



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 6th 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'¹. 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 4th 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.

¹ 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 Advice².
- c. The GAC Advice Framework³ 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.⁴

² 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>

³ 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 28th 2011 and 1st 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 9th 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.⁵
- 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."*⁶
- 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.

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

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

⁶ 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.”*⁷

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.

⁷ See [Letter from Erik Wilbers to the ICANN Board](#) dated 9th 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.⁸

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 Objection⁹, 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."*¹⁰

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

⁸ 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>

⁹ 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.

¹⁰ 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 6th June 2008 to 26th 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 ICANN¹¹ which should account for goodwill, since due process has not been entirely exhausted according to the enshrined provisions

¹¹ 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/ 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