

**Recommendation Of The Board Governance Committee
Reconsideration Request 13-1
11 April 2013**

On 24 March 2013, Ummah Digital, Ltd (“Ummah”), through its CEO, Katim Seringe Touray, submitted a reconsideration request (“Request”) to the Board Governance Committee (“BGC”). The Request asked the Board to reconsider the 11 March 2013 action of ICANN staff regarding Ummah’s application for the .UMMAH gTLD application, concluding that the .UMMAH gTLD application “is ineligible for further review under the New gTLD Program and the evaluation fee of USD 47,000 will be refunded as stated in the Financial Assistance Handbook.” This conclusion was based on the Support Applicant Review Panel’s determination that Ummah’s application did not meet the minimum requirements to qualify for financial assistance and based on the process in place that addresses such circumstances.

I. Relevant Bylaws.

Article IV, Section 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information.

When challenging a staff action or inaction, a request must contain, among other things, “a detailed explanation of the facts as presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies).” Bylaws, Art. IV, § 2.6(g).

Dismissal of a request for reconsideration is appropriate if the BGC finds that the requesting party does not have standing because it failed to satisfy the criteria set forth in the Bylaws. Bylaws, Art. IV, § 2.16. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff acted in contravention to established policies.

The Request was received on 24 March 2013, making it timely under the Bylaws. Bylaws, Art. IV, § 2.5. The Bylaws require that the BGC publicly announce by 23 April 2013 its intention either to decline to consider or to proceed to consider the Request. Bylaws, Art. IV, § 2.9.

II. Background.

In March 2010, the Board requested “stakeholders to work through their SOs and ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs.” Resolution 2010.03.12.47.

Following from this Resolution, the Joint Applicant Support Working Group (JAS-WG) was formed and ultimately delivered a final report to the community, noting recommendations for the development of a financial support panel. The Board then directed work to implement the recommendations of the JAS-WG. Resolutions 2012.12.08.01 – 2012.12.08.03. A Financial Assistance Handbook was developed and posted for public comment on 20 January 2011. Ultimately, the SARP was established and tasked with evaluating applicants requesting financial assistance against criteria established within the Financial Assistance Handbook.

In the Board’s rationale to the December 2011 decision, the Board stated: *“Those who do not meet the criteria threshold will be disqualified from the new gTLD process altogether and lose their \$47K fee. This will help ensure only bona fide candidates for assistance will apply.”* In the December 2011 announcement for the public comment on the implementation plans for the gTLD Applicant Support Program, ICANN emphasized in underlined text:

Important Notice: the Financial Assistance Program is dedicated to truly deserving new gTLD applicants. Those applications from entities that apply for financial assistance and do not meet certain threshold criteria will be disqualified from the new gTLD program.

This point is also emphasized in the New gTLD Financial Assistance Handbook on page 3.

Ummah was one of the three applicants that applied to ICANN for financial assistance under the Financial Assistance Program. On 11 March 2013, Christine Willett, ICANN’s Vice President, gTLD Operations, sent a letter to Ummah notifying it that the SARP completed its financial assistance review and the SARP determined that Ummah’s application failed to meet the minimum requirements of the following Public Interest Criteria: (1) public interest benefit; (2) service in under-served language; (3) advocated by non-profit, civil society, or NGO (outside support); and (4) operation by a not-for-profit. *See* 11 March 2013 Letter from Christine Willett. The letter provided that “[d]ue to this determination, your application is ineligible for further review under the New gTLD Program and the evaluation fee amount of USD 47,000 will be refunded as stated in the Financial Assistance Handbook.”

III. Stated Grounds For The Request.

The Request is brought on the following grounds:

- The implementation of the ineligibility requirement is in “breach of the intent of ICANN Board Resolution, as well as GAC advice, and recommendations from various ICANN stakeholders which call for a New gTLD Program that is inclusive of participants from developing countries.” Page 4, Request.
- “Reinstatement “would help ensure that the New gTLD Program is inclusive of applicants from Africa and the developing countries This is especially so in view of the fact that much of the thinking that went into the development of the applicant support rules did not foresee the dimly low number of applications for support. Page 5, Request.

- Granting the request would “strengthen the participation of developing countries in the New gTLD Program.” Ummah cites that their application is the only “truly generic, globally-oriented application from Africa. Furthermore, of the 1,154 applicants from 60 countries in the New gTLD Program, we are the only applicant from the 49 least developed countries [] which ICANN targets for special attention.” Ummah states that the method in which ICANN implemented the Applicant Support Program, with the “overly-restrictive definition of ‘public interest,’ and the disproportionate penalties for failing to qualify for funding” are “serious drawbacks” to the work done by the ICANN community in developing the program. Pages 5-6, Request.
- Implementation of the New gTLD Program has to be “flexible,” as “reality has often deviated from the stipulations of the Guidebook,” such as shifting of target dates for milestones and the rate of acceptance for change requests. Just as these changes were made “in the best interest of the ICANN community,” a decision to reinstate the .UMMAH gTLD application “would not be prejudicial to the stellar work done to prepare the New gTLD Program Financial Assistance Handbook,” “would help achieve key objectives of the Applicant Support Program” and “would also be consistent with the flexibility ICANN has shown so far in implementing the New gTLD Program.” Pages 6-7, Request.
- If the application is not reinstated, then it would be possible for other companies to apply for the .UMMAH gTLD in a future round, which “could in effect deny [Ummah] the string because we simply would not get the resources to compete against richer companies.” Page 7, Request.
- Reinstatement can be done at no cost to ICANN, as Ummah would be responsible for payment of the remainder of the evaluation fee. “Furthermore, our UMMAH TLD would not negatively impact the systemic security, stability and resiliency of the domain name system.” Page 8, Request.

IV. Request for Stay.

Ummah requests a stay of the determination of ineligibility (noting that it seeks not only a temporary, but a “permanent” stay). Ummah states that the continued exclusion of the .UMMAH gTLD application “from further consideration in the New gTLD Program would harm both [Ummah], the effective participation of Africa and least developing countries in the New gTLD Program, and the interests of ICANN in Africa and developing countries.” Ummah cites statistics regarding the low numbers of applications for New gTLDs from Africa, and participation from least developed countries, and states “excluding our application from the New gTLD Program would also send the wrong signals about ICANN’s determination . . . to help build a vibrant DNS industry in Africa. . . . Africa can hardly be expected to build a vibrant DNS industry if all its initiatives have to be not-for-profit to be eligible for support.”

V. Analysis of the Request.

In our opinion, the Request fails to state any grounds that support reconsideration of staff's adherence to the established processes for the Applicant Support Program, which Ummah acknowledges. Accordingly, the BGC concludes that none of the stated grounds supports reconsideration, and therefore recommends that the Request be denied and that the determination reflected in the 11 March 2013 letter from Christine Willett on the .UMMAH gTLD application not be reconsidered.

Ummah acknowledges that the staff determination of ineligibility is consistent with the Financial Assistance Handbook. Further, Ummah confirms that it "was aware of the stringent requirements of the applicant support program" when it applied for support. The challenged staff action is therefore in conformity with established procedures and policies, and the reconsideration requirements cannot be met.

While we are not without sympathy to Ummah's position, ICANN's accountability mechanisms are not intended for instances where a requestor: (1) is fully aware of the potential risks and defined outcomes within a process; (2) chooses to participate within that process; and (3) when they experience an unfavorable but defined outcome, seeks relief from that outcome. Ummah is not claiming that ICANN staff failed to follow established process and procedure in reaching the decision on Ummah's application; to the contrary, Ummah's Request is better characterized as a request for an exception to established procedures, which is not a grounds for reconsideration.

Once the 8 December 2011 Board resolutions were posted, the ICANN community was aware of the Board's directive that those financial assistance applicants that did not meet the criteria would be disqualified from the new gTLD process altogether. The December 2011 public comment on the Financial Assistance Handbook also made clear the criteria and the risks inherent in seeking financial assistance. If Ummah considered the risks too disproportionate or the criteria too strict in light of the considerations cited in the Request, the time for Ummah to challenge the design of the Applicant Support Program is not a full year after the program was implemented. The first round of the Applicant Support Program has concluded. Applicants other than Ummah applied for financial assistance under those same rules. The time for seeking this exception has passed.

VI. Analysis of Request for Stay.

Because the Request does not satisfy the Bylaws requirements for a stay, we recommend that Ummah's request for stay be denied

VII. Recommendation.

The BGC believes that Ummah Digital, Ltd. ("Ummah") has not stated proper grounds for reconsideration. Accordingly, we recommend that Ummah's Request be denied and that the Request not be considered further. The BGC believes, however, that Ummah raises some interesting issues in its Request and suggests that the Board direct that the concerns raised in Ummah's Request be included in a review of the Applicant Support Program so that the design

of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round.