

Reconsideration Request

1. Requester Information

Name: Asia Green IT System Ltd.

Address: Contact Information Redacted

Email: Contact Information Redacted

Contact Information Redacted

(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.

Applicant seeks reconsideration of the following NGPC decisions in its Feb. 5th Resolution: 1) to refuse to initiate contracting with Applicant to operate the .Islam and .Halal gTLD applications; 2) to provide effective veto power over just these two applications, to just two countries' governments and two IGOs.

Applicant also seeks reconsideration of the following Staff decisions in implementing the NGPC Resolution, embodied in Dr. Crocker's letter to Applicant dated Feb. 7th: 1) to fail to provide clear definition of the purported "conflicts" mentioned in Dr. Crocker's letter, and clear criteria for Applicant to "resolve" those

purported conflicts; and 2) to fail to explain how any such conflicts, if any, have not already been resolved by (i) Applicant's PICs and proposed governance model, (ii) the relevant Independent Objector determination, (iii) the relevant Expert determinations in the Community Objections, (iv) the manifest lack of GAC Advice against the applications, and/or (v) Applicant's compliance with all other rules and procedures set forth in the Applicant Guidebook.

4. Date of action/inaction:

February 7, 2014. Date of letter from Dr. Crocker to Applicant.

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

February 11, 2014. Date the aforementioned letter was emailed to Applicant.

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

Applicant has invested more than USD 750,000 in its applications to operate these gTLD strings that are not prohibited, and thus allowed, by ICANN's own policy as documented within the Applicant Guidebook. Applicant, a Turkish corporation owned and operated by devout Muslims, intends to bring these TLDs to all of the various Muslim communities around the world, for all Muslim communities' mutual benefit. Applicant reasonably estimates a multi-million dollar business opportunity from operating these gTLDs.

Applicant has paid application fees to ICANN, and COI fees as required by ICANN. At significant expense, Applicant has passed ICANN's Initial Evaluation as to both strings, without any issues for Extended Evaluation.

At further significant expense, Applicant subsequently has responded to ICANN's Independent Objector's inquiry, which was made in light of GAC Early Warnings from the governments of the UAE and India. The IO issued two final rulings, refusing to file either a Limited Public Interest Objection or a Community Objection against Applicant with respect to .Islam¹:

For all these reasons, the IO is of the 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. ...

The IO considers 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.

On June 4, 2013, the NGPC adopted a resolution² as a consequence to the communique³ received from the GAC at the conclusion of the GAC's secretive and closed Beijing meetings. The NGPC responded to this communique by producing a Scorecard,⁴ and committing to further dialogue with the GAC. This Scorecard further referenced the Community Objection filed by the UAE government with ICC

¹ <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/islam-general-comment/>

² <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm#1.a>

³ The GAC only noted in the Beijing Communique that "some GAC members" believed the applications "lack community involvement and support. It is the view of these GAC members that these applications should not proceed."

<https://www.icann.org/en/news/correspondence/gac-to-board-11apr13-en.pdf>

⁴ <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-04jun13-en.pdf>

against .ISLAM and .HALAL, and said that “these applications cannot move to the contracting phase until the objections are resolved.”

At significant expense, Applicant then successfully overcame those Community Objections filed against both applications by the Telecom Regulatory Authority of the UAE government. In those cases, in October 2013, the ICC expert found⁵ there was *no substantial opposition* to these applications and that, “*The Objector has certainly not provided any evidence that the Respondent is not acting or does not intend to act in accordance with the interests of the Muslim community.*” Consequently, the expert found in both cases that there would be no material detriment to any community of Muslims.

Then in November 2013, Dr. Crocker forwarded a letter⁶ from the Organization of Islamic States to the GAC Chair, which requested the GAC to “kindly consider this letter as an official opposition of the Member States of the OIC ... [to] use of these [TLDs] by any entity not representing the collective voice of the Muslim people.” GAC further discussed these applications and that letter during the Buenos Aires meetings, and decided not to issue any formal advice against the applications. Instead, the GAC stated⁷ that “it concluded its discussion on these strings” six

⁵ <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP-427-ICANN-44-Expert-Determination/> and <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP-430-ICANN-47-Expert-Determination/>

⁶ <http://www.icann.org/en/news/correspondence/crocker-to-dryden-11nov13-en.pdf>

⁷ <http://www.icann.org/en/news/correspondence/gac-to-board-20nov13-en.pdf>

months earlier in Beijing. The GAC Chair clarified in her letter⁸ to Dr. Crocker that “no further GAC input on this matter can be expected.” Thus, at most, “some GAC members” objected nearly a year ago, without any specific rationale provided by GAC or ICANN to Applicant. But the GAC has not recommended and will not recommend that the applications be rejected.

Thus, Applicant has withstood every potential challenge to these applications set forth in the Applicant Guidebook, at great expense of both time and money. And still, the NGPC has now unilaterally decided that there is one more hurdle, unique only to Applicant and these two applications. Dr. Crocker stated in his Feb. 7 letter, directly contrary to the ICC expert’s determination made after full legal briefing and evidence from the government of the UAE and the Applicant, that “a substantial body of opposition urges ICANN not to delegate the strings.” And so these two applications are sent to a unique, ICANN-imposed purgatory, with no inkling whatsoever as to how they ultimately will be evaluated by ICANN. This causes clear harm to Applicant, and to the entire Muslim world.

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

Internet users who seek to use domain names within the .Islam and .Halal TLDs are harmed by their continued unavailability, particularly when soon .Catholic and other ‘religious’ strings will be operational. The GNSO constituencies, Working Group members, and public commenters, who considered religious strings in the many Policy Development and implementation processes leading to adoption of the

⁸ <https://www.icann.org/en/news/correspondence/dryden-to-crocker-29nov13-en.pdf>

Applicant Guidebook, will be harmed by the NGPC and Staff refusals to adhere to the consensus recommendations set forth therein. ICANN itself will suffer further degradation in community interest in PDP participation, if the consensus recommendations are ignored by NGPC. And ICANN itself will suffer further degradation in the perception of people in the Muslim world, who will not understand why ICANN has singled out these applications for disparate, discriminatory treatment.⁹

8. Detail of Board and Staff Action

I. The NGPC Resolution did not consider material information provided since May 23, 2013.

The NGPC Resolution dated Feb. 5, 2014, imposing open-ended delay upon these applications, with no criteria whatsoever to end such delay, cites only one document from Applicant as a source upon which the NGPC relied. That document, the Applicant's response to the GAC's Beijing communique, was dated May 23, 2013.

Given all of the other matters discussed both in the Resolution and in the many various applicants' responses to the GAC's Beijing communique, it is highly doubtful that any NGPC member actually even read the Applicant's response before coming to its omnibus Resolution this month. Moreover, much has happened in the 8 ½ months in between, of which the NGPC apparently has not been made aware.¹⁰

⁹ Applicant notes that ICANN has approved the .kosher gTLD application, to be operated by a private entity with a multi-stakeholder governance model no more inclusive than the model proposed by Applicant for .halal and .Islam. How will ICANN explain this to Muslim people who live halal lifestyle?

¹⁰ Applicant incorporates by reference its voluminous archive of letters of support from prominent Muslim organizations and individuals. *See infra*, § 12, with

Dr. Crocker’s letter dated Feb. 7, 2014, conveying the Staff’s interpretation of this Resolution to Applicant, mentions just four governmental letters which purportedly comprise the “substantial body of opposition” to the applications. Yet this purported opposition – supposedly from the Cooperation Council for Arab States of the Gulf (“CCASG”), Lebanon, OIC and Indonesia – thoroughly has been addressed by the Applicant, and generally has been deemed insubstantial by both the Independent Objector and the ICC expert arbitrator. It is also effectively insubstantial per the terms of the Applicant Guidebook, since no GAC Advice has been or will be rendered against the application. Regardless, much of the crux of what is said in these letters is supportive of Applicant and its promised governance model.

a. CCASG/UAE Objections have been denied by ICC Expert.

A prominent CCASG and OIC member state, the UAE (represented by a highly prominent legal firm in the Middle East), filed a formal Community Objection with ICC and soundly was defeated. Not only was the purported community opposition deemed insubstantial, but also the expert found no likelihood of material detriment to any purported Muslim community. The Objections failed on both bases, and so the Objector proved only two of the four required elements.

ICANN has no right to second-guess this expert finding, which was based upon the procedures set forth in ICANN’s contract with Applicant (referencing the

Summary at Exhibit A. Many of these letters have been provided since last May 23, particularly in context of the Community Objection proceeding in which the Expert allowed additional submissions per the request of the Objector.

Applicant Guidebook), and which was fully briefed by lawyers retained by one of the wealthiest per capita nations in the world. The CCASG arguments were unconvincing to the honorable ICC expert, as they previously had been found unavailing by ICANN's own Independent Objector.

The Applicant Guidebook specifically indicates that the ICANN Board should consider the advice of experts in making determinations about new gTLD applications which raise sensitive government issues. Guidebook §3.1 re GAC Advice specifically provides: "The ICANN 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." And of course, the Guidebook contains specific lengthy provisions about the Independent Objector and the Community Objection procedures. Here, not only has the GAC **not** advised ICANN to reject the application, but **two** of ICANN's appointed experts have advised ICANN **not** to reject the applications. What reasonable basis exists for this determination? It seems clear that the NGPC did not consider this material information in coming to its latest Resolution as to these applications.

b. Applicant proposes a model complying with these governments' only stated criteria.

As specifically found by ICANN's own Independent Objector, Applicant indeed has proposed a multi-stakeholder governance model as suggested by the government of Lebanon ("neutral, non-governmental multistakeholder group") and by the OIC ("entity representing the collective voice of the Muslim people").

Applicant has even committed to contractual PICs in this regard. The NGPC has not acknowledged this proposed governance model or the PICs in its Resolution, and so presumably did not consider them.¹¹

Instead, NGPC assumes there is “conflict” between Applicant’s proposed governance model, and the concerns expressed in the four cited letters. But neither the Resolution nor Dr. Crocker’s letter make any effort whatsoever to explain any such purported conflict, nor how such conflict was not fully resolved by the Applicant’s governance model, the Independent Objector, the Community Objection expert, and/or the lack of any GAC Advice against the applications. This notion of conflict is belied by the critical text of both the Lebanese and OIC “opposition” quoted above. Applicant has documented via PIC and otherwise its commitment to a multi-stakeholder, inclusive operational model representing the collective voice of the Muslim world. These are the criteria set forth by Lebanon and the OIC in their letters of purported opposition.

c. ICANN violates established policy by failing to provide objective evaluation criteria, and by giving late veto to a few government actors.

ICANN gives Applicant no guidance whatsoever as to how it can pass this hurdle and resolve such unexplained and illusory “conflict”, thus overcoming the special veto that ICANN appears to have given to these two governments and two IGOs. ICANN must reconsider this ill-advised decision to place just these two

¹¹ Dr. Crocker did reference the governance model in his letter, and thus at least ICANN has received it, even if it was not considered by NGPC.

applications into an interminable limbo, with no guidance whatsoever as to how they ultimately will be evaluated by ICANN and/or these out-of-bound 'objectors'.

This new policy is directly contradictory to the policy set forth in the Applicant Guidebook, and thus can only be based upon insufficient and/or inaccurate material information. In effect, ICANN is currently ignoring two experts' well-considered opinions that Applicant's governance model is sufficient to overcome governmental objections. And ICANN is currently ignoring the fact of no GAC Advice against the applications, indicating insufficient governmental objections per ICANN's consensus policy as adopted in the Applicant Guidebook.

Not one Advisory Committee, Supporting Organization, Stakeholder Group, Constituency, Working Group, Review Panel, Implementation Team, Independent Expert or any other ICANN creation is or ever has been opposed to these applications. Only a "few governments", at various times, have opposed the applications -- with the latest OIC letter coming far too late to be given weight against these applications.

Yet ICANN's Board, eighteen months after the application window closed and the Guidebook was finalized, now appears to give veto power over just these 2 applications to 2 countries and 2 IGOs -- without any clear means for ICANN and/or Applicant to override such vetoes. There is no precedent for such a decision. It is a foolish decision if ICANN hopes to remain independent of governmental interference in its operations. Thus it can only be based upon insufficient and/or inaccurate information, and must be reconsidered.

And ICANN's Staff, via Dr. Crocker's letter, has not provided any criteria by which Applicant will be evaluated in this next step of the application process, and effectively has given a veto to two select governments and two select IGOs, over just these two applications. This is directly contrary to ICANN's stated Principle "A" underlying the New gTLD Program:¹²

New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.

Further, it is directly contrary to Recommendation 1, 9 and 12:¹³

(1) The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

(9) There must be a clear and pre-published application process using objective and measurable criteria.

(12) Dispute resolution and challenge processes must be established prior to the start of the process.

It is also directly contrary to ICANN's Principle "G":¹⁴

The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.

¹² http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_Toc43798015

¹³ *Id.*

¹⁴ *Id.*

This freedom of expression principle was cited by both the Independent Objector and the Community Objection expert, in deciding that Applicant's applications were important for the Muslim world's freedom of expression rights, and that this outweighed potential governmental concerns over control of these TLDs.

These Principles and Recommendations were adopted unanimously by the GNSO Council in late 2007, and almost unanimously by the ICANN Board in early 2008. The Applicant Guidebook represents the implementation of these Principles and Recommendations. Yet the NGPC and Staff have now gone completely outside the bounds of these bedrock principles underlying the New gTLD Program, and outside the bounds of all of the various processes set forth in the Applicant Guidebook, pertaining *inter alia* to the Independent Objector, Community Objection, and GAC Advice. Instead they apparently have allowed a last-minute veto to a few governmental actors, with no input from any ICANN stakeholder group, for no discernible purpose whatsoever, and with no discernible means for the applications to be further evaluated.

d. .Halal should proceed, regardless of concerns about .Islam.

The NGPC and Staff appear to have ignored important details relating to the difference between the two applications at issue here. Thus they have based the decision to lump the two applications together on insufficient and/or inaccurate information.

First, Indonesia only objected to .Islam, and specifically endorsed Applicant's operation of .Halal. "In principle, Indonesia approves the proposal and use of

domain name .halal, provided that it is managed properly and responsibly.”¹⁵

Similarly, the Independent Objector did not even inquire about .halal as potentially problematic, focusing only on .islam.

Moreover, Applicant has provided a specific letter of support from the OIC’s affiliated HalalWorld Institute.¹⁶ This is the single largest halal certification organization in the world, with specific backing from the OIC. Indeed it is an Institute within the OIC’s Islamic Chamber Research and Information Center (ICRIC). It is OIC’s own unified Halal Standard project operator; its developed Halal Food Standards were approved by the Organization of Islamic Cooperation (OIC) in 2010, and now its scope of activities was expanded into new sectors like “Halal science,” “Halal regulations,” and “Halal code of conduct”.¹⁷ The ICRIC has also provided three specific letters of support to Applicant.

In addition, ICANN cannot discriminate between the .halal and .kosher applications. From a government “sensitivity” perspective, they must be deemed equal, as essentially the words mean the same thing -- halal referring to Muslim lifestyle and kosher referring to Jew lifestyle.¹⁸ Apparently the NGPC did not realize in its Resolution, and Staff in its implementation, that the .kosher application has been approved by ICANN and is nearing delegation. As certainly ICANN cannot explain to the Muslim communities how and why .kosher can be operated by a

¹⁵ <https://www.icann.org/en/news/correspondence/iskandar-to-chalaby-24dec13-en.pdf>

¹⁶ <http://www.halalworld.org/about/2?lang=en#.UwemefldXjV>

¹⁷ *Id.*

¹⁸ *See, e.g.,*

http://en.wikipedia.org/wiki/Comparison_of_Islamic_and_Jewish_dietary_laws

private entity with an inclusive governance structure, yet .halal cannot. At minimum, ICANN immediately should release the .halal application from the discriminatory purgatory created by the NGPC Resolution.

9. What are you asking ICANN to do now?

Approve both applications for contracting, immediately. Or at least approve .halal for contracting, immediately.

If both applications are not immediately approved for contracting, then: 1) provide clear definition of the purported “conflicts” mentioned in Dr. Crocker’s letter, and provide clear criteria for Applicant to “resolve” those purported conflicts; and 2) explain how such conflicts have not already been resolved by (i) Applicant’s PICs and proposed governance model, (ii) the Independent Objector determination, (iii) the Expert determinations in the Community Objections, (iv) the manifest lack of GAC Advice against the applications, and/or (v) Applicant’s compliance with every other rule and procedure set forth in the Applicant Guidebook.

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.

Please see Applicant’s response to items 6 through 9, *supra*.

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

Yes

No

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

Applicant refers to its archive of support letters, contained at this Dropbox

link. This archive is far too voluminous to attach to email. A summary of this archive is attached as Exhibit A.

By: 

February 26, 2014

Mike Rodenbaugh

RODENBAUGH LAW

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