

# JONES DAY

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## VIA EMAIL

Mr. Babak Barin  
Prof. Catherine Kessedjian  
Judge William J. Cahill

Re: DCA and ICANN; ICDR Case No. 50-20-1300-1083

Dear Mr. Chairman and Members of the Panel:

I write to follow up on three matters that were pending at the conclusion of the hearing.

1. Report of the BGC Subcommittee on Ethics and Conflicts

The Panel asked ICANN to produce a report, if one existed, that documented the decision by the Board Governance Committee (BGC) Subcommittee on Ethics and Conflicts related to the New gTLD Program on whether either Mr. Disspain or Mr. Silber had a conflict with respect to voting on DCA's application. One of ICANN's inside attorneys did, in fact, prepare a report, and that report is marked "privileged and confidential." If DCA will agree that ICANN's production of this document does not constitute a waiver of any applicable privilege, ICANN will produce the report. I should note that the purpose of the report was simply to document the fact of the investigation, and that as of that time (July 2013), no gTLD applicant other than DCA had asserted any conflict of interest with respect to any of the NGPC members.

2. Audio recording of the 4 June 2013 NGPC meeting

I have confirmed that no such recording exists. On rare occasions, ICANN has recorded certain meetings, but it is not ICANN's practice to do so, and ICANN did not record this particular meeting.

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3. DCA's Final Request For Relief

The Panel offered ICANN the opportunity to respond to DCA's Final Request for Relief, which was marked as Hearing Exhibit 4. Our initial response, of course, is that ICANN believes that the Panel should find that no action (or inaction) of the ICANN Board was inconsistent with the Articles of Incorporation or Bylaws, and accordingly none of DCA's requested relief is appropriate.

DCA urges that the Panel issue a declaration in its favor (the requests at the top of the page), and also asks that the Panel declare that DCA is the prevailing party and entitled to its costs. Although ICANN believes that the evidence does not support the declarations that DCA seeks, ICANN does not object to the form of DCA's requests.

At the bottom of DCA's Final Request for Relief, DCA asks that the Panel recommend that ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR, and that ICANN permit DCA's application to proceed and give DCA no less than 18 additional months<sup>1</sup> from the date of the Panel's declaration to attempt to obtain the requisite support of the countries in Africa. ICANN objects to the appropriateness of these requested recommendations because they are well outside the Panel's authority as set forth in the Bylaws.

As we discussed during the hearing (including my closing argument), Article IV, Section 3, Paragraph 11 of the Bylaws provides that any IRP Panel:

"shall have authority to:

c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP."<sup>2</sup>

Because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from recommending how the Board should then proceed in light of the Panel's declaration. Pursuant to Paragraph 12 of that same section of the Bylaws, the Board

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<sup>1</sup> Even to the extent any applicant would receive more time because the applicant did not have the proper documentation, the most amount of additional time would be ninety days as set forth in Section 2.2.1.4.4 of the Guidebook.

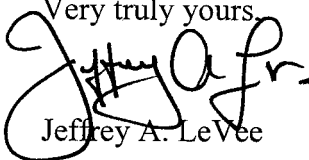
<sup>2</sup> I have deleted the portions of Paragraph 12 that are inapplicable.

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will consider the Panel's declaration at its next meeting, and if the Panel has declared that the Board's conduct was inconsistent with the Articles or the Bylaws, the Board will have to determine how to act upon the opinion of the Panel.

By way of example only, if the Panel somehow found that the unanimous NGPC vote on 4 June 2013 was not properly taken, the Board might determine that the vote from that meeting should be set aside and that the NGPC should consider the issue anew. Likewise, if the Panel were to determine that the NGPC did not adequately consider the GAC advice at 4 June 2013 meeting, the Board might require that the NGPC reconsider the GAC advice.

In all events, the Bylaws mandate that the Board has the responsibility of fashioning the appropriate remedy once the Panel has declared whether or not it thinks the Board's conduct was inconsistent with ICANN's Articles of Incorporation or Bylaws. The Bylaws do not provide the Panel with the authority to make any recommendations or declarations in this respect.

Very truly yours,  
  
Jeffrey A. LeVee

cc: Counsel for DCA

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