

**ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2013-08-13-XX**

**TO:** ICANN New gTLD Program Committee

**TITLE:** Reconsideration Request 13-4

**PROPOSED ACTIONS:** For Committee Consideration and Approval

**EXECUTIVE SUMMARY:**

On 19 June 2013, DotConnectAfrica Trust (“DCA Trust”), through Sophia Bekele, submitted a reconsideration request (“Request”) seeking reconsideration of the Board action (through the New gTLD Program Committee (“NGPC”)) of 4 June 2013 regarding DCA Trust’s new gTLD application for .AFRICA. The BGC considered DCA Trust’s Request at its 14 July 2013 meeting in Durban, and again at its 1 August 2013 meeting, and concluded that DCA Trust has not stated proper grounds for reconsideration. The BGC recommended to the NGPC that the Request be denied and that no further action be taken in response to the Request.

**BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:**

The BGC recommends that Reconsideration Request 13-4 be denied and that no further action be taken in response to the Request. As detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that Request 13-4 fails to state any grounds that support reconsideration.

**PROPOSED RESOLUTION:**

Whereas, DotConnectAfrica Trust’s (“DCA Trust”) Reconsideration Request, Request 13-4, sought reconsideration of the Board action (through the New gTLD Program Committee) on 4 June 2013, accepting advice from ICANN’s Governmental Advisory Committee regarding DCA Trust’s new gTLD application for .AFRICA, and determining that this particular new gTLD application will not be approved.

Whereas, the BGC considered the issues raised in Reconsideration Request 13-4.

Whereas, the BGC recommended that Reconsideration Request 13-4 be denied because DCA Trust has not stated proper grounds for reconsideration.

Resolved (2013.08.13.xx), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-4, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dca-trust-01aug13-en.pdf>.

**PROPOSED RATIONALE:**

ICANN's Bylaws call for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, section 3 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Reconsideration Request 13-4 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

This Request asserted that the NGPC should have consulted with and considered the inputs of independent experts before acting on advice from the Governmental Advisory Committee ("GAC") regarding DCA Trust's new gTLD application. The Request calls into consideration: (1) whether the NGPC was required to consult with independent experts prior to making the decision on the GAC Advice on DCA Trust's application and whether consultation with independent experts would have provided additional material information to the NGPC; and (2) whether the prescribed procedure for addressing GAC Advice in the Applicant Guidebook for the New gTLD Program was not complied with because the NGPC did not consult with independent experts in considering GAC Advice.

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachments, as well as the briefing materials presented to the NGPC in advance of its 4 June 2013 decision, the rationale for that decision, the minutes of that meeting, and the

material information from both the GAC and DCA Trust that was available and considered prior to the NGPC's decision. The BGC concluded that DCA Trust failed to adequately state a Request for Reconsideration of Board action because they failed to identify any material information that was not considered by the NGPC. The BGC noted that DCA Trust does not suggest in the Request that the discretionary use of an independent expert would have resulted in a different outcome on their application. The BGC further concluded that, as DCA Trust had an opportunity to provide additional information in their response to the GAC Advice, but remained silent on this point, the NGPC considered all material information in making its 4 June 2013 decision.

In consideration of the second issue, the BGC determined that DCA Trust's interpretation of the Applicant Guidebook to require the Board to seek advice is not accurate. Section 3.1 of the Guidebook provides with Board the discretion to seek the input of an independent expert when considering GAC advice, but does not obligate the Board to do so. Accordingly, the BGC concluded that the plain language of the Guidebook does not support the suggestion that the NGPC violated its process, and therefore made a decision without material information, when it did not seek the input of an independent expert.

In addition to the above, the full BGC Recommendation that can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dca-trust-01aug13-en.pdf> and that is attached to the Reference Materials to the Board Submission supporting this resolution, shall also be deemed a part of this Rationale.

Although not detailed in DCA Trust's Request, and therefore not specifically discussed in the BGC Recommendation, the NGPC also considered DCA Trust's claim that because the designated Kenyan GAC Representative disclaimed the GAC Advice on DCA Trust's application, GAC Advice is in question. DCA Trust's communications on this topic were sent to ICANN and the GAC Chair. As the Board has not received any notice of change from the GAC regarding its advice on this application, DCA Trust's assertions on this topic do not provide any grounds for modification of the decision on Reconsideration Request 13-4.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel

Dated Noted: 7 August 2013

Email: amy.stathos@icann.org

**REFERENCE MATERIALS TO NEW gTLD PROGRAM COMMITTEE  
SUBMISSION 2013.08.13.2c**

**TITLE: Reconsideration Request 13-4**

**Summary Background**

While the full background can be found in the documentation attached to this Annex, the 19 June 2013 Reconsideration Request 13-4, brought by DotConnectAfrica Trust (DCA Trust), through Sophia Bekele (“Request”), seeks reconsideration of the Board action (through the New gTLD Program Committee (“NGPC”)) of 4 June 2013 regarding DCA Trust’s new gTLD application. DCA Trust claims that the NGPC should have consulted with and considered the inputs of an independent expert prior to taking the decision on whether to accept the GAC advice and 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.

The Board Governance Committee found that none of the grounds identified in the Request were sufficient to support reconsideration. 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 existing material information, DCA Trust must explain why it did not provide that information to the Board in advance of the decision that is being challenged. The BGC determined that, while DCA Trust’s Request identifies the type of material information that it believes the NGPC should have considered prior to taking its decision on DCA Trust’s application (i.e. input from independent experts), DCA Trust has not identified what that information would have provided to the NGPC, nor that it would have changed the decision taken.

The BGC further concluded that DCA Trust had an earlier opportunity to request that the NGPC seek advice from independent experts in its response to the GAC Advice at issue, but it remained silent on this point. The BGC noted that, prior to consideration of the

GAC 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 suggest that the NGPC should have sought 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, but failed to raise the suggestion that it believed there was more information that the NGPC should seek prior to making a decision.

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), the BGC concluded that 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. 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 not require the Board to seek the advice of independent experts when considering GAC Advice on individual strings. The plain language of the Applicant Guidebook does not support the suggestion that the NGPC violated its process, and therefore made a decision without material information, when it did not seek the input of an independent expert. Accordingly, the BGC determined that all material information was considered by the NGPC in making the 4 June 2013 decision.

### **Document/Background Links**

The following attachments are relevant to the BGC's recommendation regarding DCA Trust's Reconsideration Request 13-4.

Attachment A is [Reconsideration Request 13-4](#).

Attachment B is [Attachments to Request 13-4](#).

Attachment C is the BGC's [Recommendation on Reconsideration Request 13-4](#).

Submitted by: Amy A. Stathos  
Position: Deputy General Counsel  
Date Noted: 30 September 2013  
Email: [amy.stathos@icann.org](mailto:amy.stathos@icann.org)

## 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](mailto:reconsideration@icann.org).

### 1. Requester Information

Name: [DotConnectAfrica Trust](#)

Address, email and phone number redacted.

[Redacted]

acer 6/18/13 10:22 AM

Deleted:

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

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

Board action/inaction



\_\_\_ **Staff action/inaction**

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

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

[The Resolution No. is 2013.06.04.NG01. The Board Meeting was supposedly held on June 4, 2013.](#)

[A public announcement was made on 6<sup>th</sup> June 2013 to inform the ICANN Global Community that the ICANN Board has approved the Consideration of Non-Safeguard Advice in the GAC's Beijing Communiqué re: 'NPGC Adopts Resolution Accepting Nine Items of GAC Beijing Advice on new gTLDs'. We specifically note the statement: 'the NGPC adopts the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué" \(4 June 2013\), attached as Annex 1 to this Resolution, in response to the items of GAC Advice in the Beijing Communiqué as presented in the scorecard.' Please see <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm> for more information.](#)

**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.)

[The resolution was publicly posted on June 6, 2013 following the meeting that was supposedly held on June 4, 2014](#)

**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.)

[7<sup>th</sup> June 2013 from the ICANN Web Site and so far, 15 days has not yet elapsed.](#)

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

[The NGPC accepted the GAC Objection Advice against our application for .Africa new gTLD ID: 1-1165-42560 and have indicated that our application will not be approved. This decision has advised ICANN staff that our application will not be approved, and as such, will put our application out of contention for the .Africa new gTLD name string, and will mean that as an applicant, we are out of the](#)

[ICANN new gTLD Program.](#)

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

[The supporters and business partners of DCA Trust are quite disappointed by the decision.](#)

**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.)

[A fuller explanation is contained in the attached letter dated 14<sup>th</sup> June 2013 which we are also submitting as a supporting document to this completed reconsideration form.](#)

Our request for reconsideration is made pursuant to the relevant provision(s) in the ICANN Bylaws. The adoption of the Board Resolution (2013.04.06.NG01) by the ICANN NGPC on the Non-Safeguard Advice in the Beijing GAC Advice on new gTLDs, resulted in a decision not to approve our new gTLD application for the .Africa name string (Application ID: 1-1165-42560). The NGPC Response (as per Item No. 1 of Annex 1 of the NGPC Scorecard of 1As) to the GAC advice recommended that the applicant (in this case, DCA Trust) should withdraw its application “or seek relief according to ICANN’s accountability mechanisms (See ICANN Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.”

In trying to understand what the ICANN New gTLD Program Committee has done, we consulted the following documents:

- a. The Board Resolution (2013.06.04.NG01) and the rationale for the decision that was taken as conveyed in the Board Resolution.
- b. The current version of the new gTLD Applicants Guidebook, by paying particular attention to all the likely actions as stipulated therein, that may be embarked upon by the ICANN Board in dealing with GAC Advice.
- c. The GAC Advice Framework as published by the ICANN NGPC.
- d. Updates on the GAC Advice published by ICANN regarding the work of the New gTLD Program Committee and how the GAC Advice was being processed and handled.
- e. Utilized the GAC Scorecard Framework established between the ICANN GAC and ICANN Board in Brussels on February 28<sup>th</sup> 2011 and 1<sup>st</sup> March 2011.
- f. The expert opinion by Mr. Erik Wilbers of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center detailing some ‘Observations in Connection with GAC Scorecard on Rights Protection and Corresponding ICANN Board Questions’. This information is readily available in the correspondence section of the ICANN web site.
- g. The ICANN Bylaws (11 April 2013 version) available from the ICANN web site.

We considered the Board Resolution and the options of accountability available to us, and decided to first of all make a request for the decision to be rescinded and reconsidered. By applying the necessary legal principles against the decision, we concluded that the decision was unfair and inequitable and was not based on the proper application of the principles of natural justice and the rule of law. If these principles are upheld, then the ICANN Board Decision seriously violates the relevant provisions of the ICANN Bylaws.

In addition to the principles, we also disagreed with the decision because we believe that the process that led to the NGPC consideration of the GAC Objection Advice against our application was not thorough which therefore led to a decision that was not taken in good faith.

*In considering the ICANN new gTLD Applicant Guidebook provisions stipulated in Module 3, Section 3.1, regarding GAC Advice and how GAC Advice would be considered, and the range of likely actions that would be performed by the ICANN Board when considering GAC Advice, we believe that the ICANN Board deviated from its process, and did not perform a certain*

*important step (procedure) that was necessarily required as per the new gTLD Applicant Guidebook when considering GAC Advice.*

*We have principally pivoted our argument on the following stipulation in Section 3.1, Module 3, of the Guidebook, viz:*

*“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.**”*

*Indeed, it is our very strong belief that the ICANN Board should have consulted Independent Experts as per Guidebook stipulations. We have concluded that the Board Decision did not take into account the need to subject the GAC Advice and our Response submitted to the ICANN Board to an independent expert determination as stipulated in the Guidebook.*

*In our opinion, it is quite evident that the new gTLD Program Committee failed to exercise the necessary amount of discretion as a required procedure when dealing with GAC Advice, thereby deviating from its agreed process. In this case, we believe that the Guidebook provisions are clear enough and should be treated as sacrosanct; therefore, there is really no need for ICANN to deviate from its agreed processes in coming to a decision.*

*We hereby challenge the insinuation of finality conveyed in the decision which cannot be presently justified against the backdrop that a key procedural pathway outlined in the Guidebook has not been followed by the new gTLD Program Committee in considering the GAC Advice and the Response to GAC Advice submitted by DCA Trust to the ICANN Board.*

Therefore, we wish to reiterate our enduring position that the New gTLD Program Committee (acting as the ICANN Board or on behalf of the ICANN Board) should have exercised due discretion and acted in good faith by consulting first with independent experts, who are the recognized/approved subject matter specialists in New gTLD Dispute Resolution Procedures, especially in our case “where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.” There is no provision within the Guidebook that empowers the ICANN Board or its New gTLD Program Committee to take a final decision on a matter relating to an Objection.

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. Whilst the A1 scorecard is outside the new gTLD Program Guidebook, and is rather extraneous to the provisions enshrined in Section 3.1 of Module 3 of the new gTLD Program Guidebook, we believe that the entire provisions contained in Section 3.1 of Module 3 regarding consultation with independent experts should have been adhered to before the decision was taken.

Consequently, the recommendation in the NGPC Response that we should “seek relief according to ICANN’s accountability mechanisms (See ICANN Bylaws, Articles IV and V)” as contained in the NGPC Response to GAC Advice should now be utilized by ICANN to reconsider its decision based on ‘Section 2 - RECONSIDERATION’ of Article IV of the Bylaws, by taking into account, all the procedural steps specified in the Guidebook regarding how to deal with GAC Advice.

We therefore insist that the entire decision should be re-evaluated and immediately reconsidered, and an independent expert consulted first before the GAC Objection Advice regarding our application and our Response to GAC Objection Advice are deliberated upon by the ICANN NGPC. In a nutshell, we believe that the outcome of a determination process by an independent expert designated to hear objections in the new gTLD Dispute Resolution Procedure must be a required input into the decision regarding whether to approve or not approve our application.

In reading through the Board Resolution No. 2013.06.04 and the Rationale (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm>), and the actions that were taken, including who was consulted (“Which stakeholders or others were consulted?”), we note that an independent expert on new gTLD Dispute Resolution was not consulted, and this should therefore be the basis for approving this request for reconsideration so that the decision as it presently stands is not allowed to prevail and constitute a serious miscarriage of justice that would frustrate our new gTLD aspirations.

## **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?)

The decision should be reversed, and our application reinstated under the new gTLD Program, and the GAC Advice decision reconsidered after all likely actions have been taken into consideration according to the Guidebook provisions such as seeking the advice of Independent Experts as per Section 3.1 of Module 3 of new gTLD Applicant Guidebook. Specifically, we expect the Board to first of all 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. In a nutshell, we are asking the Board to take necessary corrective action based on the due process provisions enshrined in the Applicant Guidebook regarding GAC Advice for cases like ours – a GAC Objection Advice - which correspond to Objections under 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 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.)

[DCA Trust has standing to ask for reconsideration as a directly affected party. It is the named applicant for the new gTLD in question. The justification for requesting the reconsideration is our strong belief that independent experts were not consulted by the ICANN Board in dealing with the GAC Advice relating to our application, and our Response to the GAC Advice. We believe that a prescribed procedure was not followed, and as such the Board deviated from its process indicated in the new gTLD Applicant Guidebook.](#)

[A decision by the NGPC that our application will not be approved is injurious to our application, and frustrates our new gTLD Program aspirations. A lot of time, effort, and resources have been expended in preparing and submitting the application, and responding to issues that have arisen such as clarifying questions and defending threats of community objection, etc. Apart from incidental costs, and fees paid to third parties for service agreements, we have paid the application evaluation fees to ICANN at the time of submitting our application, and also covered costs for setting-up a Registry continued Operations Instrument that is, financial reserves to support critical registry functions over a 3-year operations that is valid for 5 years as per ICANN requirements. A summary decision not to approve our application will make us suffer a lot of damages in addition to the frustration of our aspirations. A reversal of the NGPC decision will mitigate these damages and enable us recover our position as a new gTLD applicant.](#)

**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.**

**Not Applicable**

**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>.

[See attached letter to ICANN dated 14th June 2013](#)

[Other documents referred to are stored on the ICANN Web Site](#)

### **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.

*Stebele*

June 19, 2013

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Signature

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Date





June 14, 2013

The Chief Executive Officer  
Internet Corporation for Assigned Names & Numbers (ICANN)  
4676 Admiralty Way, Suite 330  
Marina Del Rey, CA 90292-6601  
United States of America

**Copy to: Dr. Steven Crocker, Chairman of the ICANN Board of Directors**

Dear Sirs,

**Subject: Request for Immediate Reconsideration of the ICANN Board Decision regarding our .Africa new gTLD Application (ID. 1-1165-42560) and Our Response to the New gTLD Program Committee Resolution (No. 2013.06.04.NG01)**

We wish to refer to your recent public announcement on 6<sup>th</sup> June 2013 to inform the ICANN Global Community that the ICANN Board has approved the Consideration of Non-Safeguard Advice in the GAC's Beijing Communiqué re: 'NGPC Adopts Resolution Accepting Nine Items of GAC Beijing Advice on new gTLDs'<sup>1</sup>. We specifically note the statement: 'the NGPC adopts the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué" (4 June 2013), attached as Annex 1 to this Resolution, in response to the items of GAC Advice in the Beijing Communiqué as presented in the scorecard.'

DotConnectAfrica Trust (DCA Trust) has gone through the Resolution (2013.06.04.NG01) and the accompanying Annex, and, as a directly affected party, hereby wish to communicate as follows:

- i. We disagree completely with the decision taken by the NGPC (acting as the ICANN Board), regarding our New gTLD application for .Africa (1-1165-42560) that has been conveyed in your Board Resolution dated 4<sup>th</sup> June 2013.
- ii. We would like you to rescind the decision, and reconsider with a view to reinstating our application under the ICANN New gTLD Program.
- iii. We believe that the process that led to the decision was not thorough, and not conscientious enough, and that the resulting decision was not taken in good faith.
- iv. We also believe that the NGPC deviated from its process, and did not perform a certain important step (procedure) that was necessarily required as per the new gTLD Applicant Guidebook when considering GAC Advice. In our estimation, the process used by the NGPC therefore seems arbitrary and lacked the necessary thoroughness required in considering a weighty decision with serious ramifications for an application that was submitted by a new gTLD applicant.
- v. We believe that the NGPC has not taken into account, the need to exercise utmost discretion and apply the principles of natural justice, and the rule of law in reaching its decision as per earlier GAC recommendations/exhortations to the ICANN Board.

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<sup>1</sup> See <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm>



- vi. We think that the decision was taken with undue haste, and this has led to the obvious lack of conscientiousness. For example, according to the published updates (Re: 'NGPC Progress on GAC Advice'), [the ICANN Public Announcement on May 10 2013](#) conveyed the notion that 'Part 2 of the Plan' – that is, the *"actions for responding to each advice given by the GAC - is not yet finalized and, with respect to some of the advice, cannot be finalized until after the review of the Public Comments due to be completed on 20 June"*. We note that the Board action on the GAC Advice relating to our application was taken on June 4, 2013; more than 2 weeks ahead of the anticipated completion date.
- vii. We believe that the insinuation of finality regarding the decision is uncalled for at this stage, and should now be set aside, whilst steps are taken forthwith by the ICANN Board to reconsider the decision and immediately act to ameliorate as per the Applicant Guidebook provisions.
- viii. We have no intention of withdrawing our application against the backdrop that we rightly believe that the Board decision is injudicious, very wrong and injurious to our application and to our organizational aspirations. We are placing faith in the possibility that this particular communication will serve the purpose of causing the ICANN Board to have a rethink, and see the wisdom in allowing DCA Trust to continue to participate in the new gTLD Program without the necessity of going to an Independent Review Process (IRP) Panel to challenge the ICANN Board Decision which we presently disagree with in the most absolute terms.

### **Documents Consulted:**

In trying to understand what the ICANN New gTLD Program Committee has done, we have consulted the following documents:

- a. The Board Resolution (**2013.06.04.NG01**) and the working methodology that was used by the New gTLD Program Committee to arrive at the decision in question; and whether the decision conveyed in the resolution as it appertains to our application, conformed to the procedures enshrined in the new gTLD Applicants' Guidebook. In other words, we tried to ascertain for ourselves whether the New gTLD Program Committee has acted in conformity with the stipulated processes that have been clearly indicated in the new gTLD Program Guidebook.
- b. The current version of the new gTLD Applicants Guidebook, and relevant amendments published by ICANN, as the only guiding framework based on set (agreed) policy within the new gTLD Program. We understand that the provisions of the Guidebook have been rendered in plain language without any room for misinterpretation or ambiguity, and that these provisions can be broadly applied with a certain amount of exactitude and predictability. In referring to the Guidebook, we have paid particular attention **to all the likely actions as stipulated therein**, that may be embarked upon by the ICANN Board in dealing with GAC Advice<sup>2</sup>.
- c. The GAC Advice Framework<sup>3</sup> as published by the New gTLD Program Committee of the Internet Corporation for Assigned Names and Numbers.
- d. Updates on the GAC Advice published by ICANN regarding the work of the New gTLD Program Committee and how the GAC Advice was being processed and handled.<sup>4</sup>

<sup>2</sup> Specifically, Module 3 of the Applicant Guidebook (2012-06-04) version available at: <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

<sup>3</sup> See <http://newgtlds.icann.org/en/applicants/gac-advice/framework-22may13-en.pdf>



- e. Utilized the GAC Scorecard Framework established between the ICANN GAC and ICANN Board in Brussels on February 28<sup>th</sup> 2011 and 1<sup>st</sup> March 2011, which are stored in the ICANN web site as the [Dengate Thrush-Heather Dryden correspondence](#) documenting the Board/GAC Brussels meeting.
- f. The expert opinion communicated by Mr. Erik Wilbers of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center who had proffered an opinion that was circulated to members of the ICANN Board following the Brussels meetings. Please see '[Letter from Erik Wilbers to the ICANN Board](#)' dated 9<sup>th</sup> March 2011 that is available on the ICANN Web Site. This letter from the WIPO Arbitration and Mediation Center details some '**Observations in Connection with GAC Scorecard on Rights Protection and Corresponding ICANN Board Questions**', and is highly relevant to the Guidebook provisions on the likely actions to be taken by the ICANN Board when considering GAC Advice.
- g. Referred to existing records of past Independent Review Process (IRP) Panel proceedings that took place between ICANN and other third parties based on documents that are also publicly available from the ICANN web site.<sup>5</sup>
- h. The [ICANN Bylaws \(11 April 2013 version\)](#) available from the ICANN web site.

### **Legal Principles Constituting the Bases for this Appeal to the Board to Reconsider its Decision:**

The bases for asking the ICANN Board to reconsider its decision are anchored on the following basic principles, viz:

- I. We cite the principles of equity and fairness that should pertain to Board Decision as enshrined in the ICANN By-Laws. (The By-Laws specify that *"ICANN shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."* ICANN is to operate in an open and transparent manner *"and consistent with procedures designed to ensure fairness"* (Article III, Section 1.)
- II. We cite the principle for the Board to always act on the basis of natural justice and rule of law, as gleaned from the exhortation contained in the ICANN Board/GAC Brussels Transactions wherein it is stated that: *"the GAC expects that ICANN will continue **to adhere to the rule of law and follow broad principles of natural justice**. For example, if ICANN deviates from its agreed processes in coming to a decision, the GAC expects that ICANN will provide an appropriate mechanism for any complaints to be heard."*<sup>6</sup>
- III. We cite the statement contained in the Guidebook regarding what happens in case of any GAC Advice as per Module 3 of the Applicant Guidebook, June 4, 2012 version. This should be treated as a codified principle of the ICANN New gTLD Program with the appropriate legal weight in terms of its substantiality.

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<sup>4</sup> See for example, <http://www.icann.org/en/news/announcements/announcement-22may13-en.htm>

<sup>5</sup> See <http://www.icann.org/en/news/irp>

<sup>6</sup> See the documentation of the ICANN Board/GAC Brussels 2011 meetings as contained in the [Dengate Thrush-Heather Dryden correspondence](#) which is available on the ICANN web site.



- IV. Regarding an Appeals process for decisions, we also cite the statement contained in the WIPO Opinion that was shared with the ICANN Board: *“The perceived need for an appeals process calls into question the need for substantive determination by an examiner in a “first round”; in any event, for an appeal to add value in this context, it should not be a second (or indeed third) bite at the apple, but should instead offer a closer look by a neutral on an appropriately corresponding standard.”*<sup>7</sup>

***The Board should have consulted Independent Experts as per Guidebook stipulations:***

We have concluded that the Board Decision did not take into account the need to subject the GAC Advice and our Response submitted to the ICANN Board to an independent expert as stipulated in the Guidebook. For ease of reference, we have reproduced the entire section viz:

*“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.**”*

In our opinion, it is quite evident that the New gTLD Program Committee failed to exercise the necessary amount of discretion as a required procedure when dealing with GAC Advice, thereby deviating from its agreed process. In this case, we believe that the Guidebook provisions are clear enough and should be treated as sacrosanct; therefore, there is really no need for ICANN to deviate from its agreed processes in coming to a decision.

Our understanding is that, ‘the closer look by a neutral’ as encouraged by the 2011 opinion of the WIPO Arbitration and Mediation Center to the ICANN Board is equivalent to consultation with ‘independent experts’, whilst the ‘appropriate corresponding standard’ is equivalent to how the GAC Objection Advice against our .Africa application should have been treated as an ‘Objection’ to be heard in the New gTLD Dispute Resolution Procedure; in which case the opinion of the Independent Expert should have been sought by the ICANN Board regarding our Response to the GAC Objection Advice before any decision was taken by the ICANN New gTLD Program Committee. Against the backdrop that the New gTLD Program Committee had already tacked a “1A” label against our application, thus indicating “that the NGPC's proposed (tentative) position appeared to be consistent with GAC Advice as described in the Scorecard”, then the necessary discretion should have been exercised to first of all consult an independent expert (as a neutral party) on the matter before taking a final decision.

This underscores our conviction that the Board Decision is unfair and inequitable, and is something that we cannot live with.

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<sup>7</sup> See [Letter from Erik Wilbers to the ICANN Board](#) dated 9<sup>th</sup> March 2011, already cited.



From a close reading of the GAC Advice Framework, our new gTLD application for .Africa has been classed as an 'Objection' by the ICANN New gTLD Program Committee in line with the [GAC Beijing Communiqué](#) which indicates that a GAC Objection Advice was obtained against our application.<sup>8</sup>

As already cited above, according to the Guidebook, the Board may consult with independent experts such as those designated to hear objections. We believe that our application has received a 'GAC Objection Advice' and this objection is similar to a Community Objection<sup>9</sup>, and the GAC Objection Advice and our Response to GAC Advice should have been subjected first to a review by the International Center of Expertise of the International Chamber of Commerce – where Community Objections are heard – in line with the earlier expert observation on the need for neutral examination expressed by Mr. Erik Wilbers of the WIPO Arbitration and Medication Center to the ICANN Board in 2011.

### ***Our Consideration of the Options Recommended by the ICANN Board in its Decision***

According to item No. 1 in the Annex of ICANN Board Resolution No. 2013.06.04.NG01, the NGPC has responded to the GAC Advice on DCA Trust's .Africa application (ID. 1-1165-42560) by recommending that: *"the applicant may withdraw (pursuant to AGB Section 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."*<sup>10</sup>

We have no intention of withdrawing our application at this stage since we believe that the ICANN Board should rescind its decision. The insinuation of finality conveyed in the decision cannot be presently justified against the backdrop that a key procedural pathway outlined in the Guidebook has not been followed by the new gTLD Program Committee in considering the GAC Advice and the Response to GAC Advice submitted by DCA Trust to the ICANN Board.

Therefore, we wish to reiterate our enduring position that the New gTLD Program Committee (acting as the ICANN Board or on behalf of the ICANN Board) should have exercised due discretion and acted in good faith by consulting first with independent experts, who are the recognized/approved subject matter specialists in New gTLD Dispute Resolution Procedures, especially in our case *"where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures."* There is no provision within the Guidebook that empowers the ICANN Board or its New gTLD Program Committee to take a final decision on a matter relating to an Objection.

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. Whilst the A1 scorecard is outside the new gTLD Program Guidebook, and is rather extraneous to the provisions enshrined in Section 3.1 of Module 3 of the new gTLD Program Guidebook, we believe that the entire provisions contained

<sup>8</sup> See Section IV ('GAC Advice to the ICANN Board') on page 3 of GAC Beijing Communiqué available at <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>

<sup>9</sup> Section 8 'Use of geographic names', item No. 8.1.1.2 in the GAC Scorecard indicates that *"Governments and other representatives of communities will continue to be able to utilize the community objection process ....."* In which case, a GAC Objection Advice would correspond to a Community Objection.

<sup>10</sup> Please see Item No. 1 on page 2 of Annex to NGPC Resolution 2013.06.04.NG01 – NGPC Scorecard of 1As Regarding Non-Safeguard Advice in [crocker-to-dryden-06jun13-en](#) available from the ICANN web site.





in Section 3.1 of Module 3 regarding consultation with independent experts should have been adhered to before the decision was taken.

Consequently, the recommendation that we should “seek relief according to ICANN’s accountability mechanisms (See ICANN [Bylaws, Articles IV and V](#))” as contained in the NGPC Response to GAC Advice is a decision that was not taken in good faith since that outlines a more arduous and less propitious route for DCA Trust. We do not accept the option of seeking accountability elsewhere, for example with an Independent Review Process (IRP) Panel, when the opportunity exists for ICANN to reconsider its decision based on ‘**Section 2 - RECONSIDERATION**’ of Article IV of the Bylaws, by taking into account, all the procedural steps specified in the Guidebook regarding how to deal with GAC Advice.

We therefore insist that the entire decision should be re-evaluated, and an independent expert consulted first before it is even contemplated to recommend that we seek relief according to ICANN’s accountability mechanisms, for example with an Independent Review Process (IRP) Panel.

### ***Why DCA Trust has elected not to Exercise the IRP Panel Option at this stage***

Judging by the dates on the documents relating to the IRP between ICM vs. ICANN, the process lasted from about 6<sup>th</sup> June 2008 to 26<sup>th</sup> March 2010. Another IRP involving ICANN, Manwin Licensing International vs. ICANN, lasted from about 16 November 2011 on the [Notice of Independent Review](#) to May 8 2013 when the process was terminated and settled by a [Joint Letter of Dismissal of IRP](#).

Experience shows that previous IRPs involving ICANN and other parties have taken between 18 to 21 months to resolve. Should DCA Trust choose to embark on this path of accountability as per [Section 3 - INDEPENDENT REVIEW OF BOARD ACTIONS](#) of Article IV of the ICANN Bylaws, within the intervening period, ICANN may reach an official delegation decision to award the .Africa new gTLD mandate to UniForum ZA Central Registry, the other competing applicant in contention for the .Africa new gTLD. On the other hand, if the NGPC had exercised the discretion of seeking the advice of an Independent Expert such as the International Center of Expertise of the International Chamber of Commerce that administers disputes brought pursuant to Community Objections; then the GAC Objection Advice against our application can be necessarily resolved within the same time-frame that has been set for determining Objections with the official Dispute Resolution Service Providers as governed by the New gTLD Program. We therefore elect that the decision should first of all be re-considered instead of seeking accountability with an Independent Review Process Panel. We believe that if our case were treated instead as an Objection as it has been classed in the published GAC Advice Framework, and subjected first to an independent Expert determination as per Section 3.1 of the Applicant Guidebook, this would obviate the need for us to request accountability by an Independent Review Process Panel under the applicable section of the ICANN Bylaws.

We believe that on the basis of DCA Trust’s long-standing tradition of support for ICANN<sup>11</sup> which should account for goodwill, since due process has not been entirely exhausted according to the enshrined provisions

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<sup>11</sup> See for example, <http://www.icann.org/en/correspondence/bekele-to-dengate-thrush-18jan11-en.pdf> which details an Open Letter by Sophia Bekele to the United States National Telecommunications and Information Administration dated 18 January 2011; and also the public advocacy op-ed published in the CircleID web site [http://www.circleid.com/posts/2012\\_the\\_year\\_of\\_the\\_new\\_gtld\\_program\\_and\\_the\\_year\\_to\\_support\\_icann\\_part\\_i/](http://www.circleid.com/posts/2012_the_year_of_the_new_gtld_program_and_the_year_to_support_icann_part_i/) which specifically calls for support for ICANN.



in the Guidebook, a less 'litigious' route should be followed at this early stage: the ICANN Board should rescind its decision and reconsider based on all of the principles outlined above.

Our decision to seek relief according to ICANN's accountability mechanisms at any futurity will be based on the outcome of the re-consideration that we are now requesting.

We might prevail or not prevail after an Independent Expert determination – but we want that at the end of the procedure, our relationship with ICANN should remain in good standing since our organization has already made a lot of investments in participating as a member of the ICANN Global Community over the years.

### **Conclusion**

We hope that on the basis of this appeal, the ICANN Board will now reconsider its decision contained in Resolution (2013.06.04.NG01) and take necessary corrective action to act based on the due process enshrined in the Applicant Guidebook regarding GAC Advice for cases that correspond to Objections under the new gTLD Program.

Thanking you in anticipation as we look forward to following up with ICANN regarding this re-consideration request and the overall procedures and necessary paperwork to be performed in pursuance of our objective.

Most respectfully yours,

*For & On Behalf of DotConnectAfrica Trust*

*Sbekele*

Ms. Sophia Bekele, B.S., M.B.A., CISA, CCS, CGEIT  
DotConnectAfrica Trust (Applicant for the .Africa gTLD) Application ID: 1-1165-42560

### **Other ICANN Officials copied in this Communication:**

cc: Cherine Chalaby, Chair, New gTLD Program Committee  
cc: Susanna Bennett, ICANN Chief Operating Officer  
cc: Akram Atallah, President of ICANN Generic Domains Division  
cc: Robert Antrobus, Director, New gTLD Operations, ICANN  
cc: Christine Willett, General Manager, New gTLD Program  
cc: Heather Dryden, Chair, ICANN Government Advisory Committee  
cc: The Hon. Suzanne Radell, Senior Policy Advisor, US NTIA, Department of Commerce & US Rep. to GAC  
cc: Dr. Olivier Crépin-Leblond, Chair of the ICANN ALAC Executive Committee  
cc: Dr. Tarek Kamel, Sr Advisor to President - Governmental Engagement  
cc: John Jeffrey, ICANN General Counsel & Secretary  
cc: Chris LaHatte, ICANN Ombudsman  
cc: Professor Alain Pellet, Independent Objector for the ICANN new gTLD Program

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

**1 AUGUST 2013**

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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.)<sup>1</sup>

**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

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<sup>1</sup> 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.<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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.