity is relevant by reference to inputs from any governments such as the Requester. (Guidebook, § 2.2.1.4.2.)

And while the Requester correctly notes that it is one of the “relevant” parties to an “agreement” referred to in the GAC Durban Advice and GAC Singapore Advice, the Requester’s attempt to import the use of the word “relevant” by the GAC into the Guidebook’s geographic name provisions is not appropriate. The use of the term “relevant” party by the GAC does not change – and indeed is not relevant to – the GNP’s determination that the applications for .SPA are not for a geographic name. The Requester improperly conflates the two. That the Guidebook also uses the word “relevant” in the course of explaining procedures regarding applications for geographic names (Guidebook, § 2.2.1.4.2) bears no relation to the GAC’s use of the same term regarding which parties were relevant to a potential agreement.

As the Response Letter made clear to the Requester, “the Applicant Guidebook does not provide for a mechanism for individual governments to select a preferred outcome for an application for a string, particularly when that string is not considered to be a geographic name as defined by the Applicant Guidebook criteria and the [GNP]’s determination.”<sup>29</sup>

In sum, the Guidebook’s provisions applicable to applications for geographic name gTLDs do not apply to the applications for .SPA, so reconsideration is not appropriate based upon a failure to apply such provisions.

## **2. The Requester’s Opinion That The Applications Will Use Its City Name Does Not Render The Guidebook’s Geographic Name String Provisions Applicable.**

The Requester states that the Applications “will use the TLD primarily for purposes associated with the city *name*,” given that they will use .SPA to promote spa-related purposes (in

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<sup>29</sup> See Response Letter, available at <https://www.icann.org/en/system/files/correspondence/chehade-to-lanotte-03oct14-en.pdf>, Pg. 5.

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. 3, 10.)<sup>30</sup> However, as called for under the Guidebook, the GNP conducted an independent evaluation of the Applications and specifically considered the stated purposes of the proposed gTLD. The GNP found that the applications for .SPA did not meet the criteria for a geographic name. In so doing, the GNP followed the policies and procedures set forth in the Guidebook, which authorizes only the GNP, not an individual governmental entity (even one the GAC has deemed “relevant” for some other reason), to make the final determination as to whether a gTLD application is for a geographic name. (Guidebook, § 2.2.1.4.4.) Simply put, while the Requester may disagree with the GNP’s determination that the Applications do not seek to use the string for purposes associated with the city of Spa, the Requester’s substantive disagreement does not present any policy or procedure violation. As such, reconsideration is not appropriate.

**B. ICANN Acted Consistently With All Relevant GAC Advice.**

The Requester contends that ICANN violated established policy or procedure by not following the GAC’s advice concerning .SPA. First, the Requester claims that the GAC advice requires ICANN to “seek . . . input specifically from the City of Spa before making its final decision [as to the string’s delegation].” (Request, § 8, Pg. 7.) Second, the Requester argues that the GAC advice was not applied to the Applications during Module 2 of the Guidebook’s evaluation process, which includes initial and extended evaluation, including notably the geographic names provisions. (*Id.*) Neither claim supports reconsideration, as each incorrectly conflates the GNP’s independent determination that the Applications were not for a geographic name, and the GAC’s advice. The GNP and the GAC are separate and unrelated.

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<sup>30</sup> Portions of the Request mirror verbatim ASWPC’s Reconsideration Request. *Compare* Request 14-46, available at <https://www.icann.org/en/system/files/files/request-aswpc-25jul14-en.pdf>, at Pg. 6 *with* Request, § 8, Pg. 10.

## 1. The GAC Never Instructed the GNP To Seek Input From The City Of Spa.

The Requester asserts that the GAC's advice required the GNP to "at least seek the input specifically from the City of Spa before making its final decision." (Request, § 8, Pg. 7.) However, the GAC did not advise the Board to seek input from the City of Spa. Rather, the GAC's advice presented a series of requests to the Board to delay moving forward with the applications for .SPA to allow the GAC to further consider the string, and later to allow for additional time to permit the city of Spa (the "relevant" party) to try to reach agreements with the Applicants. In each instance the NGPC accepted the GAC's advice to allow for additional time.

The Requester, however, tries to portray the GAC Advice as something different than it actually was. On 27 March 2014, the GAC stated in its Singapore Communiqué that it had finalized its consideration of the string and stated that an agreement had been reached between Requester and one of the Applicants.<sup>31</sup> The GAC Singapore Advice consisted of three statements. First, it noted that certain "discussions" had taken place between the applicants for .SPA and the city of Spa.<sup>32</sup> Second, in response to the NGPC's request (on 5 February 2014) that the GAC "identify the 'interested parties' noted in the GAC [Buenos Aires] advice",<sup>33</sup> the GAC Singapore Advice identified the city of Spa as one of the "relevant parties" to a potential agreement. Third, the GAC stated that it had considered the string and understood that one applicant had "reached an agreement" with the city of Spa.<sup>34</sup> Nothing in the GAC Singapore Advice spoke to whether the Applications were or should be deemed to be for a geographic name. Crucially, as previously explained, only if the GNP had already determined that the applications

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<sup>31</sup> See Singapore GAC Communiqué, available at <https://www.icann.org/news/announcement-55-2014-04-08-en>.

<sup>32</sup> *Id.*

<sup>33</sup> See Annex 1 to NGPC Resolution No. 2014.02.05.NG01; GAC Advice (Beijing, Durban, Buenos Aires): Actions and Updates, available at <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-05feb14-en.pdf>.

<sup>34</sup> *Id.*

for .SPA were for a geographic name does the Guidebook require the GNP to consider input from a governmental entity such as the Requester. (*See* Guidebook, §§ 1.2.2, 2.2.1.4.2, 2.2.1.4.4.)

Once again, nothing in the GAC London Communiqué spoke to whether the GNP must take the city of Spa’s input into account when evaluating the Applications; rather, it advised that applicable Guidebook provisions be followed. The NGPC responded, indicating that it would continue to follow the process in the Guidebook taking into consideration the GAC advice, and that, “[b]ecause neither of the .SPA applications were the subject of GAC advice pursuant to Module 3.1,” “both applications for .SPA remain active and will continue to be processed” to the next step, which is contention resolution pursuant to the procedures set forth in Module 4.

In sum, the Requester’s claim that the GAC instructed ICANN or the GNP to consider the Requester’s input is not correct, and no reconsideration is warranted on that ground.

## **2. ICANN Acted Consistently With The GAC Advice.**

ICANN acted consistently with all GAC advice issued regarding .SPA. The Requester, however, mistakenly conflates together unrelated terms in GAC statements which leads to an inaccurate construction of GAC advice, namely that ICANN was required to take into account the Requester’s input in the evaluation of the .SPA Applications. The facts are clear however—the GAC did not issue an early warning regarding the .SPA string; neither the GAC nor any GAC member filed a formal objection to either of the .SPA Applications; and the GAC never issued any advice pursuant to Module 3.1 regarding any of the Applications. (*See* Guidebook, §§ 1.1.2.4, 3.1.)<sup>35</sup> Rather, the GAC issued advice on several occasions regarding certain timing

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<sup>35</sup> The Guidebook provides that GAC advice on New gTLDs may take any of the following forms: (1) consensus advice that an application should not proceed; (2) advice that a string gives rise to “concerns” and that the Board must confer with the GAC and provide a rationale for its decision regarding such a string; or (3) advice that an application may not proceed unless remediation takes place. (Guidebook, § 3.1.) In the GAC Singapore Advice, the GAC stated that it had “finalised its consideration of the .spa string[,]” and as such confirmed that it would not issue any of the aforementioned three types of advice. Absent GAC advice issued pursuant to Module 3.1 of the

aspects of the application process; and ICANN considered, responded to, accepted and acted consistently with that GAC advice.

The GAC’s Beijing, Durban and Buenos Aires Communiqués advised the ICANN Board not to proceed beyond IE in order to give the GAC time to consider the .SPA issue, and then to allow time for the applicants and the city of Spa to reach an agreement. The NGPC responded in each instance and explained that: “ICANN will allow evaluation and dispute resolution processed to go forward, but [ICANN] will not enter into any registry agreements with the applicants” until the parties reach agreement “or the GAC issu[es] final advice.”<sup>36</sup> ICANN’s subsequent actions were consistent with the advice and the response.

In its Singapore and London Communiqués, the GAC reported that an agreement had been reached between the city of Spa and one of the applicants, and sought reassurance that ICANN “will follow the Applicant Guidebook taking into consideration the GAC advice.”<sup>37</sup> Again, the NGPC responded, confirmed that “ICANN will follow the Applicant Guidebook taking into consideration the GAC advice,” and explained that because neither of the Applications were the subject of Module 3.1 GAC advice, both Applications “remain active and will continue to be processed pursuant to the procedures of the [Guidebook],” noting that the next step in the process is contention resolution pursuant to Module 4 of the Guidebook.<sup>38</sup> Again, ICANN’s subsequent actions were consistent with the advice and the response.

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Guidebook, the NGPC properly concluded and explained that “both applications for .SPA remain active and will continue to be processed pursuant to the procedures of the AGB.”

<sup>36</sup> See GAC Register of Advice, 2013-4-11-gTLD strings, *available at* <https://gacweb.icann.org/display/GACADV/2013-04-11-gTLDStrings>; see Annex 1 to NGPC Resolution No. 2013.09.10.NG03; see ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué, *available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-10sep13-en.pdf>.

<sup>37</sup> See GAC Register of Advice, 2014-06-25 .spa, *available at* <https://gacweb.icann.org/display/GACADV/2014-06-25+.spa>.

<sup>38</sup> See NGPC Annex 1 to Resolution 2014.09.08.NG02, *available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf>.



The Requester contends that ICANN failed to apply the GAC's advice to Module 2, which contains the provisions concerning geographic names. (Request, § 8, Pg. 7; Guidebook, § 2.2.1.4.) However, as set forth above, there was no relevant GAC advice to apply to Module 2. The only GAC advice regarding .SPA related to the timing of the process. The GAC never issued any advice applicable to the determination of whether or not the .SPA Applications were for a geographic name. Thus, ICANN did not fail to apply any relevant GAC advice.

Further, the Requester never objected to any of the .SPA Applications even though the Guidebook provides an avenue for cities to do so:

City governments with concerns about strings that are duplicates, nicknames or close renderings of a city name *should not rely on the evaluation process as the primary means of protecting their interests in a string*. Rather, a government may elect to file a formal objection to an application that is opposed by the relevant community, or may submit its own application for the string.

(Guidebook, § 2.2.1.4, fn. 7 (emphasis added).) The Requester did not avail itself of this provision, and the window for such objections closed on 13 March 2013.<sup>39</sup>

In short, contrary to the Requester's interpretation of the GAC advice and the Response Letter, nothing in either (or elsewhere) suggests that the GAC's advice was ignored at any stage of the Applications' progress through the evaluation process, and reconsideration is not warranted on that basis.

## **VI. Determination.**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-43. 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.

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<sup>39</sup> See ICANN Announcements, 28 Feb. 2013, *available at* <https://www.icann.org/news/announcement-2-2013-02-28-en>.

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 14-43 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.