



February 21, 2018

Mr. Cherine Chalaby
Chair, Board of Directors
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA

Via email: correspondence@icann.org

Re: Asia Green IT Systems' applications to operate the .Islam and .halal gTLDs

Dear Mr. Chalaby and the ICANN Board of Directors,

We write with respect to the longstanding new gTLD applications for .HALAL and .ISLAM.

Background

As you are likely aware, our client Asia Green IT Systems has prevailed in its Independent Review Process complaint against ICANN. The unanimous "Final Declaration" of the panel stated that ICANN has violated its Articles and Bylaws in several ways with respect to these applications. (Paragraphs 147 to 151.)

First, ICANN failed to sufficiently disseminate information relating to the GAC's non-consensus advice from the Beijing meeting. More specifically, there was insufficient reasoning in the GAC Communique and resulting NGPC Scorecard to support the unique "On Hold" policy for these applications. Second, ICANN failed to apply documented policies neutrally and objectively, and must promptly make a decision with respect to the applications "with integrity and fairness." Third, ICANN essentially developed a new policy with respect to these applications, without going through the Bylaws procedures for developing such policy. Finally, along the same lines, "ICANN failed to implement procedures pursuant to which applications placed in 'On Hold' status should proceed."

The unanimous panel found AGIT to be the prevailing party, and that all of its IRP costs should be reimbursed by ICANN, because ICANN's "failure to determine how Claimant shall proceed under the new 'On Hold' policy has largely resulted in Claimant's costs in this IRP." (Paragraph 152.). AGIT appreciates that the Board Accountability Mechanisms Committee subsequently has acknowledged that AGIT was the prevailing



party, and has agreed to reimburse AGIT’s costs, exceeding \$93,000. We expect the Board will agree with those recommendations from the BAMC.

Next Steps

We write to the Board now, in hopes you will consider our views as you consider next steps to proceed with these applications.

The BAMC cannot second-guess ICANN’s appointed experts.

We note the BAMC’s recent action on this matter, January 17, requesting ICANN Staff to prepare materials for Board consideration. Apparently the BAMC intends to “evaluate the findings in the Final Declaration and the GAC non-consensus advice as well as the subsequent communications from or with objecting and supporting parties, in light of the Final Declaration, and provide a recommendation to the Board as to whether or not the applications for .HALAL and .ISLAM should proceed.”

Fundamentally, the BAMC should not be tasked to make such a recommendation at all, as such a decision would appear to be completely outside its remit. Moreover, the decision whether the applications should proceed -- in light of these governmental objections and AGIT’s responsive Governance Model -- has already been made, twice. Those decisions were thoroughly documented by two experts who each independently found the applications to be in furtherance of the public interest. As further discussed below (and thoroughly in the IRP briefing), those experts applied documented procedures derived from community-based policymaking, previously adopted by the GNSO Council and the Board and detailed in the Applicant Guidebook. The BAMC has no authority or capability to second-guess those expert determinations now.

ICANN has two options – approve AGIT’s applications, or facilitate dialogue towards their approval.

In our view, ICANN has two legitimate options for next steps with respect to these applications. Ideally, the Board would disregard the unsupported, non-consensus GAC advice with respect to these applications, and task the GDD to further process them. That would be consistent with the unanimous IRP panel recommendation in the *DCA Trust* matter re the .Africa TLD, which the Board unanimously followed.

That IRP panel held that, at minimum, the Board should have made an appropriate inquiry and investigation into the GAC’s rejection, and should have provided substantial reasoning for it, given the substantial investment DCA made in the application, and given ICANN's purported requirement that applicants waive all rights to redress in



court. Because the GAC failed to provide any rationale, the IRP panel recommended that the Board disregard the GAC Advice and return the applications to processing – and the Board agreed. In that matter, the GAC Advice was consensus against the application; so, there should be far less of a concern to disregard the non-consensus, unsupported ‘advice’ of just a relative few governments as to AGIT’s applications. In all fairness, these applications should return to processing, and be approved for contracting.

Alternatively, ICANN must proceed to facilitate direct dialogue and negotiations between AGIT and the governmental objectors, with the view of reaching a mutually acceptable solution to allow for the use of .Islam and .halal as top level domains under AGIT’s management. Such dialogue, at minimum, must specify the objectors’ remaining concerns, in detail and in light of AGIT’s efforts thus far to address those concerns in its Governance Model. The dialogue must be structured to negotiate a way forward for AGIT to operate the TLDs in the public interest, as they have promised to do.

These applications have been “On Hold” due to governmental concerns purportedly reflected in various warnings and correspondence from various governments and the OIC. AGIT has thoroughly addressed those concerns in its voluntarily proposed Governance Model. But no governments have addressed the Governance Model in any of their warnings or correspondence to ICANN to date. They were never even requested by ICANN to do so. Instead, ICANN vaguely had mandated that AGIT somehow resolve those unspecified “conflicts” before ICANN would further proceed on these applications. That Resolution was at the heart of AGIT’s successful IRP complaint, and was found to violate ICANN’s Articles and Bylaws.

So, facilitation of such dialogue is required now, as the IRP panel specifically has declared that ICANN violated its Articles by failing to get sufficient information from the objecting governments at the Beijing meeting. That can only be remedied by having such dialogue now, however belatedly. What are the conflicts between the objectors’ position and AGIT’s proposal? How can those conflicts be resolved? These are the fundamental questions that AGIT has been asking for years. Such dialogue is required now, in order to effectively and reasonably develop appropriate policy and procedure as to these applications, as the IRP panel has recommended. The Board could not possibly vote with “integrity and fairness” to reject these applications, without facilitating such a comprehensive dialogue first.

Such dialogue is also required now, in order to be consistent with ICANN’s response to the recommendations of the Amazon IRP panel. On February 4, the Board directed the ICANN President and CEO to “facilitate negotiations between the ACTO member states and the Amazon corporation”, such “with the view of reaching a mutually acceptable solution to allow for the use of .amazon as a top level domain.” Note again, there was



full consensus GAC Advice against the .Amazon applications, which led to Amazon’s IRP complaint. That must be compared to the mere non-consensus advice of a relative few GAC members against the .Islam and .halal applications, which led to AGIT’s IRP complaint.

AGIT’s applications are in furtherance of the public interest.

There can be no doubt that there is far stronger public interest for ICANN to facilitate discussions on the applications for .Islam and .halal, and to approve them as live TLDs, than as to the “.brand” applications of one American corporation. ICANN could not possibly justify, in any semblance of “public interest”, the facilitation of government-level negotiations aiming to get .Amazon live as a TLD for the benefit of one giant corporation, but not also a similar process aiming to get the .Islam and .halal TLDs operating in accord with AGIT’s proposed community Governance Model. Note that ICANN has approved .Catholic, .bible, .kosher and other analogous TLDs which give voice to those communities; all the while keeping .Islam and .halal indefinitely “On Hold” for absolutely no legitimate reason.

ICANN must respect that two independent experts have found a strong public interest in having these TLDs available for freedom of expression of Muslim people. ICANN appointed both of them to make decisions on these matters, in accord with the Applicant Guidebook. The Guidebook set forth in great detail the community-derived policies that were approved by the GNSO Council and the Board, and relied upon by AGIT and all other TLD applicants. The Guidebook included the thorough Independent Objector and Community Objection processes. AGIT’s government objectors participated in both processes, and failed to prevail. Neither the BAMC nor the Board has any authority or basis to create any new process now, nor to second-guess its own appointed experts’ opinions that AGIT’s applications are in furtherance of the public interest.

The Independent Objector engaged in detailed dialogue between AGIT and the government objectors, and considered AGIT’s proposed Governance Model. Dr. Pellet engaged in two rounds of written, public dialogue with AGIT, expressing his initial concerns and allowing AGIT the opportunity to respond. In his Final Assessment, Dr. Pellet found that “guarantees presented by the applicant properly address his initial concerns. Therefore and for all these reasons, the IO is finally of the opinion that an objection on community ground is not warranted.” Specifically, he was persuaded by AGIT’s proposal for the governance of the .Islam TLD, which would have registration, dispute resolution and content monitoring policies developed by an inclusive and representative Policy Advisory Council (“PAC”) to be comprised of government representatives, religious leaders, and civil society.



He further came to the educated opinion that:

an objection to the launch of the new gTLD “.Islam” on the limited public interest ground is not warranted. Quite the contrary, the gTLD could encourage the promotion of the freedom of religion, a fundamental right under public international law, by creating and developing a new space for religious expression that could benefit the Muslim community.¹

Subsequently, the Community Objection expert similarly considered the UAE’s comprehensive formal objections to these applications, in light of AGIT’s response and all of the voluminous evidence presented by both parties. Mr. Cremades agreed with AGIT and with ICANN’s Independent Objector, holding in each case that “there is not substantial opposition from the community to Respondent’s application,” and that “Respondent’s application does not create a likelihood of any material detriment to the rights or legitimate interests of a significant portion of the relevant community.” Consequently, he dismissed the UAE’s Community Objections, and found AGIT to be the prevailing party.

Both Dr. Pellet and Mr. Cremades were experts appointed by ICANN and through community-derived ICANN process, set forth in great detail in the Applicant Guidebook -- each to consider the very matter under consideration by the Board again now. They were appointed due to their expertise and experience in the subject matter of international relations and conflict resolution. They were paid substantial fees to spend extensive amounts of time to review all of the competing arguments and all of the very voluminous evidence provided by literally thousands of different people and organizations, for and against the subject applications.

Both of those experts explicitly found that AGIT’s applications **are** in the public interest, and should **not** be rejected due to the stated concerns of the government objectors, in light of AGIT’s promised Governance Model. Neither the GAC nor the Board nor any government objector has ever provided any evidence or analysis to support any contrary finding, in any of their many various reflections on these applications. Therefore, those determinations must be respected. AGIT’s applications are in furtherance of the public interest. So, ICANN must either approve them, or facilitate negotiations towards their approval.

¹ See also, e.g., ICANN’s Principle “G” underpinning the New gTLD Program: “The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.”



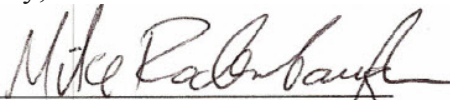
Roddenbaugh
LAW

Conclusion

If ICANN remains unwilling to approve AGIT's applications in light of these facts and the .Africa IRP precedent, then ICANN at minimum must facilitate comprehensive dialogue with AGIT and the objectors now, in light of the .Islam/halal Final Declaration and the .Amazon precedent. Neither the Board nor the BAMC could reasonably consider any assessment of "public interest" different from the clear conclusions of both Dr. Pellet and Mr. Cremades, without first facilitating a comprehensive dialogue, and then explaining in detail how the Board has come to a different conclusion. In fairness, the same facilitation provided to the Amazon corporation and its government objectors must be provided to AGIT and its government objectors -- with the same goal, to reach a mutually acceptable resolution that allows the applicant's use of the subject TLDs.

We hope the Board will choose to promptly reconsider this matter, in accord with the above points and authorities. We are happy to engage in further dialogue with ICANN at any time, and look forward to your prompt and considered response.

Sincerely,

By: 
Mike Rodenbaugh
RODENBAUGH LAW

cc: John Jeffrey, Esq.
Amy Stathos, Esq.