



August 1, 2018

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Via Email

Dear Eric,

This responds to your letter dated July 19, 2018 -- purportedly responding to our letter dated February 21, 2018. Thank you for allowing us less than two weeks to respond, before the BAMC addresses AGIT's .halal and .Islam TLD applications tomorrow. We offered five pages of analysis and argument in our last letter to the ICANN Board. Five months later, we have received from ICANN's lawyer just five paragraphs and exactly two counterpoints to assertions in our letter, each discussed below. We otherwise will not reiterate the analysis and argument from our previous letter, which ICANN apparently accepts as accurate.

1. **ICANN has discretion to act in an informed manner, in the public interest.**

ICANN first argues that "the Board maintains the discretion to make a decision on whether the Applications shall proceed." AGIT has not argued otherwise. Instead, AGIT has summarized the prior decisions of the Independent Objector and the Community Objection arbitrator, each of whom expressly found the .Islam and .halal applications to be in the public interest. AGIT argues that neither the BAMC nor the Board could reasonably reject the applications unless and until the Board could otherwise reasonably inform itself, and then articulate precisely how the applications are not in the public interest, despite ICANN's expert determinations to the contrary.

AGIT further argues that ICANN could not possibly do so, without at least engaging the government objectors in renewed dialogue to specifically understand any remaining, real objections to AGIT's proposed Governance Model. That Model has never once been addressed either by ICANN or by any of the government objectors in any substantial way. ICANN does not have unfettered discretion to ignore its own experts, ignore AGIT's proposed resolution to the unsubstantiated "conflicts," and simply kowtow to unsubstantiated, conclusory "advice" (or, "veto") from a few governmental bodies.

ICANN must make informed decisions in the public interest and must explain those decisions to the Internet community. This is in the Bylaws, right near the top, Core Value No. 2:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy



development process is used to ascertain the global public interest and that those processes are accountable and transparent.

To the extent AGIT's applications have had any sort of accountable and transparent process to date, AGIT has succeeded at every turn to satisfy the requirements of the multistakeholder model as embodied in the Applicant Guidebook and its thoroughly detailed objection processes. However, then the OIC belatedly and unilaterally intervened in December 2013, with no substantiation whatsoever as to their stated "concerns." And since then, ICANN has been paralyzed, doing nothing other than litigating over the propriety of it doing nothing. It lost that IRP litigation, and so now must do something.

2. **AGIT should be afforded at least the same facilitation as Amazon.**

ICANN next argues that the .Amazon case is different because the GAC requested ICANN to conduct dialogue between the American corporate behemoth and interested government objectors, with the aim of getting the corporate ".brand" TLD open for business. Of course, that notion is misleading since that GAC action followed a specific request from the ICANN Board, following Amazon's IRP decision against ICANN. The reopening of that GAC discussion involved an application that had been unanimously rejected by the GAC; whereas AGIT's applications were not. ICANN was specifically rebuked in the AGIT IRP decision for not getting adequate rationale from the GAC with respect to AGIT's applications, four years ago. So, why has the ICANN Board still not even asked the GAC for further advice in this matter?

It seems clear that ICANN finds Amazon's .brand application to be a lot more important than AGIT's applications for .halal and .Islam -- at least more worthy of GAC and Board discussion. That is immensely offensive, particularly given ICANN's two appointed experts who each specifically decided that AGIT's applications were in the public interest, in light of the thoroughly defined criteria of the Applicant Guidebook. Further, they each specifically found AGIT likely to benefit the global Muslim community's fundamental human rights to speech and communication. (See also, Core Value No. 2.) Amazon has had no such findings in its favor. Yet, AGIT's TLDs have been inexplicably and stagnantly "on hold" for five years, and counting. While Amazon at least has ICANN doing something to facilitate dialogue with its objectors.

Rather than presenting any semblance of a proposed solution or process towards a solution, ICANN again "encourages" AGIT to resolve the unspecified "conflicts" with the objectors. This is precisely the same advice stated Dr. Crocker's letter of Feb. 7, 2014, which directly led to AGIT's IRP Complaint and the resulting Final Declaration that found ICANN has violated its Bylaws and Articles in four separate ways. So, after four years, and well over a million dollars in legal fees and IRP costs, ICANN is taking exactly the same position it took then. It has now been eight months since the Final Declaration in the IRP, and still ICANN has done absolutely nothing to provide any clarity as to how AGIT's TLD applications will be evaluated and resolved.

As argued in our last letter in great detail, ICANN now has just two reasonable options. Either the applications need to be returned to GDD for processing, per the .Africa



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precedent; or, ICANN needs to facilitate a dialogue with the government objectors, as it has done with .Amazon -- specifically with the express view of reaching a "mutually acceptable solution to allow for the use of [.Islam and .halal] as top level domains." Unless and until ICANN requests such dialogue to occur in good faith, under implicit threat that the TLDs will be awarded to AGIT (as per the Applicant Guidebook and incorporated procedures), the objectors have no incentive whatsoever to engage in dialogue with AGIT. ICANN has given them precisely what they want, for five years now -- the TLDs are not delegated and there is no set path towards delegation. So why should they even talk to AGIT now, without ICANN engaging them in discussion?

To be sure, AGIT stands ready to discuss at great length any specific concerns with its proposed and detailed Governance Model, and towards any other mutually acceptable resolution that allows AGIT to give voice to the global Muslim community through use of these two TLDs, and to recoup its investment in these TLD applications. At minimum, ICANN must step forward and facilitate that dialogue, just as it has done with .Amazon.

ICANN has delayed AGIT's applications for more than five years, without any real explanation or analysis of the purportedly remaining "conflicts" with the purported objectors -- who have twice lost their case before ICANN-appointed expert tribunals. Consequently, ICANN has been unanimously held by three IRP panelists to have violated its Bylaws and Articles in four specific ways. Now, the Board owes AGIT a real discussion with the purported government objectors, with the aim of getting these TLDs live as soon as possible. Otherwise, the Board must follow the only competent evidence and advice in front of it, and return the applications to processing by the GDD because they are decidedly in the public interest, and have fulfilled all of ICANN's requirements in the Applicant Guidebook.

Sincerely,

By: 

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