

RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 13-4

1 AUGUST 2013

On 19 June 2013, DotConnectAfrica Trust (DCA Trust), through Sophia Bekele, submitted a reconsideration request (“Request”) to the Board Governance Committee (“BGC”). The Request asked that the ICANN Board action (through the New gTLD Program Committee) of 4 June 2013 regarding DCA Trust’s new gTLD application be reconsidered.

I. Relevant Bylaws.

This Request was submitted under the Bylaws effective 11 April 2013. 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, 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.

When challenging a Board action, the requester must submit a “detailed explanation of the material information not considered by the Board” and if that information was not presented to the Board, the reasons why the requester did not submit the material to the Board. Material

information are “facts that are material to the decision.” (Terms and Conditions for submission of Reconsideration Requests.)

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, § 2.9. 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.

The Request was received on 19 June 2013, which makes it timely under the Bylaws. Bylaws, Art. IV, § 2.5.

II. Background.

As part of the Applicant Guidebook for the New gTLD Program, the Governmental Advisory Committee (GAC) may provide advice to ICANN regarding any application. This includes consensus advice in the following form:

- I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.

Applicant Guidebook, Section 3.1.

After receipt of that GAC Advice, the following process is required to be followed:

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.

ICANN will consider the GAC Advice on New gTLDs as soon as practicable.

The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

Applicant Guidebook, Section 3.1.

DCA Trust submitted Application Number 1-1165-42650 for .AFRICA. On 11 April 2013, the GAC, in its Beijing Communiqué, issued advice to the Board stating “The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:

1. The application for .africa (Application number 1-165-42560)”

On 18 April 2013, ICANN published the GAC advice for applicant response.

<http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>. Applicants were given 21 days, until 10 May 2013, to submit responses. DCA Trust submitted a response in relation to the advice on its .AFRICA string, at

<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf>.

The New gTLD Program Committee (NGPC), a Board committee delegated with all powers of the Board in relation to the New gTLD Program, was then provided with the GAC Advice, DCA Trust’s response to the GAC Advice, and a proposed Scorecard for addressing the portion of GAC Advice that encompassed the advice on the .AFRICA application. On 4 June

2013, the NGPC, after review of the applicant responses and other materials, accepted the GAC's advice in relation to DCA Trust's .AFRICA application. The NGPC stated as follows in the Scorecard attached as Annex 1 to the NGPC resolution:

The NGPC accepts this advice. The AGB provides that if 'GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.' (AGB § 3.1) The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-1165-42560 for .africa will not be approved. In accordance with the AGB the applicant may withdraw (pursuant to AGB § 1.5.1) or seek relief according to ICANN's accountability mechanisms (see ICANN Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm>. When the resolution was published on 6 June 2013, it was accompanied by a detailed rationale listing the information that the NGPC took into account, including the items listed above.

After the NGPC decision, ICANN notified DCA Trust of the NGPC decision and the effect it would have on the future processing of the DCA Trust application. On 14 June 2013, DCA Trust submitted a letter to various ICANN Board members and staff regarding its dissatisfaction with the NGPC decision (the "DCA Trust Letter" or "Letter"). DCA Trust then, on 19 June 2013, submitted the formal Request.

III. DCA Trust's Request for Reconsideration.

DCA Trust seeks reconsideration of the ICANN Board's 4 June 2013 decision (through the New gTLD Program Committee) to accept the GAC Advice on DCA Trust's application

for .AFRICA. DCA Trust suggests that the NGPC should have consulted with and considered the inputs of an independent expert prior to taking the decision on whether to ultimately approve or disapprove DCA Trust's application. DCA Trust requests that the NGPC's decision be reversed and that the NGPC consult with independent experts prior to taking further action on DCA Trust's application.

IV. Stated Grounds For The Request.

The stated grounds for the Request are as follows: (i) the GAC Advice corresponds with Objections under the Program; therefore, the Board should have consulted with independent experts such as those designated to hear objections prior to taking this decision; and (ii) the prescribed procedure for addressing GAC Advice was not complied with because an independent expert was not consulted; thus, without this "key procedural pathway" being followed, the "insinuation of finality" is not appropriate.

A. DCA Trust suggests that consultation with independent experts would have provided additional material information to NGPC.

DCA Trust suggests that the NGPC acted without the material information that it would have been provided in consultation with independent experts. In its Request, DCA Trust states that because the NGPC did not consult independent experts prior to making the decision on the GAC Advice, NGPC's consideration "was not thorough." (Request, Page 4.)

B. DCA Trust notes potential procedural violations in the NGPC decision.

DCA Trust also raises a procedural issue stemming from the NGPC's not consulting with an independent expert prior to accepting the GAC's advice on the .AFRICA string. DCA Trust states that because the GAC Advice section is within the "Objection" portion of the Applicant Guidebook, the GAC Advice is therefore properly characterized as "GAC Objection Advice."

Because it is “Objection” Advice, notes DCA Trust, independent experts designated to hear objections in the New gTLD Program, should have been consulted prior to the decision. According to DCA Trust, such consultation would have been the “necessary discretion” for the NGPC to take in this decision. (DCA Trust Letter, at Page 4.)¹

C. How DCA Trust will be adversely affected.

DCA Trust explains that if the NGPC decision is allowed to stand, DCA Trust will effectively lose its status as an applicant in the New gTLD Program and will not be able to proceed. DCA Trust also indicates that its business partners will be disappointed with this outcome. (Request, Page 3.)

V. Request for Stay.

DCA Trust does not request a stay.

VI. Analysis of the Request.

Based upon the record set forth in the Request and in the documentation provided, it is our opinion that DCA Trust has not sufficiently stated a request for reconsideration of this matter. While DCA Trust has identified the type of material information that it believes the NGPC should have considered prior to taking its decision on DCA Trust’s application, DCA Trust has not identified what that information would have provided to the NGPC, nor that it would have changed the decision taken. Further, in its response to GAC Advice, DCA Trust had an earlier

¹ The DCA Trust Letter, submitted on 14 June 2013, sought an appeal of the NGPC decision. (DCA Trust Letter, at Page 3.) While there is no mechanism for such an appeal, DCA Trust clarifies that the discussion provided in the DCA Trust Letter describes the grounds for Reconsideration. Where appropriate, the Letter is cited in this Recommendation. The DCA Trust Letter also provides explanation for why DCA Trust did not elect to pursue a Request for Independent Review at this time. This discussion is not necessary to the Reconsideration Request. It is important to note, however, that the Independent Review Process has timelines that are independent from the Reconsideration Process, and the use of one of ICANN’s accountability processes does not provide any grounds for tolling (or the delay of filing requirements) for other available processes.

opportunity to request that the NGPC seek advice from independent experts, but it remained silent on this point.

Further, assuming a Board decision could be reconsidered based upon a claim that the Board did not follow the correct process in making that decision (although this is not a ground for Reconsideration), DCA Trust's Request does not demonstrate that the NGPC took action without following the correct process. Instead, DCA Trust relies upon a discretionary clause in an attempt to require the NGPC to follow that process even when it may not be, and in this case was not, deemed necessary by the NGPC.

Finally, the BGC has reviewed the briefing materials presented to the NGPC in advance of the 4 June 2013 meeting, as well as the rationale for the decision and the minutes of the meeting, and the material information from both the GAC and DCA Trust was available and considered prior to the NGPC's decision. As DCA Trust had an opportunity to, and did not identify, additional material information prior to the NGPC decision, the BGC has determined that the NGPC considered all material information. As noted within the rationale, the NGPC reviewed the GAC advice as well as the DCA Trust's response to that GAC advice, and no further material information was identified for the NGPC prior to the 4 June 2013 decision.

A. DCA Trust has not identified material information that was not considered.

In order for DCA Trust to state a Request for Reconsideration of a Board action, it must: (1) identify information that the Board had available to it that it did not consider; and (2) identify that the information would be material to the decision. In the event that the Board did not have the information, DCA Trust must explain why it did not provide that information to the Board in advance of the decision that is being challenged. DCA Trust's Request does not satisfy these requirements. In its Request, DCA Trust identifies only the type of information that is missing –

input from independent experts such as those designated to hear objections in the New gTLD Program. DCA Trust does not even suggest that the discretionary use of an independent expert would result in a different outcome on their application; rather, DCA Trust suggests that such advice should have been secured prior to making a decision on the .AFRICA application. Even if we assume this advice could provide material information to the Board, the absence of any indication that the outcome would be different causes concern in the utility of hearing this Request.

B. There is no requirement to seek input from independent experts in this situation, therefore no material information was missing.

DCA Trust's Request suggests that there is a requirement that the Board seek the advice of an independent expert if GAC "Objection" Advice is issued.² In that instance, DCA Trust's assertion could be interpreted to suggest that if there was a requirement to obtain expert advice, the materiality of the advice that the expert would provide could be assumed. DCA Trust's interpretation of the Applicant Guidebook to require the Board to seek advice is, however, not accurate. Section 3.1 of the Applicant Guidebook states "[t]he Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures." This permissive language ("may") does

² Part of DCA Trust's argument on this point is that because the GAC Advice section is in Module 3 to the Applicant Guidebook on Objection Processes, the GAC Advice must then be subject to the third party dispute resolution processes set out within that module. (Request, page 5 ("If the GAC Objection Advice against our application corresponds to the standard of an Objection under the new gTLD process, then it should be treated based on established new gTLD Program criteria.") A plain reading of the Applicant Guidebook does not support DCA Trust's interpretation, as the Module clearly states that there are "two types of mechanisms that may affect an application: I. The procedure by which ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors... [and] II. The dispute resolution procedure triggered by a formal objection to an application by a third party." (Guidebook, page 3-2.) The Module proceeds to discuss each mechanism separately, and sets out the specific processes for each. There is no language within the Applicant Guidebook that would support DCA Trust's notion that GAC Advice must be subject to dispute resolution processes.

not require the Board to seek the advice of independent experts when considering GAC advice on individual strings. While seeking advice is surely an avenue that the NGPC could have taken when considering the GAC Objection Advice on .AFRICA, the plain language of the Applicant Guidebook does not support the suggestion that the NGPC violates its process, and therefore makes a decision without material information, when it does not seek the input of an independent expert.³ The only requirement that must be followed when the Board receives GAC advice on a particular string – such as .AFRICA – is to publicly post the advice, to allow the applicants a 21-day response period after posting, and to consider the advice as soon as practicable. ICANN did each of these things. The Applicant Guidebook was followed.

It is also important to note that DCA Trust seems to recognize the discretionary nature of the Applicant Guidebook language on this point. Part of the basis of its Request is that the NGPC “failed to exercise the necessary amount of discretion” in not seeking this advice. The fact that even DCA Trust recognizes that seeking independent expert advice is not required – but just an avenue DCA Trust wishes had been utilized – shows that we cannot infer that any process violation occurred or necessary information was missing.

C. DCA Trust had the opportunity, but did not raise the issue of independent expert advice.

One of the foundations of the Reconsideration Process is that a Requester cannot hold back information that it believes is material and then seek to use that same information as a basis

³ DCA Trust also relies upon a letter submitted by Erik Wilbers on behalf of WIPO as supportive of DCA Trust’s arguments. The 9 March 2011 letter (at <http://www.icann.org/en/correspondence/wilbers-to-board-09mar11-en.pdf>) makes reference to the propriety of a “closer look by a neutral” in an unrelated instance. DCA Trust relies on this opinion both for the purpose of justifying the need to seek independent expert advice from a neutral in this instance and to stress that it believes that an appeals process should be available in regards to the NGPC decision on its application. (DCA Trust Letter, at Page 4.) The Wilbers letter, addressing a suggestion of an appeals process under the Uniform Rapid Suspension system, does not demonstrate that ICANN was bound to seek the advice of an independent expert upon the receipt of GAC “Objection” Advice.

for reconsideration after a Board decision. Here, prior to consideration of the GAC “Objection” Advice on .AFRICA, DCA Trust took the opportunity to provide ICANN with a response to that advice. Within that 14-page response (available at <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf>), DCA Trust did not mention its position that the NGPC should seek the advice of an independent expert prior to considering the GAC Advice. While such a recommendation by DCA Trust in its applicant response would not be dispositive of the Request due to the permissive language in the Applicant Guidebook on this topic, DCA Trust could have at least raised the suggestion that it believed there was more information that the NGPC should seek prior to making a decision. DCA Trust’s silence on this point in the one submission authorized prior to NGPC consideration of the GAC Advice does not support its Request.

As DCA Trust had the opportunity to identify additional information that it believed to be material to the consideration of GAC Advice, and did not do so, DCA Trust cannot now say that the NGPC failed to consider material information. In fact, the NGPC considered all material information before it, including the GAC Advice and DCA Trust’s response to that GAC Advice, prior to taking its 4 June 2013 decision.

VIII. Recommendation And Conclusion.

The BGC has determined that DotConnectAfrica (DCA Trust) has not stated proper grounds for reconsideration. Accordingly we recommend that DCA Trust’s Request be denied and the Request not be considered further. We recognize that upholding the 4 June 2013 decision of the New gTLD Program Committee will have great impact on DCA Trust, and this decision is not taken lightly. However, we cannot authorize deviations from process or mandate that discretionary actions now be required in an attempt to further any individual application,

particularly when there is no indication that such discretionary actions will have any impact on the ultimate conclusion. Finally, the record shows that all material information was considered in taking this decision.