



February 25, 2015

VIA EMAIL (ombudsman@icann.org)

Mr. Chris LaHatte
Ombudsman
ICANN

Re: Board Governance Committee Review of and Action Upon
Amazon EU S.à.r.l. Request for Reconsideration No. 14-27

Dear Mr. LaHatte:

Thank you for meeting with us on February 6 about the complaint by Amazon EU S.à.r.l. (“Amazon”) that the ICANN Board Governance Committee unfairly treated Amazon’s Reconsideration Request 14-27 (the “Reconsideration Request”). You’ve asked us to detail why we believe we’ve been treated unfairly. In short, the only Board members reviewing Board decisions on new gTLD applications are the very Board members who made the decisions in the first place. Specifically, the May 14, 2014 decision by the New gTLD Program Committee (“NGPC”) to accept the tardy Governmental Advisory Committee advice that the .AMAZON Applications¹ should not proceed was first reviewed by a Board Governance Committee (“BGC”) comprised exclusively of the *same* ICANN Board members who made the NGPC decision under review. Compounding matters, the BGC then referred its recommendation back to the NGPC for final action by the *same* ICANN Board members who made the initial NGPC decision that prompted our Reconsideration Request. This process was fundamentally and inherently unfair, and precluded any meaningful and objective review of our Reconsideration Request. We urge you to recommend that our Reconsideration Request receive an unbiased review free from conflict of interest.

During our conversation, you suggested that Amazon might have consented to this process. We disagree, for several reasons.

First, Amazon did not have advance notice of this inherently unfair process when it filed its .AMAZON Applications. The January 2012 Applicant Guidebook, which applied during the new gTLD application window, made no mention of the fact that Requests for Reconsideration of Board action would be reviewed by the same ICANN Board members (as BGC members) that made the decision (as NGPC members) that is the subject of the Request for Reconsideration, or that final action on those Requests for Reconsideration would be made by the same ICANN Board members (once again as NGPC members).² Moreover, the ICANN Board had not publicly announced this process when Amazon filed its .AMAZON Applications. The ICANN Board created the NGPC on April 10, 2012.³ The ICANN community (including Amazon) first learned of the NGPC’s creation on April 13, 2012.⁴ But this was *after* ICANN opened the

¹ .AMAZON Applications refers to Amazon’s new gTLD applications for the strings .AMAZON (application ID 1-1315-58086), .アマゾン (application ID 1-1318-83995) and .亚马逊 (application ID 1-1318-5591).

² See the attached chart tracking the composition of the NGPC and BGC on the relevant dates.

³ See Board Resolutions from April 10, 2012 Special Meeting of the Board, available at <https://www.icann.org/resources/board-material/resolutions-2012-04-10-en>.

⁴ See April 13, 2012 message from ICANN Board Member Bruce Tonkin to GNSO Council mailing list, posting ICANN Board resolution establishing the New gTLD Program Committee, available at <http://gns0.icann.org/mailing-lists/archives/council/msg12925.html>.

gTLD application window⁵ and *after* we submitted our .AMAZON Applications that are the subject of our Reconsideration Request.

Amazon could not have consented to a process that did not even exist when we filed our .AMAZON Applications and did not waive this inherent conflict of interest by filing our .AMAZON Applications.

Second, ICANN – not Amazon, not any other new gTLD applicant, nor the ICANN community – is responsible for ensuring that the Request for Reconsideration process is a meaningful and fair accountability mechanism for Board action. Indeed, one of ICANN’s core values is to “mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness.”⁶ ICANN’s Bylaws require “procedures designed to ensure fairness.”⁷ ICANN could have taken several steps to follow these principles, but failed to do so. For instance, ICANN could have selected for the BGC only those Board members who did not serve on the NGPC and did not have new gTLD conflicts. It did not. To the contrary, every BGC member either served on the NGPC or had new gTLD-related conflicts (which is why they weren’t NGPC members). ICANN could have limited the number of NGPC members so that the BGC had enough members who did not serve on the NGPC and did not have new gTLD conflicts. It did not. The fact that ICANN failed to observe basic procedural fairness does not mean that Amazon somehow consented to the inherent conflict of interest of having the same Board members review their own decisions.

Moreover, BGC’s history suggests a troubling neglect of procedural fairness. None of the BGC’s posted annual reports since 2006 contain the bylaws-required discussion of whether “the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.”⁸ The omission of this discussion in one report could be inadvertent; the omission from *all* BGC annual reports since 2006 suggests that the BGC itself may be aware of this unfairness. Further, the BGC has denied all 22 Requests for Reconsideration relating to new gTLD applications and, like ours, based on Board action/inaction. This 0% success rate strongly suggests that BGC does not provide any meaningful and fair review of these NGPC decisions.⁹

Finally, the absence of objection by the ICANN community should not prevent you from recommending that our Reconsideration Request receive an unbiased review. Although the ICANN community has not broadly objected to the conflict of interest inherent in having the Board review its own decisions, it is not clear that the ICANN community is aware of these conflicts. A member of the ICANN community that is not a new gTLD applicant and has not filed a Request for Reconsideration of Board action would have no reason to be aware. Moreover, the current discussions about ICANN accountability suggest that these particular circumstances are not known by the broader community; had this conflict been widely known, we suspect more community members would have objected. Even if the ICANN community were aware of the problem, the absence of objection would not make the conflict of interest disappear, or transform a fundamentally unfair process into a fair one.

We understand that the potential consequence of recognizing that the complained-of process is unfair makes all of the decisions on reconsideration requests of Board action relating to new gTLD applications vulnerable to challenge. However, the fact that the Board designed and followed an inherently unfair process

⁵ The new gTLD application window opened on January 12, 2012. See About the New gTLD Program, available at <http://newgtlds.icann.org/en/about/program>.

⁶ ICANN Bylaws, Art. II, Sec. 2, ¶. 8.


⁷ Id., Art. III, Sec. 1.

⁸ Id., Art. IV, Sec. 2, ¶ 20(d).

⁹ In addition to the 0 for 22 success rate, ICANN’s numbers are only slightly better for Requests for Reconsideration relating to new gTLD applications that are based on Staff action/inaction – the other basis on which reconsideration can be sought. For those, the BGC has granted only 2 of 45 requests, both of which related to determinations outsourced by ICANN (e.g., Community Objection and Community Priority Evaluation).

cannot insulate the decisions resulting from that process from further review. We urge you to recommend that our Reconsideration Request receive an unbiased review, free from conflict of interest. Please contact us if you have any questions or need any further information.

With best regards,



Kristina Rosette
Sr. Corporate Counsel

cc: Scott Hayden, Vice President, IP
Dana Northcott, Associate General Counsel, IP

Attachment A

Composition of New gTLD Program Committee and Board Governance Committee

NGPC Members Who Voted on May 14, 2014 Acceptance of GAC Advice that AMAZON Applications Should Not Proceed	BGC Members Who Voted on August 22, 2014 to Recommend that NGPC Reject Amazon's Reconsideration Request	NGPC Members Who Voted on September 8, 2014 to Adopt BGC's Recommendation to Reject Amazon's Reconsideration Request
<p><i>Cherine Chalaby</i> <i>Chris Disspain</i> <i>Olga Madruga-Forti</i> <i>Mike Silber</i> Fadi Chehadé Stephen Crocker Bill Graham Gonzalo Navarro George Sadowsky</p> <p>Unavailable to vote: Bruno Lanvin, Erika Mann, Raymond Plzak, Kuo-Wei Wu</p>	<p><i>Cherine Chalaby</i> <i>Chris Disspain</i> <i>Olga Madruga-Forti</i> <i>Mike Silber</i></p> <p>Unavailable to vote: Raymond Plzak, Ram Mohan</p> <p>Abstained due to conflict: Bruce Tonkin</p>	<p><i>Cherine Chalaby</i> <i>Chris Disspain</i> <i>Olga Madruga-Forti</i> <i>Mike Silber</i> Fadi Chehadé Steve Crocker Bill Graham Bruno Lanvin Erika Mann Gonzalo Navarro George Sadowsky Kuo-Wei Wu</p> <p>Unavailable to vote: Raymond Plzak</p>

Board members whose names appear in bold and italics participated in all three decisions.