Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit http://www.icann.org/en/general/bylaws.htm#IV and http://www.icann.org/en/committees/board-governance/.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: Schwarz Domains & Services GmbH & Co. KG

Mr. Max Killinger

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

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

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

___ **Board action/inaction**

X Staff action/inaction

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

Schwarz Domains & Services GmbH & Co. KG ("SDS") is the applicant for three generic top-level domains in the context of ICANN's New gTLD Program ("the Program"). In particular, it has applied for the following strings:

- .LIDL (application ID 1-1123-60314 with prioritization number 1569);
- .SCHWARZ (application ID 1-1123-39254 with prioritization number 1442); and
- .SCHWARZGROUP (application ID 1-1123-12611 with prioritization number 122).

SDS has applied for these gTLDs in its own name, but on behalf of the companies owning the trademark rights to LIDL, SCHWARZ and SCHWARZ GROUP.

Recently, the company owning the SCHWARZ and SCHWARZ GROUP brands, Schwarz Dienstleistung KG, has decided to no longer make a distinction between the services rendered under the SCHWARZ and SCHWARZ GROUP brands, and will henceforth only use the trademark SCHWARZ in relation to its activities.

Since SDS has applied for .SCHWARZGROUP in its own name, but for the account of Schwarz Dienstleistung KG, the .SCHWARZGROUP gTLD has – in fact – become useless following the decision taken by the latter company. Considering the fact that significant investments have been made and time spent in applying for the .SCHWARZGROUP gTLD, which would be lost to a large extent if the application would be withdrawn, SDS has requested ICANN to consider an alternative solution: recently, it has obtained the instruction from the company Kaufland Warenhandel GmbH & Co. KG to assist the latter in the future for applying for and managing the .KAUFLAND gTLD.

Schwarz Dienstleistung KG, SDS and Kaufland Warenhandel GmbH & Co. KG are a member of the same overarching corporate structure.

In view of seizing the opportunity of, on the one hand, having a pending application for a gTLD that will have no future use and, on the other hand, the limiting the costs and avoid further significant delays in applying for a new gTLD in a future round, SDS has requested ICANN to consider SDS' request for changing the string for the .SCHWARZGROUP application into .KAUFLAND.

On August 28th 2014 SDS submitted a change request, requesting ICANN to change its answer to Question 13 from .SCHWARZGROUP into .KAUFLAND.

This Change Request was as follows:

"Considering the fact that the company owning the SCHWARZ GROUP brand has decided to no longer actively use this brand as an identifier that is distinctive from SCHWARZ, the applicant is requesting to change the string from .SCHWARZGROUP to .KAUFLAND.

In addition, the applicant would like to emphasize the following:

- *it has also applied for the .SCHWARZ and .LIDL gTLDs, which have both passed initial evaluation. Due an internal (re)branding exercise set out above, .SCHWARZGROUP does no longer have a particular importance for the applicant over .SCHWARZ;*
- *one of the members of the Schwarz organization holds exclusive trademark rights for KAUFLAND, which is one of Europe's most distinctive retail brands, and has requested the applicant whether such well-recognized brand could be reflected as a gTLD in lieu of .SCHWARZGROUP, hence safeguarding the significant investments already made in applying for three gTLDs, and the .SCHWARZGROUP gTLD in particular;*
- *ICANN has not received an application from a third party for the .KAUFLAND gTLD, nor for any confusingly similar gTLD;*
- *therefore, ICANN would not create any contention set that would contain this gTLD string;*
- *ICANN has approved other change requests for the string itself, and is therefore seeking a similar treatment;*
- *if ICANN would like to provide for third parties to object against this change, the applicant is open to provide any third party with the possibility to formally object during a timeframe of three months or even more, considering the objection grounds contained in the Applicant Guidebook;*

Updates to the other relevant answers will be submitted following the approval of this Change Request, wherein – basically – ".schwarzgroup" will be changed into ".kaufland", with all other answers remaining substantially the same."

On August 29th 2014, ICANN informed SDS of the fact that it has rejected SDS' Change Request.

ICANN's email reads as follows:

"Thank you for your inquiry.

Per the Change Request Process, the requested change of your application for the string ".SCHWARZGROUP" to the string ".KAUFLAND" was denied due to the nature of the proposed change.

Requests to change applied-for strings generally are not acceptable. The only exceptions have been in the cases of typographical or otherwise minor errors. As you may recall, the list of applied-for strings was not publicly announced until Reveal Day, in order to prevent applicants from amending their applied-for strings based on submissions from other applicants. In the time since the list of strings was published, changes to applied-for strings (other than the aforementioned corrections to minor errors) have not been accepted. This is in the interest of fairness to all applicants, which is one of the criteria against which change requests are considered, as well as one of the tenets of the Program.

For more information on the change request criteria, please review the information on the New gTLD microsite (http://newgtlds.icann.org/en/applicants/customer-service/change-requests).

If your should require further explanation to the outcome of this case, please open a new case along with any such questions you would like further details on. We will now close this case.

Thank you for your time and patience.

Regards,
New gTLD Customer Service"

Following receipt of this email, SDS has requested ICANN for further information on the reasons for rejecting its change request, but no response has been received for weeks.

On December 15, 2014, SDS submitted a second change request, which was substantially similar to the first change request (collectively: the "Change Request"), with the addition of:

- *"Applicant is requesting ICANN for an in-person discussion in order to determine the most efficient and effective way forward in dealing with this Change Request."*

In January 2015, a conference call was organized between SDS and ICANN, in view of discussing the way forward on this change request. On February 3, 2015, ICANN informed SDS of the fact that it has rejected SDS' Change Request.

ICANN's letter reads as follows:

"This letter is to inform you that the request to modify Questions 13, 16 and 18 of the .SCHWARZGROUP application has been denied. This change request was carefully evaluated according to the criteria listed at

http://newgtlds.icann.org/en/applicants/customer-service/change-requests.

Requests to change applied-for strings are not accepted. The only exceptions have been to correct typographical errors. Because the request under case 148002 is not a typographical correction, and instead is to propose an entirely new string, we cannot approve such a request."

4. Date of action/inaction:

3 February 2015.

5. On what date did you became aware of the action or that action would not be taken?

4 February 2015.

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

The fact that ICANN's staff has not awarded SDS' Change Requests and has not provided sufficient, motivated and clear explanation in relation to the decision that has been taken, it is unclear for SDS on how to proceed (if at all) with its application for the .SCHWARZGROUP gTLD, which entailed a total investment of at least USD 250.000.

For this reason, SDS would like to request ICANN to reconsider its decision in line with this Request for Reconsideration process and ICANN's by-laws.

Insofar and to the extent it would not come to a different conclusion than the decision communicated to SDS, ICANN should provide for an adequate explanation, in particular in view of other decisions taken by ICANN where change requests in relation to the applicant's answer to Question 13 have been accepted.

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

To SDS' knowledge and belief, no third party will be adversely affected by the action or inaction.

Furthermore, SDS is of the opinion that no third party will be affected if ICANN would accept SDS' request to change its answer to Question 13 in Application # ID 1-1123-12611 into .KAUFLAND, as:

a) no gTLD application has been submitted for the .KAUFLAND string;

b) no gTLD application has been submitted for any string in relation to which the .KAUFLAND string could be considered confusingly similar;

c) SDS has specifically requested ICANN to engage into discussions with SDS in view of mitigating risks of third party claims or interests in relation to this string;

d) more in particular, SDS has specifically stated in its Change Request that "*if ICANN would like to provide for third parties to object against this change, the applicant is open to provide any third party with the possibility to formally object during a timeframe of three months or even more, considering the objection grounds contained in the Applicant Guidebook*".

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:

Applicant Guidebook Criteria

SDS refers to Section 1.2.7 of the Applicant Guidebook, which states:

> *"If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant."*

This section of the Applicant Guidebook further states:

> *"ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.*
>
> *Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application."*

ICANN's Change Request Process and Criteria

After the closing of the application window for new gTLDs in 2012, ICANN has published a web page regarding the "Change Request Process and Criteria", in order to allow applicants to notify ICANN of changes to application materials (see: http://newgtlds.icann.org/en/applicants/customer-service/change-requests).

Updates to this process have been made available as recently as September 30, 2014.

In its responses to SDS' Change Requests, ICANN has referred to this Change Request Process and Criteria. However, SDS points out to the following facts:

1) ICANN's Change Request Process and Criteria have not been developed in accordance with ICANN's policy development process;

2) This Change Request Process and Criteria have, to the contrary, been developed after the closing of the application window in Q2 of 2012, which implies that applicants apparently did not have the opportunity to prepare their applications in accordance with a "clear and pre-published process using measurable, transparent and objective criteria", as required by the

GNSO's Principles, Recommendations and Implementation Guidelines.[1]

SDS refers to ICANN's statement that *"[t]he 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"* and notes that this is not applicable to the Change Request Process and Guidelines published by ICANN. ICANN has not proven that its Change Request Process and Guidelines has been approved by the ICANN Board.

Therefore, by evaluating a Change Request against criteria that have not been expressly mentioned in the Applicant Guidebook and which have even been developed after the closing of the application window, ICANN's denial of SDS' Change Requests qualifies as a violation of ICANN's Bylaws and decision-making processes;

3) In denying SDS' Change Request, ICANN has – in addition – utilized other criteria than the ones that are made available at http://newgtlds.icann.org/en/applicants/customer-service/change-requests. More in particular, ICANN has stated that

    a. it would be practically impossible to appoint and bring together independent evaluators in view of evaluating the proposed changes against the criteria set forth in the Applicant Guidebook; and

    b. allowing the changes proposed by SDS would not be fair towards "the community".

    Both criteria have not been listed in the Applicant Guidebook or the Change Request Process and Criteria document.

    Evaluating change requests against criteria that have not been published in the context of the Applicant Guidebook or ICANN's internal processes is, of course, a clear process error on ICANN's behalf.

4) SDS has sufficiently demonstrated that ICANN has approved identical, at least similar, change requests in similar cases. In one particular case, ICANN has even accepted a change request for an applied-for string that caused a direct and material harm to another applicant, as this change created a contention set.

    SDS' Change Request does not have such an effect, as no third party will be directly or indirectly impacted by such change request. Therefore, by rejecting SDS' Change Request, ICANN is treating applicants who are in the same position in a dissimilar way, and is therefore discriminating.

[1] http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf

9. What are you asking ICANN to do now?

On the basis of the above arguments, SDS is requesting ICANN to reverse its decision not to allow SDS' request to change its answer to Question 13 of application ID 1-1123-12611 with prioritization number 122 for .SCHWARZGROUP into .KAUFLAND.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

First of all, SDS would like to reiterate on a number of principles already set out below:

a) Applicant Guidebook Criteria for Change Requests

SDS refers to Section 1.2.7 of the Applicant Guidebook, which states:

> *"If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant."*

This section of the Applicant Guidebook further states:

> *"ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.*
>
> *Failure to notify ICANN of any change in circumstances that would render*

any information provided in the application false or misleading may result in denial of the application."

b) ICANN's Change Request Process and Criteria

After the closing of the application window for new gTLDs in 2012, ICANN has published a web page regarding the "Change Request Process and Criteria", in order to allow applicants to notify ICANN of changes to application materials (see: http://newgtlds.icann.org/en/applicants/customer-service/change-requests).

Updates to this process have been made available as recently as September 30, 2014.

In its responses to SDS' Change Requests, ICANN has referred to this Change Request Process and Criteria. However, SDS points out to the following facts:

1) ICANN's Change Request Process and Criteria have not been developed in accordance with ICANN's policy development process;

2) This Change Request Process and Criteria have, to the contrary, been developed after the closing of the application window in Q2 of 2012, which implies that applicants apparently did not have the opportunity to prepare their applications in accordance with a "clear and pre-published process using measurable, transparent and objective criteria", as required by the GNSO's Principles, Recommendations and Implementation Guidelines.[2]

   Therefore, in developing this Change Request Process and Criteria, ICANN went beyond the mandate provided by the GNSO and the ICANN Board, who approved the New gTLD Program during the Paris Meeting.

   SDS furthermore refers to ICANN's statement that *"[t]he 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"* and notes that this is not applicable to the Change Request Process and Guidelines published by ICANN. ICANN has not proven that its Change Request Process and Guidelines has been approved by the ICANN Board.

   Therefore, by evaluating a Change Request against criteria that have not been expressly mentioned in the Applicant Guidebook and which have even been developed after the closing of the application window, ICANN's denial of SDS' Change Requests qualifies as a violation of ICANN's Bylaws and decision-making processes;

3) In denying SDS' Change Request, ICANN has – in addition – utilized other criteria than the ones that are made available at

[2] http://gnso.icann.org/en/issues/new-gtlds/summary-principles-recommendations-implementation-guidelines-22oct08.doc.pdf

http://newgtlds.icann.org/en/applicants/customer-service/change-requests. More in particular, ICANN has stated that

a. it would be practically impossible to appoint and bring together independent evaluators in view of evaluating the proposed changes against the criteria set forth in the Applicant Guidebook; and

b. allowing the changes proposed by SDS would not be fair towards "the community".

Both criteria have not been listed in the Applicant Guidebook or the Change Request Process and Criteria document.

Evaluating change requests against criteria that have not been published in the context of the Applicant Guidebook or ICANN's internal processes is, of course, a clear process error on ICANN's behalf.

4) SDS has sufficiently demonstrated that ICANN has approved identical, at least similar, change requests in similar cases. In one particular case, ICANN has even accepted a change request for an applied-for string which caused a direct and material harm to another applicant, as this change created a contention set.

SDS' Change Request does not have such an effect, as no third party will be directly or indirectly impacted by such change request. Therefore, by rejecting SDS' Change Request, ICANN is treating applicants who are in the same position in a dissimilar way, and is therefore discriminating.

As regards the Change Request Determination Criteria

Even if the Change Request Process and Criteria would be accepted as ICANN policy – quod non – it is clear that SDS's Change Request is reasonable and falls within the scope of the criteria set forth in such Change Request Process and Criteria. According to this document, determination of whether changes will be approved will balance the following factors:

1. **Explanation** – SDS is of the opinion that the main reason for submitting the Change Request is reasonable: Schwarz Gruppe does no longer have the intention to actively use the "Schwarz Group" denomination, and one of the members of the same overarching structure – Kaufland Warenhandel GmbH & Co. KG – has developed plans for applying for the .KAUFLAND gTLD;

2. **Evidence that original submission was in error** – although the proposed change has not been made in view of correcting an error, this also does not seem to be the case for the vast majority of submitted (and approved) change requests. Indeed, many changes that have been requested by various applicants related to, for instance, a change in the

back-end operator or a change in the shareholding of the applicant, which change can arguably be qualified as “merely correcting an error”;

3. **Other third parties affected** – The information contained in both of SDS’ Change Requests demonstrates that no third parties are affected. However, in view of ensuring that third parties have the right to object against this Change Request, SDS has proposed to be subject to all of ICANN’s Objection and Dispute Resolution processes and proceedings (see http://newgtlds.icann.org/en/program-status/odr) for a certain period of time, this in order to allow third parties to object against the .KAUFLAND gTLD;

4. **Precedents** – As we will further elaborate below, there is one particular precedent where ICANN has allowed for changes to the string, being the Change Request submitted by DotConnectAfrica Trust in relation to its “DOTAFRICA” new gTLD application;

5. **Fairness to applicants** – In SDS’ view, no other applicants are affected by this particular Change Request. In rejecting these Change Requests, ICANN staff has failed to demonstrate that accepting this particular change request is unfair to other applicants.

   During the telephone conversation that was organized by ICANN in January of 2015, ICANN explained that accepting a change request like this would likely not be accepted by “the community”. However, although SDS accepts that ICANN is operating to the benefit of “the community”, ICANN’s own Change Request Process and Guidelines states that the change must be “fair to applicants”, which not the same and a mere subset of “the community”.

   Furthermore, in order for a rejection of these Change Requests to make sense, such “other applicants” must have an interest in the change, or – in fact – must be able to demonstrate that by ICANN allowing the Change Request, their interests are harmed. ICANN has not provided for such evidence. In fact, in at least one other change request that was allowed by ICANN, at least one other applicant was affected by such request, which was of no particular concern to ICANN … (see also below)

6. **Materiality** – SDS is aware of the fact that the change will affect the evaluation score or require re-evaluation of some or all of the application, and is willing to accept the consequences when presented by ICANN in so far and to the extent these are reasonable. SDS is aware that Furthermore, as SDS has pointed out in its Change Requests, the change would not affect string contention. Also, SDS does not foresee any issues in relation to community priority, considering the fact that no other applied-for gTLD string comes even close to .KAUFLAND;

7. **Timing** – According to the Change Request Process and Criteria, ICANN reserves the right to require a re-evaluation of the application in the event

of a material change. As stated in SDS' Change Requests, SDS is willing to undergo an additional evaluation and pay (reasonable) costs associated with such evaluation.

Therefore, SDS is of the opinion that ICANN has not provided for arguments on why the Change Request has been denied, as it has merely stated that "*[r]equests to change applied-for strings are not accepted"*. ICANN has not included such prohibition to change the string or exclusion from using the change request process in the Applicant Guidebook. Furthermore, no such prohibition or exclusion can be found in ICANN's Change Request Process and Guidelines.

Other Change Requests for the String Have Been Approved by ICANN

According to the email sent by the New gTLD Customer Services department to the primary contact of the Application:

> *"Per the Change Request Process, the requested change of your application for the string ".SCHWARZGROUP" to the string ".KAUFLAND" was denied due to the nature of the proposed change.*
>
> *Requests to change applied-for strings generally are not acceptable. The only exceptions have been in the cases of typographical or otherwise minor errors. As you may recall, the list of applied-for strings was not publicly announced until Reveal Day, in order to prevent applicants from amending their applied-for strings based on submissions from other applicants. In the time since the list of strings was published, changes to applied-for strings (other than the aforementioned corrections to minor errors) have not been accepted. This is in the interest of fairness to all applicants, which is one of the criteria against which change requests are considered, as well as one of the tenets of the Program."*

Since SDS did not receive any response their subsequent enquiries from ICANN, SDS filed a second Change Request on December 15, 2014, whereby SDS has been informed that *"[r]equests to change applied-for strings are not accepted. The only exceptions have been to correct typographical errors."*

ICANN's rejection of SDS' Change Requests comes as a surprise, in particular because it has previously accepted requests to make changes to the answer to Question 13 in other applications. Reference is made to the approved change request submitted by DotConnectAfrica Trust, which is available under https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory/1276. In this change request, ICANN approved the applicant's request to change its answer to Question 13 from .DOTAFRICA to .AFRICA.

SDS does not understand why the above change request in relation to the .DOTAFRICA gTLD has been accepted, whilst refusing SDS' change request:

1) Given the fact that DotConnectAfrica Trust consistently referred to its application for .DOTAFRICA in its initial application (see: https://gtldresult.icann.org/application-result/applicationstatus/applicationchangehistory:downloadfromdocument/12?t:ac=1276), one can impossibly be of the opinion that this concerns a typographical or minor error. In fact, according to ICANN's own SWORD algorithm, available at https://icann.sword-group.com/algorithm/, "AFRICA" and "DOTAFRICA" are not even considered similar, so this change cannot qualify as a minor change. Also, it cannot be considered a typographical error, since DotConnectAfrica Trust's application quite consistently refers to the DotAfrica gTLD, which reasonably disqualifies such error as a typographical one …

2) Secondly, and moreover, by allowing DotConnectAfrica Trust's request to change its answer to Question 13, ICANN created a contention set with the application for .AFRICA that was submitted by ZA Central Registry NPC trading as Registry.Africa (https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1184). This is not the case if ICANN would allow for SDS' request to change its answer to Question 13 from .SCHWARZGROUP into .KAUFLAND, as no third party has applied for the .KAUFLAND gTLD or any confusingly similar string. Furthermore, SDS refers to its proposal formulated in the Change Request to open a window of three months during which third parties could initiate objections on the same grounds as stated in ICANN's Applicant Guidebook, this in order to consider any third party claims or concerns in relation to SDS' application for .KAUFLAND;

3) third, but less relevant in the present discussion, DotConnectAfrica Trust filed for an Independent Review against ICANN's decision that DotConnectAfrica Trust's application for .DOTAFRICA / .AFRICA should not proceed (see: https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en).

ICANN's Core Values, reflected in Section 2 of its By-Laws, state the following:

4) *"[I]n performing its mission, the following core values should guide the decisions and actions of ICANN:*

5) *[…]*

6) *7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*

7) *8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

8) *9. Acting with a speed that is responsive to the needs of the Internet while,*

as part of the decision-making process, obtaining informed input from those entities most affected."

According to SDS:

1. ICANN's "decision", formulated in a short standard email, did not meet the standard of a "well-informed decision based on expert advice";
2. Bearing in mind that ICANN has allowed at least one other applicant to change its answer to Question 13, it has not made – in the present case – a decision that meets the standard of objectivity;
3. ICANN has not requested any additional input from those entities most affected by its decision, being SDS, despite SDS' explicit request, and has not shown the responsiveness set out in its by-laws.

For this reason, the Applicant is of the opinion that ICANN has applied its standards, policies, procedures, or practices inequitably or single out a particular party for disparate treatment.

Furthermore, no justification of a substantial and reasonable cause has been provided in the communication of ICANN's decision not to accept the Change Request. The apparently standard email that was sent by ICANN does not include any motivation for the decision taken, only a mere reference to a policy framework.

One would at least expect ICANN to motivate its decision, especially in a case where the reason for the change request was quite elaborate and specific.

Practical Issues with Evaluation

During the telephone conversation that was organized by ICANN in January of 2015, ICANN staff explained that it was practically impossible for them to re-convene the evaluation teams in order to deal with the Change Request.

This explanation is simply not credible: ICANN has retained consulting and auditing firms EY, KPMG, JAS Advisors, InterConnect Communications, the Economist Intelligence Unit and Interisle Communications as Independent Evaluators. Combined, they employ thousands of qualified professionals. There is no doubt that some of these professionals who have been involved in the Initial Evaluation of applications can still be made available for reviewing this one Change Request.

As ICANN has been dealing with numerous other change requests over the past two years, there must be a way to bring together qualified experts, especially considering the fact that ICANN has been charging fees for dealing with certain change requests.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

____ Yes

X No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

_____ _____

Signature Date